A TREATISE

ON THE

LAW OF EVIDENCE

BY

SIMON GREENLEAF, LL.D.

Quorsum enim sacræ leges inventæ et sancitæ fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur? — MASCARDUS EX ULPIAN

IN THREE VOLUMES

VOL. II

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REVISED, ENLARGED, AND ANNOTATED

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EDITOR'S NOTE.

SIXTEENTH EDITION. VOLUMES II. AND III.

THE arrangement of the notes in this edition is the same in all three volumes, that is to say, the notes have been consolidated so as to be more easily read. The notes of the previous edition are distinguished from those of the author by being enclosed in braces, { }, those of the present edition being enclosed in brackets, [ ]. Several thousand citations of cases which have been decided since the publication of the Fifteenth Edition have been added to Volumes II. and III., bringing the annotation down to the present year. The exhaustive annotation of the First Volume by Mr. Wigmore renders discussion of the principles of evidence unnecessary in the notes to Volumes II. and III. The editor of these volumes has undertaken to reinforce the statements of the text by additional citations of recent cases; to show what modifications of the law have taken place; and to add such additional illustrations or corollaries of the text as have seemed of most importance in the recent decisions of the courts. The encyclopædic character of Volumes II. and III. necessitates the omission of certain details of the subjects treated. It is doubtful, however, if any two volumes contain a greater amount of legal information than these two volumes of Greenleaf.

E. A. H.

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A TREATISE

ON

THE LAW OF EVIDENCE.

VOL. II. — 1

A TREATISE

ON

THE LAW OF EVIDENCE.

OF THE EVIDENCE REQUISITE IN CERTAIN PARTICULAR ACTIONS AND ISSUES AT COMMON LAW

PRELIMINARY OBSERVATIONS.

§ 1. **Recapitulation.** Having, in the preceding volume, treated, *first*, Of the Nature and Principles of Evidence; *secondly*, Of the Object of Evidence, and the Rules which govern in the Production of Testimony; and, *thirdly*, Of the Means of Proof, or the Instrument by which Facts are established, — it is now proposed to consider, *fourthly*, The Evidence requisite in certain Particular Actions and Issues at Common Law, with reference both to the nature of the suit or of the issue, and to the legal or official character and relations of the parties.

§ 2. **Summary of Topics treated.** We have already seen that the evidence must correspond with the allegations, and be confined to the point in issue;[1] that the substance of the issue, and that only, must be proved;[2] that the burden of proof generally lies on the party holding the affirmative of the issue;[3] and that the best evidence of which the nature of the case is susceptible, must be adduced.[4] These doctrines, therefore, will not be again discussed in this place.

§ 3. **The Issue.** The first thing which will receive attention, in the preparation of a cause for trial, will naturally be the issue or proposition to be maintained or controverted. In the early age of the common law the pleadings were altercations in open court, in pres-

[1] Vol. I. c. 1.
[2] Vol. I. c. 2.
[3] Vol. I. c. 3.
[4] Vol. I. c. 4.

ence of the judges, whose province it was to superintend or moderate the oral contention thus conducted before them. In doing this, their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some specific point or matter, affirmed on one side, and denied on the other. If this point was matter of fact, the parties then, by mutual agreement, referred it to one of the various methods of trial then in use, or to such trial as the court should think proper. They were then said to be at *issue* (*ad exitum*, that is, at the *end* of their pleading); and the question thus raised for decision was called the *issue*.[1] In this course of proceeding, every allegation passed over without denial was considered as admitted by the opposite party, and thus the controversy finally turned upon the proposition, and that alone, which was involved in the issue. This method was found so highly beneficial that it was retained after the pleadings were conducted in writing, and it still constitutes one of the cardinal doctrines of the law of pleading.

§ 4. **The Issue, how formed.** It will be observed, that, by the common law, the issue is formed by the parties themselves through their attorneys, the court having nothing to do with the progress of the altercation except to see that it is conducted in the forms of law; and it always consists of a single proposition precisely and distinctly stated. The advantages of this mode over all others in use, especially where the trial is by jury, are strikingly apparent. The opposite to this method is that which was pursued in the Roman tribunals, and which still constitutes a principal feature in the proceedings in the courts of Continental Europe, by which the complaint of the plaintiff may be set forth at large, with its circumstances and in all its relations, even to diffuseness, in his bill or libel, and the answer and defence of the defendant may be made with equal variety and minuteness of detail. Proceedings in this form are utterly unfit for trial by a jury; and accordingly, when material facts are to be settled in Chancery, in England, the Chancellor ordinarily directs proper issues to be framed and sent for trial to the courts of common law. In the United States, the same course is pursued wherever the equity and common-law jurisdictions are vested in separate tribunals. But where the courts of common law are also clothed with Chancery powers, if important facts are asserted and denied, which are proper to be tried by a jury, the court, in its discretion, will direct the making up and trial of proper issues at its own bar.[1] In the courts of the States of Continental Europe, where the forms of procedure are derived from the Roman law, the necessity has been universally felt of adopting some method of extracting from the multifarious counter-allegations of the parties the material points in controversy, the decision of which will finally terminate

[1] Stephen on Pleading, pp. 29, 30.
[1] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

the suit;[2] and various modes have been pursued to attain this necessary object. In the courts of Scotland, where the course of procedure is still by libel and answer, the practice since the recent introduction of trials by jury is for the counsel first to prepare and propose the issues to be tried, and, if these are not agreed to (or, which is more usual, are omitted to be prepared), the clerks frame the issues, which are sent to the Lord Ordinary for his approval. In all these methods, the point for decision is publicly adjusted by a retrospective selection from the pleadings; but, in the more simple and certain method of the common law, the altercations of the parties, being conducted by the established rules of good pleading, will, by the mere operation of these rules, finally and unerringly evolve the true point in dispute in the form of a single proposition.

§ 5. **Issues, General and Special.** Of the issues thus raised, some are termed *general issues;* others are *special.* The general issue is so called, because it is a general and comprehensive denial of the whole declaration, or of the principal part of it. The latter kind of issue usually arises in some later stage of the pleadings, and is so called by way of distinction from the former. The general issue, as will be more distinctly seen in its proper place, puts in controversy the material part of the declaration, and obliges the plaintiff to prove it in each particular.[1] Thus, upon the plea of not guilty, in trespass *quare clausum fregit,* the plaintiff must prove his possession by right as against the defendant, the unlawful entry of the defendant, and the damages done by him, if more than nominal damages are claimed. But if the defendant specially pleads that the plaintiff gave him a license to enter, then no evidence of the plaintiff's title or possession, or of the defendant's entry, need be adduced, the fact of the license being alone in controversy.

§ 6. **General Issue in Assumpsit.** The form of the general issue in *assumpsit* is, "that the defendant did not promise (or undertake) in manner and form," etc. This would seem to put in issue only the

[2] [The same need has been felt in this country where, under the modern practice, so many distinct questions are presented to the jury in a single case. To prevent injustice from the confusion of facts and law in the minds of the jury, it is common practice to call upon the jury for special findings of fact, upon which findings the court may render judgment regardless of the general verdict.]

[1] [In several of the United States, the defence is now set up by an *answer*, which must deny either in general terms or specifically, all the facts in the plaintiff's statement of his case which the defendant intends to controvert, and must set forth, in clear and precise terms, each substantive fact intended to be relied on in avoidance of the action. This latter duty is sometimes performed by what is called the specification of defence. See Massachusetts: Pub. Stat. c. 167, §§ 15, 17, 20. California: Hittell's Codes, § 437. Georgia: Code 1882, § 3452. Indiana: Stat. 1876, p. 60. Iowa: Code 1873, § 2655. Kentucky: Bullitt's Codes (Civil), c. iv. p. 22. Ohio: Rev. Stat. 1880, § 5070. Rhode Island: Pub. Stat. 1882, p. 578.] [The tendency of the modern practice generally is to make the pleadings on each side consist of a statement of the material facts; following in this regard the fundamental principles of equity pleading, rather than the technicalities and fictions of common-law pleading.]

fact of his having made the promise alleged; and so, upon true principle, it appears to have been originally regarded. But for a long time in England, and still in the American courts, a much wider effect has been given to it in practice; the defendant being permitted, under this issue, to give in evidence any matter showing that the plaintiff, at the time of the commencement of the suit, had no cause of action.[1] The same latitude has been allowed, under the general issue of not guilty, in actions of trespass on the case, by permitting the defendant not only to contest the truth of the declaration, but, in most cases, to prove any matter of defence tending to show that the plaintiff has no right of action, even though the matter be in confession and avoidance, such, for example, as a release or a satisfaction given.[2]

§ 7. **Limitation of the Issue.** It is obvious that so very general a mode of pleading and practice is contrary to one of the great principles of the law of remedy, which is, that all pleadings should be certain, that is, should be distinct and particular, in order that the party may have a full knowledge of what he is to answer, and to meet in proof at the trial, as well as that the jury may know what they are to try, and that the courts may know not only what judgment to render, but whether the matter in controversy has been precisely adjudicated upon in a previous action. To the parties themselves this distinctness of information is essential on principles of common justice. These considerations led to the passage of an act,[1] in England, under which the courts have corrected the abuse of the general issue, by restricting its meaning and application to its original design and effect.[2]

§ 8. **Same Subject.** Thus, in all actions of *assumpsit*, except on bills of exchange and promissory notes, the general issue by the English rules now operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. In actions on bills of exchange and promissory notes the plea of *non assumpsit* is no longer admissible, but a plea in denial must traverse some particular matter of fact. All matters in confession and avoidance, whether going to the original making of the contract or to its subsequent discharge, must now be specially pleaded. The plea of *non est factum*, in debt or covenant, is restricted in its operation to the mere denial of the execution of the deed, in point of fact; all other defences, whether showing the deed absolutely void or only voidable, being required to be specially pleaded. The plea of *non detinet*, also, now puts in issue only the detention of the goods, and

[1] Stephen on Pleading, pp. 179, 180.
[2] Ibid. pp. 182, 183.
[1] 3 & 4 W. IV. c. 42.
[2] See Regulæ Generales, Hil. T. 1834; 10 Bing. 453–475.

not the plaintiff's property therein. In actions on the case, the plea of not guilty is now restricted in its effect to a mere denial of the breach of duty or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement; in actions of trespass *quare clausum fregit*, the same plea operates only as a denial that the defendant committed the act alleged in the place mentioned, and not a denial of the plaintiff's possession or title; and in actions of trespass *de bonis asportatis*, this plea operates only as a denial of the fact of taking or damaging the goods mentioned, but not of the plaintiff's property therein.

§ 9. **Same Subject.** While the learned judges in England have thus labored to restore this part of the system of remedial justice to more perfect consistency, by limiting the general issue to its original meaning, thus securing greater fairness in the trial by preventing the possibility of misapprehension or surprise, the course of opinion and practice in the United States seems to have tended in the opposite direction. The general issue is here still permitted to include all the matters of defence which it embraced in England prior to the adoption of the New Rules; and in several of the States the defendant is by statute allowed in all cases to plead the general issue, and under it to give in evidence any special matter pleadable in bar, of which he has given notice by a brief statement, filed at the same time with the plea or within the time specified in the rules of the respective courts.[1] In some States, however, the course of remedy is by petition and answer, somewhat similar to proceedings in equity.

§ 10. **Same Subject.** Amid such diversities in the forms of proceeding, it is obviously almost impossible to adjust a work like this to the particular rules of local practice, without at the same time confining its usefulness to a very small portion of the country. Yet

[1] See New York Rev. Stat. vol. ii. p. 352, § 10. Maine: Rev. St. c. 115, § 18. LL. Ohio, c. 822, § 48 (Chase's ed.). LL. Tennessee, 1811, c. 114. In Massachusetts, this privilege is given only in certain specified cases. See Mass. Rev. Stat. c. 21, § 49; c. 58, § 17; c. 85, § 11; c. 100, §§ 26, 27; c. 112, § 3; but in nearly all the States, it is accorded to justices of the peace, and other public officers and their agents, in actions for anything done by them in the course of their official duties; the statutes being similar to 21 Jac. I. c. 52, and other English statutes on this subject. In Maine, the plaintiff may file a counter brief statement of any matter on which he intends to rely, in avoidance of the matter contained in the brief statement of the defendant; so that the substance of the common law of pleading is not totally abolished, though exceptions of form, by special demurrer, can no longer be taken. Of the wisdom of such wide departures from the distinctness and precision of allegation required from both parties by the common law, grave doubts are entertained by many of the profession; especially where the rules do not require the plaintiff to file any notice of the reply intended to be made to the matter set up in defence. Nor is it readily perceived how the courts can administer equal and certain justice to the parties, without adopting, in the shape of rules of practice, or in some other form, the principle of the common law, which requires that each party be seasonably and distinctly informed, by the record, of the proposition intended to be maintained by his adversary at the trial, that he may come prepared to meet it. But these are considerations more properly belonging to another place. [The tendency of the modern practice is to require definite issues of fact, as in equity.]

as, in every controversy, under whatever forms it may be conducted, the parties may come at last to some material and distinct proposition, affirmed on one side and denied on the other; and as the declarations and pleas and the rules of good pleading, adopted in the courts of common law, exhibit the most precise and logical method of allegation, the principles of which are acknowledged and observed in all our tribunals, it may not be impracticable, by adhering to these principles, to lay down in the following pages some rules which will be found generally applicable, under whatever modifications of the common law of remedy justice may be administered.

§ 11. **Variance.** A further preliminary observation may here be made, applicable to every action founded on a written document; namely, that the first step in the evidence on the side of the plaintiff is the production of the document itself. If there is any variance between the document and the description in the declaration, it will, as we have previously seen,[1] be rejected. If the variance is occasioned by a mere mistake in setting out a written instrument, the record may generally be amended by leave of the court, under the statutes of amendment of the United States, and of the several States; and in England, under Lord Tenterden's Act.[2] Thus, where a written contract by letter was set forth as a promise to pay for certain goods, and, on production of the letter, the contract appeared to be an undertaking to guarantee to the plaintiff the amount supplied, an amendment was permitted.[3] But if the variance is occasioned by the allegation of a matter totally different from that offered in evidence, it will not be amended. Thus where, in a declaration for a malicious arrest, the averment was that the plaintiff in that action "did not prosecute his said suit, but therein made default," and the proof by the record was, that he obtained a rule to discontinue, the plaintiff was not permitted to amend, the matter being regarded as totally different.[4]

§ 11 *a*. **Amendments of Process.** The general practice in these cases may be illustrated by a few examples. And first, in regard to *amendments of the process* in the *names of parties*. The rule of the common law, that no new parties can be *added* by amendment,[1] is believed to be universally adopted in the United States; though in some few States the common law in this respect has been changed by statutes, which permit this to be done in certain cases at law, as

[1] Vol. I. §§ 56, 58, 61, 63, 65, 66, 69, 70. There is a material distinction between mere allegations and matter of description. In mere matters of allegation, a variance in proof, as to time, number, or quantity, does not affect the plaintiff's right of recovery; but in matters of description, a variance in time is fatal: Gates *v.* Bowker, 18 Vt. 23.

[2] 9 Geo. IV. c. 15. See also Stat. 3 & 4 W. IV. c. 42.

[3] Hanbury *v.* Ella, 1 Ad. & El. 61.

[4] Webb *v.* Hill, 1 M. & Malk. 253, per Ld. Tenterden.

[1] Winslow *v.* Merrill, 2 Fairf. 127; Wilson *v.* Wallace, 8 S. & R. 53; Atkinson *v.* Clapp, 1 Wend. 71.

is done in all cases in courts of equity. But generally, parties unnecessarily and improperly made such, and having no interest in the matter, may be stricken out, where the cause or nature of the action is not affected, and no injury can accrue to the defendant. Thus, if the wife is improperly made defendant with the husband in an action on a contract made during coverture;[2] or if several are sued in covenant, and, on oyer had, it appears that some of them never became parties to the deed,[3] — the names improperly inserted may be stricken out of the process. But if such amendment will change the ground of action, or have the effect of constituting a different party to the record, as, if the suit be against two as partners, and it is proposed to amend by erasing the name of one, and so making it a suit against the other in his several capacity, it will not be allowed.[4] If the name of the party be misspelled, or the designation of *junior* be omitted, or a corporation be sued by a wrong name, the service of process being right, the mistake may be amended.[5] So, also, the process may be amended by stating the capacity or trust in which the plaintiff sues, such as trustee, or other officer or agent of a society beneficially interested in the suit, or the like; or, if an infant, by inserting the name of his next friend.[6] So, a *scire facias* may be amended by the record on which it is founded.[7]

§ 11 *b*. **Amendments of Pleadings.** In the next place, as to *amendments of the pleadings*. The general doctrine of variance having already been discussed in the preceding volume,[1] it will suffice here to remark, that the courts manifest an increasing disposition to give to the statutes of amendments the most beneficial effect, not suffering the end of the suit to be defeated, where the record contains *the substance of a valid claim*, and an amendment is seasonably asked for. The American statutes on this subject give to the courts much broader discretionary powers than are given by any English statutes, prior to Lord Tenterden's Act; and powers scarcely exceeded by that and the later statutes.[2] Accordingly, the only question in regard to

[2] Colcord *v*. Swan, 7 Mass. 291; Parsons *v*. Plaisted, 13 id. 189; Whitbeck *v*. Cook, 15 Johns. 483.

[3] McClure *v*. Burton, 1 Car. Law Repos. 472. And see Wilson *v*. King, 6 Yerg. 493, *acc*. But see Reddington *v*. Farrar, 5 Greenl. 379, where, in *assumpsit* against two, an amendment by striking out the name of one of them was refused.

[4] Peck *v*. Sill, 3 Conn. 157. Whether a writ of entry may be amended by striking out the name of one of the demandants, *quære*. See Treat *v*. McMahon, 2 Greenl. 120; Pickett *v*. King, 4 N. H. 212, that it may not be; Rehoboth *v*. Hunt, 1 Pick. 224, that it may be.

[5] Furniss *v*. Ellis, 2 Brock. 14; Kincaid *v*. Howe, 10 Mass. 203; Bullard *v*. Nantucket Bank, 5 id. 99; Sherman *v*. Connecticut River Bridge, 11 id. 338; Burnham *v*. Strafford Savings Bank, 5 N. H. 573.

[6] Anderson *v*. Brock, 3 Greenl. 243; Blood *v*. Harrington, 8 Pick. 552.

[7] Maus *v*. Maus, 5 Watts 315; Moody *v*. Stracey, 4 Taunt. 588; Williams *v*. Lee, 2 Taylor 146; Burrows *v*. Heysham, 1 Dall. 133; Hazeldine *v*. Walker, 1 Har. & Johns. 487; Patrick *v*. Woods, 3 Bibb 232.

[1] See *ante*, Vol. I. §§ 63–73.

[2] See 6 Dane's Abr. c. 184, art. 1, § 3; art. 11, §§ 7, 8.

the admissibility of an amendment of the pleadings now is, whether it introduces another and distinct cause of controversy. If it does not, but the original cause of action or ground of title or defence is adhered to, the allegations and pleadings may be amended.[3] Thus, if, in an action for money had and received, the promise be laid as made by the administrator, when it was the promise of his intestate;[4] or, if the allegation of a demand be omitted where it was necessary to the foundation of the action;[5] or, if the indorser of a note in blank be charged as an original promisor, when he should have been charged as a guarantor; or,[6] if the loss of a vessel be alleged to have been by capture and by perils of the sea, when it was by barratry;[7] or if, in trover for promissory notes, or in *assumpsit* to recover the money due upon them, they are misdescribed,[8] — in these and the like cases the errors may be amended. But to add counts upon other promissory notes will not be allowed;[9] nor will the plaintiff be permitted to amend, in an action against the sheriff for a false return of bail when none was taken, by adding a count for refusing to deliver the bail bond, mentioned in his return.[10]

§ 11 *c*. **Amendments by English Statutes.** The recent *English statutes* having been framed for the like objects, it may be useful here to advert to their provisions and the decisions under them. The statute, termed *Lord Tenterden's Act*,[1] empowers the courts "to cause the record, on which any trial may be pending in any civil action, or in any indictment or information for any misdemeanor, *when a variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending* to be forthwith amended in such particular," on payment of such costs, if any, as the court shall think reasonable. By a subsequent statute,[2] this power was extended

[3] Haynes *v.* Morgan, 3 Mass. 208; Ball *v.* Claflin, 5 Pick. 304; Cassell *v.* Cooke, 8 S. & R. 287, per Duncan, J.; Cunningham *v.* Day, 2 S. & R. 1; Kester *v.* Stokes, 4 Miles 67; Commonwealth *v.* Meckling, 2 Watts 130; Ebersol' *v* Krug, 5 Binn. 53, per Tilghman, C. J.; Pullen *v.* Hutchinson, 12 Shepl. 249. {Massachusetts: Pub. Stat. c. 167, §§ 41, 42, 43, 44. Alabama: Code 1876, c. 15. California: Hittell's Codes, §§ 469, 470. Connecticut: General Laws 1875, c. viii. Delaware: Laws 1874, c. cxii. Georgia: Code 1882, c. ii. p. 879. Illinois: Rev. Stat. (Hurd) c. 7. Indiana: Stat. 1876, pp. 59, 74. Iowa: Code 1873, §§ 2686, 2692. Kentucky: Bullitt's Code (Civil), c. viii. p. 30. Maine: Rev. Stat. 1871, § 9, p. 639. Maryland: Rev. Code 1878, § 85, p. 610. New Hampshire: Gen. Laws 1878, p. 526, § 8. New Jersey: Revision, p. 9, § 8 *et seq.* Ohio: Rev. Stat. 1880, § 5114. Rhode Island: Pub. Stat. 1882, p. 577. Vermont: Rev. Laws 1880, §§ 906, 907.}

[4] Eaton *v.* Whitaker, 6 Pick. 465.

[5] Ewing *v.* French, 1 Blackf. 170.

[6] Tenney *v.* Prince, 4 Pick. 385.

[7] Anon., 15 S. & R. 83.

[8] Hoffnagle *v.* Leavitt, 7 Cow. 517; Stanwood *v.* Scovell, 4 Pick. 422.

[9] Farm. & Mech. Bank *v.* Israel, 6 S. & R. 294.

[10] Eaton *v.* Ogier, 2 Greenl. 46. See further, Butterfield *v.* Harrell, 3 N. H. 201; Edgerley *v.* Emerson, 4 N. H. 147; Carpenter *v.* Gookin, 2 Vt. 495.

[1] Stat. 9 Geo. IV. c. 15.

[2] Stat. 3 & 4 W. IV. c. 42.

not only to civil actions, but to informations in the nature of a *quo warranto* and proceedings on a *mandamus*, the courts being authorized, "*when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter,* in any particular, — in the judgment of the court or judge *not material to the merits of the case,* and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended," upon such terms as to payment of costs, or postponing the trial, or both, as the court or judge shall think reasonable; and if the amendment, being in a particular not material to the merits, is such as that the opposite party may have been prejudiced thereby in the conduct of his suit or defence, then upon such terms as to payment of costs, *and* withdrawing the record, or postponing the trial, as the court or judge shall think reasonable.

§ 11 *d.* **Instances of Amendments allowed.** These statutes have been administered in England in the liberal spirit in which they were conceived; care being taken, as in the United States, that no new and distinct cause of controversy be created. Thus, in slander, where the words charged were, "S. is to be tried" for buying stolen goods, and the words proved were, "I *have heard* that he is to be tried," an amendment was allowed, as it went only to the amount of the damages, and not to the merits of the action.[1] So, where the words stated were English and the words proved were Welsh.[2] So, where the allegation was of a libel *published in a certain newspaper,* and the proof was of a slip of printed paper, not appearing to have been cut from that newspaper, though the newspaper contained a similar article.[3] So, where the plea to an action upon a bill of exchange was, that the bill was given for two several sums lost at play in two several games, and the proof was that the parties played at both games, and that the defendant lost the gross sum in all, but not that he lost any amount at one of the games, it was held amendable.[4] An amendment has also been allowed in *assumpsit* upon the warranty of a horse, where a general warranty was alleged, and the proof was of a warranty with the exception of a particular foot.[5] So, where the allegation was with a qualification, and the proof was of a contract in general terms, without the qualification.[6] In like manner, where the contract, instrument, or duty has been misde-

[1] Smith *v.* Knowelden, 2 M. & G. 561.

[2] Jenkins *v.* Phillips, 9 C. & P. 766, per Coleridge, J. The contrary was held, under the former statutes. Zenobio *v.* Axtell, 6 T. R. 162; Wormouth *v.* Cramer, 3 Wend. 394.

[3] Foster *v.* Pointer, 9 C. & P. 718, per Gurney, B.

[4] Cooke *v.* Stafford, 13 M. & W. 379.

[5] Hemming *v.* Parry, 6 C. & P. 580. See also Read *v.* Dunsmore, 9 C. & P. 588.

[6] Evans *v.* Fryer, 10 Ad. & El. 609.

scribed in the record, it is held amendable; as, in *assumpsit* on a charter-party, where the allegation of the promise, being intended only as a statement of the legal effect of the instrument, was erroneous, the plaintiff was permitted to amend, either by striking out the allegation, or by substituting a corrected statement.[7] So, in *assumpsit* "for the use and occupation of certain standings, market-places, and sheds," where the proof was of a demise of the tolls to be collected at those places, an amendment was allowed.[8] So, where the promise alleged was to "pay" for goods furnished to another, and the proof was, to "guarantee" the payment;[9] and where the declaration was upon an instrument described as a bill of exchange, but the instrument produced appeared in fact to be a promissory note;[10] and where a guaranty was set forth as for advances to be made by A, and the proof was of a guaranty for advances to be made by A, or any member of his firm, or *e converso*;[11] and where the declaration charged the defendant upon the contract as a carrier, and the proof was, that, if liable at all, it was only as a wharfinger, on a contract to forward;[12] and where the contract alleged was, to build for the plaintiff a certain room, booth, or building, according to certain plans then agreed on, by the 28th of June, for the sum of £20, and the contract proved was, to erect certain seats or tables, for £25, to be completed four or five days before that day, being the day of the coronation;[13] and where, in debt on a bond, the penalty was stated to be £260, but in the bond produced it was only £200;[14] and in a case against the sheriff for a voluntary escape, where the proof was, that the officer did not arrest, but negligently omitted so to do, having opportunity;[15] and even where, in *assumpsit* upon a promissory note, described as made by the defendant on the 9th of November, 1838, for £250, payable on demand, the note produced bore date November 6th, 1837, and was payable with interest twelve months after date, it also not appearing that there existed any other note between the parties,[16] — in these, and many similar cases, amendments have been allowed.

§ 11 *e*. **Instances of Amendments disallowed.** On the other hand, the courts, acting under these statutes, have *refused amendments*,

[7] Whitwell *v.* Scheer, 8 Ad. & El. 301. But in a subsequent case of covenant, where it was objected that no such covenants could be implied in the deed, it was held, by Maule, J., that the statutes of amendment were designed to meet variances arising from accidental slips, and not to extend to cases where the pleading has been intentionally and deliberately, but erroneously, framed; and he therefore refused to allow an amendment: Bowers *v.* Nixon, 2 Car. & Kir. 372.

[8] Mayor, etc. of Carmarthen *v.* Lewis, 6 C. & P. 608.

[9] Hanbury *v.* Ella, 1 Ad. & El. 61.

[10] Moilliet *v.* Powell, 6 C. & P. 233.

[11] Chapman *v.* Sutton, 2 Man. Gr. & Scott 634; Boyd *v.* Moyle, ib. 644.

[12] Parry *v.* Fairhurst, 2 C. M. & R. 190; 5 Tyrw. 685.

[13] Ward *v.* Pierson, 5 M. & W. 16; 7 Dowl. 382.

[14] Hill *v.* Salt, 2 C. & M. 420; 4 Tyrw. 271.

[15] Guest *v.* Elwes, 5 Ad. & El. 118; 2 N. & P. 230.

[16] Beckett *v.* Dutton, 7 M. & W. 157; 4 Jur. 993; 8 Dowl. 865.

where the object was merely to supply material *omissions*, as well as where the amendment will probably *deprive* the defendant of a *good defence*, which he otherwise might have made, or would probably require *new pleadings*,[1] or would introduce a *transaction entirely different* from that stated in the plea.[2] Thus, an amendment has been refused in trespass, to extend the justification to certain articles omitted in the plea;[3] and in replevin to extend the avowry in the like manner.[4] So, to enlarge the *ad damnum* in the declaration.[5] So, in *assumpsit* by the vendee against the vendor of goods for non-delivery, where the contract alleged was for a certain price, and the contract proved was for the same nominal price, with a *discount of five per cent*, an amendment was refused as tending, under the circumstances stated at the bar, to preclude a good defence.[6] And, where the plaintiff alleged title to a stream of water as the possessor of a mill, which the defendant traversed, and the proof was that he was entitled only as owner of the adjoining land, an amendment was refused, on the ground that it might require a change of the issue, and that the defendant may have been misled by the plaintiff's mode of pleading.[7]

§ 12. **Materiality of Date.** It is further to be observed, that though every part of a written document is descriptive, and therefore material to be proved as alleged, yet if, in declaring upon such an instrument, the allegation is, that it was *made upon such a day*, without stating that it *bore date* on that day, the day in the declaration is not material, and therefore need not be precisely proved; but if it is described as *bearing date* on a certain day, the date must be shown to be literally as alleged, and any variance herein will be fatal unless amended.[1] The date is not of the essence of the contract, though it is essential to the identity of the writing, by which the contract may be proved. The plaintiff, therefore, may always declare according to the truth of the transaction, only being careful, if he mentions the writing and undertakes to describe it, to describe it truly.[2]

§ 13. **Immaterial Discrepancies.** But an *immaterial discrepancy* between the record and the deed itself is not regarded. Thus, upon oyer of a deed, where the declaration was that it bore date in a

[1] Perry *v.* Watts, 3 Man. & Gr. 775, as explained in Gurford *v.* Bayley, ib. 784.
[2] David *v.* Preece, 5 Ad. & El. N. S. 440.
[3] John *v.* Currie, 6 C. & P. 618.
[4] Bye *v.* Bower, 1 Car. & Marshm. 262. In the United States, amendments in these two cases would doubtless be allowed.
[5] Watkins *v.* Morgan, 6 C. & P. 661. In the United States it has been held otherwise. See McLellan *v.* Crofton, 6 Greenl. 307; Bogart *v.* McDonald, 2 Johns. Cas. 219; Danielson *v.* Andrews, 1 Pick. 156. And see Tomilson *v.* Blacksmith, 7 T. R. 132.
[6] Ivey *v.* Young, 1 M. & Rob. 545.
[7] Frankhum *v.* E. of Falmouth, 6 C. & P. 529; 2 Ad. & El. 452.
[1] Coxon *v.* Lyon, 2 Campb. 307, n.; Anon ib. 308, n., *cor.* Lord Ellenborough.
[2] Hague *v.* French, 3 B. & P. 173; De la Courtier *v.* Bellamy, 2 Show. 422.

certain year of our Lord and of the then king, and the deed simply gave the date thus, "March 30, 1701," without mention of the Christian era, or of the king's reign, it was held well.[1] So, where the condition was, "without any fraud or *other* delay," the omission of the word "other" in the oyer was held immaterial.[2] Nor will literal misspelling be regarded as a variance.[3]

§ 14. **Effect of a Writing to be set out in Pleading.** Ordinarily, in stating an instrument or other matter in pleading, it should be set forth, not according to its *terms* or its *form*, but according to its *effect in law;* for it is under its latter aspect that it is ultimately to be considered. Thus, if a joint tenant conveys the estate to his companion by the words, "give, grant," etc., the deed is to be pleaded as a release, such only being its effect in law. So if a tenant for life conveys to the reversioner by words of grant, it must be pleaded not as a grant, but as a surrender.[1] So, where a bill of exchange is made payable to the order of a person, it may be declared upon as a bill payable to the person himself.[2] If no time of payment be mentioned, the instrument should be declared upon as payable on demand.[3] If a bill be drawn or accepted, or a deed be made by an agent in the name of his principal, it should be pleaded as the act of the principal himself.[4] And a bill payable to a fictitious person or his order is, in effect, a bill payable to bearer, and may be declared on as such, in favor of a *bona fide* holder ignorant of the fact, against all the parties who had knowledge of the fiction.[5]

§ 15. **Literal Exactness not always sufficient.** But, on the other hand, it will not always suffice to adhere to the *literal terms* of the instrument, in setting it forth in the declaration; for sometimes the true interpretation of the instrument itself may lead to a result totally different from the intendment of law upon the face of the declaration. Thus, where a bill was drawn and dated at Dublin, for a certain sum, and in the pleadings it was described as drawn "at Dublin, to wit, at Westminster," without any mention of Ireland, or of Irish currency, it was held that here was a material variance between the allegation and the evidence. For though the place and the sum corresponded even to the letter, yet, by the legal interpretation of the bill, the currency intended was Irish, whereas by the allegation in the record the court could not legally understand any

[1] Holman *v.* Borough, 2 Salk. 658.
[2] Henry *v.* Brown, 19 Johns. 49.
[3] Cull *v.* Sarmin, 3 Lev. 66; Waugh *v.* Bussell, 5 Tannt. 707. The omission of the word "sterling," as descriptive of the kind of currency, is immaterial: Kearney *v.* King, 2 B. & Ald. 301.
[1] Stephen on Pl. 389, 390.
[2] Smith *v.* M'Clure, 5 East 476; Fay *v.* Goulding, 10 Pick. 122.
[3] Gaylord *v.* Van Loan, 15 Wend. 308.
[4] Heyes *v.* Haseltine, 2 Campb. 604.
[5] Chitty on Bills, 178; Bayley on Bills, 26, 431; Grant *v.* Vaughan, 3 Burr. 1516; Minet *v.* Gibson, 1 H. Bl. 569; Story on Bills, § 56.

other than British sterling, because no other was averred, and the bill was not alleged to have been drawn in Ireland.[1] So, where a note was made without any mention of the time of payment, and none was averred in the declaration, the judgment was reversed upon error brought, the plaintiff not having declared upon the contract according to its legal effect, but on the evidence only.[2]

§ 16. **Execution of Instruments.** In regard to the *proof* of the *formal execution* of deeds, bills of exchange, and other written documents, it was formerly the right of the adverse party to require precise proof of all signatures and documents, making part of the chain of title in the party producing them. But the great and unnecessary expense of this course, as well as the inconvenience and delay which it occasioned, have led to the adoption of salutary rules restricting the exercise of the right to cases where the genuineness of the instrument is actually in controversy, being either put in issue by the pleadings or by actual notice given pursuant to the rules of the court.[1]

[1] Kearney *v.* King, 2 B. & Ald. 301. Proof of a contract for —— bushels oats *according to the Hartland Quay measure,* will not support a declaration for the same quantity *without any mention of the kind of measure.* Hockin *v.* Cooke, 4 T. R. 314.

[2] Bacon *v.* Paige, 1 Conn. 404. But see Herrick *v.* Bennett, 8 Johns. 374, where such a declaration was held well on demurrer.

[1] By the rules of Hil. T. 1834, Reg. 20 (10 Bing. 456), either party after plea pleaded, and a reasonable time before trial, may give notice to the other of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent in the manner therein prescribed, to admit their formal execution, or the truth of the copies to be adduced, he may be summoned before a judge to show cause why he should not consent to such admission, and ultimately, if the judge shall deem the application reasonable, may be compelled to pay the costs of the proof. See also Tidd's New Practice, pp. 481, 482. In some of the United States, the original right to require formal proof of documents remains as at common law, unrestricted by rules of court. In others, it has been restricted either to cases where the genuineness of the document has been put in issue by the pleadings, or where the previous notice of an intention to dispute it has been reasonably given (Reg. Gen. Sup. Jud. Court, Mass., 1836, Reg. LIII. 24 Pick. 399); {this is now enacted by statute in Massachusetts. Mass. Pub. St. c. 167, § 21. "Signatures to written instruments declared on or set forth as a cause of action, or as a ground of defence or set-off, shall be taken as admitted unless the party sought to be charged thereby files in court, within the time allowed for an answer, a special denial of the genuineness thereof, and a demand that they shall be proved at the trial." And similar provisions exist in other States. California: Hittell's Code, § 887. Delaware: Laws 1874, c. cvi. § 5. Illinois: Rev. Stat. (Hurd) c. 110, § 34. Kentucky: Bullitt's Codes (Civil), § 527, p. 110;} or where the attorney has been instructed by his client that the signature is not genuine; or where the defendant, being present in court, shall expressly deny that the signature is his. (Reg. Gen. Sup. Jud. Court, Maine, 1822, Reg. XXXIII. 1 Greenl. 421.) In the Circuit Court, U. S., First Circuit, the defendant is not permitted to deny his signature to a note or bill of exchange, or the signature of a prior indorser, unless upon affidavit made of reasonable cause, necessary for his defence. Reg. 34. In the Seventh Circuit, the rule requires that the defendant shall first make affidavit that the instrument was not executed by him. And this rule has been held to be legal, under the Judiciary Act of March 2, 1793, c. 22: Mills *v.* Bank of the United States, 11 Wheat. 439, 440. By the law of South Carolina, the plaintiff is not obliged to produce the subscribing witnesses to a bond or note, but may prove its execution by any other witness, unless the defendant will swear that it is not his signature. Statutes at Large, vol. v. p. 435. As to the proof in equity, of the execution of instruments, see *post,* Vol. III. § 308 and note. [It is now the common practice to require

§ 17. **Loss of Instrument to be stated.** If the *instrument* declared on is *lost*, the fact of the loss may be proved by the affidavit of the plaintiff, a foundation being first laid for this proof by evidence that the instrument once existed, and that diligent search has been made for it in the places where it was likely to be found.[1]

We now proceed to the consideration of the evidence to be offered under particular issues in their order.

specific denial of the execution of written instruments set forth in the pleadings; in many jurisdictions this denial must be verified under oath.]

[1] *Ante*, Vol. I. §§ 349, 558.

ABATEMENT.

§ 18. **Matters in Abatement.** Such of the causes of abatement as may also be pleaded in bar will generally be treated under their appropriate titles. It is proposed here to consider those only which belong more especially to this title.[1]

§ 19. **Alien Enemy.** The plea of *alien enemy* must be pleaded with the highest degree of legal certainty, or, as it is expressed in the books, with certainty to a certain extent in particular; that is, it must be so certain as to exclude and negative every case in which an alien enemy may sue. It therefore states the foreign country or place in which the plaintiff was born; that he was born and continues under allegiance to its sovereign; of parents under the same

[1] {A plea in abatement should exclude all matter which, if alleged on the opposite side, would defeat the plea. Therefore, where the plea is founded upon defective service of the process, it is insufficient if it alleges that no summons was served on the defendant, unless it also sets forth that the defendant was at the time an inhabitant of the State. Tweed *v.* Libbey, 37 Me. 49. See Bank of Rutland *v.* Barker, 27 Vt. 293. See Gould *v.* Smith, 30 Conn. 88, in which a plea in abatement, on the ground of a material variance between the copy left in service and the original, alleged that "there was and is a material variance between said pretended copy, so left in service, and the original writ and declaration, in this, that in said original writ and declaration, between the words, 'fourth Tuesday of January,' and the words, 'then and there to answer,' were the figures '1861,' while in said pretended copy, between the same words, were the figures '1860,' and the figures '1861,' and any words indicating the same thing were entirely omitted in said pretended copy; which figures, so omitted, were a material part of said writ and declaration." And it was held that it sufficiently appeared from the plea that the variance was a material one. See also dissenting opinion in the same by Sanford, J. A plea in abatement, setting up several defects, not provable by the same evidence, is bad on special demurrer. State *v.* Ward, 63 Me. 225.

The burden of proof on a plea in abatement, if it alleges new matter and any fact alleged in it is denied by the plaintiff, is on the defendant who alleges the fact, and he must offer evidence to support it: Bellows *v.* Murray, 66 Me. 199. But if the plea in abatement is itself merely a denial of some fact alleged in the declaration or writ, the burden of proof is thereby put upon the plaintiff: Hawkins *v.* Albright, 70 Ill. 87.

It is said in State *v.* Flemming, 66 Me. 142, that the strictest technical accuracy, such as has sometimes been required in purely dilatory pleas in civil suits, should not be exacted in criminal cases; and if the plea states a valid ground of defence in language too clear to be misunderstood, and is free from duplicity, nothing more should be required: cf. Heyman *v.* Covell, 36 Mich. 157. The rule in civil cases is to require that a plea in abatement should not only aver what is necessary to support the defence, but should anticipate and negative all matter which would, if it were alleged by the other side, defeat the plea: Tweed *v.* Libbey, 37 Me. 49; Houston, etc. R. R. Co. *v.* Graves, 50 Tex. 181. The allegations should also be direct, positive statements, and not suppositions or arguments: Severy *v.* Nye, 58 Me. 246; 1 Chitt. Pl. 395. So where, in a plea in abatement for want of sufficient service, the allegation was "*it appears* that the only service," etc., this was held bad: Perry *v.* New Brunswick Ry. Co., 71 Me. 359.} [Pleas in abatement must be certain, positive, and direct, and cannot be aided by intendment or inference: Budd *v.* Meriden Electric R., 69 Conn. 272.]

allegiance, or adherents to the same sovereign; that such sovereign or country is an enemy to our own; and if he is here, that he came hither or remains without a safe-conduct or license;[1] and that he has been ordered out of the country by the President's proclamation.[2] If the plaintiff should reply that he is a native citizen and not an alien, concluding, as seems proper in such cases, to the country, the defendant has the affirmative, and must prove that the plaintiff is an alien, as alleged in the plea.[3] If the plaintiff should reply that he was *duly naturalized*, the proper evidence of this is the record of the court in which it was done.[4] If the judgment is entered of record in legal form it closes all inquiry, it being, like other judgments, complete evidence of its own validity.[5] These proceedings in naturalization have been treated with great indulgence, and the most liberal intendments made in their favor.[6] The oath of allegiance appearing to have been duly taken, it has been held, that no order of the court that he be admitted to the rights of a citizen was necessary, the record of the oath amounting to a judgment of the Court for his admission to those rights.[7] And such record is held conclusive evidence that all the previous legal requisites were complied with.[8]

§ 20. **Insufficient Service.** If the plea is founded on a defective or improper *service of the process*, as, for example, that it was served on Sunday, the day will be taken notice of by the court, and any almanac may be referred to. So if the service is made on any other day on which, by public statute, no service can be made, the like rule prevails; and this whether the day is fixed by the statute, or by proclamation by the executive.[1]

§ 21. **Misnomer.** If the defendant, in pleading a *misnomer*, allege that he was *baptized* by such a name, though the averment of his baptism was unnecessary, yet he is bound to prove the allegation, as laid, by producing the proper evidence of his baptism.[1] This may

[1] Casseres *v.* Bell, 8 T. R. 166; Wells *v.* Williams, 1 Ld. Raym. 282; 1 Chitty on Pl. 214; Stephen on Pl. 67. License and safe-conduct are implied, until the President shall think proper to order the party, either by name or character, out of the United State: 10 Johns. 72.

[2] Stat. United States, July 6, 1798 (c. 75); Clark *v.* Morey, 10 Johns. 69, 72; Bagwell *v.* Babe, 1 Rand. 272; Russell *v.* Skipwith, 6 Binn. 241.

[3] Jackson on Pleading in Real Actions, pp. 62, 65; Smith *v.* Dovers, 2 Doug. 428.

[4] [But naturalization may be inferred from the fact that one has exercised the privileges of a citizen for a long time: Boyd *v.* Nebraska, 143 U. S. 135.]

[5] Spratt *v.* Spratt, 4 Pet. 393, 408.

[6] Priest *v.* Cummings, 16 Wend. 617, 625.

[7] Campbell *v.* Gordon, 6 Cranch 176.

[8] Stark *v.* The Chesapeake Ins. Co., 7 Cranch 420; Ritchie *v.* Putnam, 13 Wend. 524; Spratt *v.* Spratt, 4 Pet. 393; [Ackerman *v.* Haenck, 147 Ill. 514; United States *v.* Gleason, 78 F. 396.]

[1] *Ante*, Vol. I. §§ 5, 6. {If a partnership is sued, and service is not made on all the partners, any one of those on whom service was made may take advantage of this defect in service, and should do so by a plea in abatement. Draper *v.* Moriarty, 45 Conn. 476.}

[1] *Ante*, Vol. I. § 60; Weleker *v.* Le Pelletier, 1 Campb. 479.

be proved by production of the register of his baptism, or a copy of the register or record, duly authenticated, together with evidence of his identity with the person there named.[2] If there is no averment of the fact of baptism, the name may be proved by any other competent evidence, showing that he bore and used that name.[3]

§ 22. **Indictment improperly found.** In *criminal cases*, it is a good objection in abatement that twelve of the grand jury did not concur in finding the bill; in which case the fact may be shown by the testimony of the grand jurors themselves, it not being a secret of State, but a constitutional right of the citizen.[1]

§ 23. **Non-tenure.** In real actions, *non-tenure* is classed among pleas in abatement because it partakes of the character of dilatory pleas; though it shows that the tenant is not liable to the action in any shape, inasmuch as he does not hold the land.[1] The replication, putting this fact in issue, alleges that the tenant "was tenant as of freehold of the premises," and concludes to the country. Tenure may be proved *prima facie*, by evidence of actual possession.[2] It is also shown by proof of an entry with claim of title;[3] or, by a deed of conveyance from a grantor in possession.[4] If a *disclaimer* is pleaded in abatement, the only advantage in contesting it seems to be the recovery of costs, where they are given by statute to the party prevailing. In such cases the only proper replication is the same in form as to the plea of non-tenure, as before stated.[5]

[2] *Ante*, Vol. I. §§ 484, 493.

[3] Holman *v.* Walden, 1 Salk. 6. {If a defendant is sued by his surname only (Seely *v.* Boon, Coxe (N. J.) 138), or, if an initial letter is put instead of his Christian name, a plea in abatement is the proper mode of taking advantage of the error: State *v.* Knowlton, 70 Me. 200. So, if the name of the defendant in the writ is different from the name as alleged in the declaration: Simons *v.* Waldron, 70 Ill. 281.}

[1] Low's Case, 4 Greenl. 439. {Any objection, based on irregularity in the impanelling or in the subsequent proceedings of a grand jury, should be made by plea in abatement: Brown *v.* State, 13 Ark. 96; Sayle *v.* State, 8 Tex. 120.

If a plea in abatement tenders an issue upon two or more separate matters of fact, each one of which is a sufficient ground for the plea, it is bad for duplicity: State *v.* Heselton, 67 Me. 598; State *v.* Ward, 63 id. 225; [Guarantee Co. *v.* First N. B., 28 S. E. 900, Va.] As to the right of the grand jurors to testify to what took place before them in their deliberations, see *ante*, Vol. I. § 252 and notes.}

[1] Saund. 44, n. (4); Jackson on Plead. in Real Actions, p. 91. The form of the plea is this: "And the said T. comes and defends his right, when, etc., and says, that he cannot render to the said D. the tenements aforesaid with the appurtenances, because, he says, that he is not, and was not on the day of the purchase of the original writ in this action, nor in any time afterwards, tenant of the said tenements as of freehold; and this he is ready to verify. Wherefore he prays judgment of the writ aforesaid, and that the same may be quashed; and for his costs." See Jackson on Plead. in Real Actions, p. 93; Story's Pleadings, p. 41; Stearns on Real Actions, App. No. 49.

[2] Newhall *v.* Wheeler, 7 Mass. 189, 199.

[3] 1 Mass. 484, per Sewall, J.; Proprietors Kennebec Purchase *v.* Springer, 4 id. 416; Higbee *v.* Rice, 5 id. 344, 352.

[4] Pidge *v.* Tyler, 4 Mass. 541; Knox *v.* Jenks, 7 id. 488.

[5] Jackson's Plead. pp. 100, 101. The form of the general disclaimer in abatement is as follows: "And the said T. comes and defends his right when, etc., and says that he has nothing, nor does he claim to have anything, in the said demanded premises, nor did he have, nor claim to have, anything therein on the day of the purchase of the

§ 24. **Non-joinder of Parties.** The *non-joinder* of proper parties is also pleadable in abatement. If the defendant plead that he made the promise jointly with another, the plea will be maintained by evidence of a promise jointly with an infant;[1] for the promise of an infant is in general voidable only, and not void;[2] and it is good until avoided by himself. If he has avoided the promise, this fact will constitute a good replication, and must be proved by the plaintiff. Where the plea was, that several persons named in the plea, being the assigns of H., a bankrupt, ought to have been joined as co-defendants, it was held that proof of their having acted as assignees was not sufficient, and that nothing less than proof of the assignment itself would satisfy the allegation.[3] And if, on the face of the assignment, it should appear that there were other assignees not named in the plea, this would falsify the plea.[4] If, upon the plea of the non-joinder of other partners as defendants, it is proved that though the contract was made in the name of the firm, it was made by the agency of the defendant alone, and for his own use, and the proceeds were actually so applied by him in fraud of his partners, the plea will not be maintained.[5]

§ 25. **In Partnership.** In cases of *partnership*, if one be sued alone and plead this plea, proof of the existence of secret partners will not support it, unless it also appears that the plaintiff had knowledge of

original writ in this action, nor at any time afterwards; but he wholly disclaims to have anything in the said premises; and this he is ready to verify; wherefore he prays judgment of the writ aforesaid, and that the same may be quashed; and for his costs:" id. p. 100.

[1] Gibbs *v.* Merrill, 3 Taunt. 307; Woodward *v.* Newhall, 1 Pick. 500. The form of such plea may be thus: "And the said D. comes, etc., when, etc., and prays judgment of the writ and declaration aforesaid, because, he says, that the said several promises in said declaration mentioned were, and each of them was, made by one A. B. *jointly* with the said D.; which A. B. is still alive, to wit, at ——, and this he is ready to verify. Wherefore, because the said A. B. is not named in said writ and declaration, the said D. prays judgment of said writ and declaration, and that the same may be quashed:" Story's Pl. 35; Wentw. Pl. 17; 1 Chitty's Precedents, p. 197; Gould *v.* Lasbury, 1 C. M. & R. 254; Gale *v.* Capern, 1 Ad. & El. 102.

[2] Fisher *v.* Jewett, 1 Berton (N. B.) 35. In this case, upon an able review of the authorities, it was held, by the learned court of the Province of New Brunswick, that an infant's negotiable note was voidable only, and not void. See also 2 Kent Comm. 234–236; 4 Cruise's Dig. 14, n. (2), Greenleaf's ed.

[3] Pasmore *v.* Bousfield, 1 Stark. 296, per Ld. Ellenborough.

[4] Ibid.

[5] Hudson *v.* Robinson, 4 M. & S. 475. So if one partner was an infant, and the bill was accepted by the other, in the name of the firm, it has been held that he was chargeable in a special count, as upon an acceptance by himself in the name of the firm: Burgess *v.* Merrill, 4 Taunt. 468. See further as to abatement, *infra*, tit. Assumpsit, §§ 110, 130–134. {The non-joinder of a co-tenant as plaintiff in an action of tort can be taken advantage of only by plea in abatement: Phillips *v.* Cummings, 11 Cush. (Mass.) 469; [Gulf, C. & S. F. R. *v.* Cusenberry, 86 Tex. 525.] See also Putney *v.* Lapham, 10 Cush. (Mass.) 234. In suits *ex delicto*, the objection of non-joinder of plaintiff should be pleaded in abatement to defeat the action. Upon trial, if not so pleaded, the objection can only avail in apportioning or severing the damages: Briggs *v.* Taylor, 35 Vt. 66, and 1 Chitty on Pleading, 75. In the absence of a statute authorizing a married woman to sue alone, the objection that her husband should be joined with her as one of the plaintiffs should be taken by plea in abatement: Snow *v.* Carpenter, 49 Vt. 426.}

the fact at the time of the contract.[1] If he subsequently discovers the existence of a secret partner, he may join him or not in the action.[2] But if the partnership is ostensible and public, and one partner buys goods for use of the firm, and in the ordinary course of the partnership business, and is sued alone for the price, — proof that the goods were so bought and applied will support the plea of non-joinder, though the plaintiff did not in fact know of the existence of the partnership, unless there are circumstances showing that the partner dealt in his own name.[3] Any acts done by the defendant in these cases, such as writing letters in his own name, and the like, tending to show that he treated the contract as his own and not his partner's, may be given in evidence by the plaintiff to disprove the plea.[4] If both partners reside abroad, and one alone being found in this country is sued here, and pleads the non-joinder of the other in abatement, his foreign domicile and residence are a good answer to the plea.[5] So, the bankruptcy and discharge of the other are made by statute[6] a good replication.

§ 26. **Prior Suit.** Where the *pendency of a prior suit* is pleaded in abatement, the plea must be proved by production of the record, or by an exemplification, duly authenticated.[1] If the priority is

[1] Baldney *v.* Ritchie, 1 Stark. 338. But if the suit is against one secret partner, it is cause of abatement that another secret partner is not joined: Ela *v.* Rand, 4 N. H. 307; Story on Partn. § 241; *infra*, tit. Assumpsit, §§ 110, 130–134. {If suit is brought on a promissory note, signed with a firm name, against one of the partners, he must take advantage of the non-joinder of the other partner by a plea in abatement: Hapgood *v.* Watson, 65 Me. 510. So of a promissory note signed by two, on which suit is brought against one only: Hyde *v.* Lawrence, 49 Vt. 361. So of a lease signed by two: Newhall House Stock Co. *v.* Flint, etc. Ry. Co., 47 Wis. 516.}

[2] Ibid.; De Mautort *v.* Saunders, 1 B. & Ad. 398; *Ex parte* Norfolk, 19 Ves. 455, 458; Mullet *v.* Hook, 1 M. & Malk. 88.

[3] Alexander *v.* McGinn, 3 Watts 220.

[4] Murray *v.* Somerville, 2 Campb. 99, n.; Clark *v.* Holmes, 3 Johns. 149; Hall *v.* Smith, 1 B. & C. 407; Marsh *v.* Ward, Peake's Cas. 130.

[5] Guion *v.* McCulloch, N. Car. Cas. 78. By Stat. 3 & 4 W. IV. c. 42, § 8, the plea itself is bad, unless it shows that the other party is resident within the jurisdiction.

[6] Stat. 3 & 4 W. IV. c. 42, § 9. *Quære*, whether it be good by the common law; and see *infra*, tit. Assumpsit, § 135.

[1] Commonwealth *v.* Churchill, 5 Mass. 174; Parker *v.* Colcord, 2 N. H. 36. {If the decision in the prior suit has been appealed from (and the case has been carried to a higher court), the records of the lower court still constitute evidence of the pendency of the suit: Bond *v.* White, 24 Kan. 45. [The plea must allege that a prior suit was pending when the plea was filed: Polsey *v.* White Rose Mfg. Co., 19 R. I. 492; Gardner *v.* Kiehl, 182 Pa. 194; Coaldale Brick Co. *v.* Southern Const. Co., 110 Ala. 605.]

Prior proceedings in bankruptcy or insolvency will not bar a suit, unless it be also alleged in the plea in abatement that the debt sued on has been proved against the bankrupt in such proceedings: Lewis *v.* Higgins, 52 Md. 614. Nor is an action pending in another State sufficient to bar a second suit: Hadden *v.* St. Louis, etc. R. R. Co., 57 How. N. Y. Pr. 390; Hatch *v.* Spofford, 22 Conn. 485; Hogg *v.* Charleton, 25 Pa. St. 200; Cole *v.* Fliteraft, 47 Md. 312; Lyman *v.* Brown, 2 Curt. C. C. 559; [Hill *v.* Hill, 51 S. C. 134; Fairchild *v.* Fairchild, 53 N. J. Eq. 678; Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390; Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209; Crossman *v.* Universal Rubber Co., 131 id. 636. But see Sulz *v.* Mutual Life Ass'n, 145 id. 563.] So a plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal: Hatch *v.* Spofford, 22 Conn. 485. Nor will a

doubtful, both suits being commenced on the same day, it will be determined by priority of the service of process.[2] And if both suits were commenced at the same time, the pendency of each abates the other.[3] But the principle of this plea is, that the *same person* shall

suit in equity in a foreign jurisdiction abate a suit in equity before a domestic tribunal: Dillon *v.* Alvares, 4 Ves. 357; Insurance Co. *v.* Brune's Assignee, 96 U. S. 588. [Nor a suit in a State court a suit in a Federal court outside the State: Humphrey *v.* Thorp, 89 F. 66.]

The pendency of a suit in a State court, between the same parties and for the same cause of action, may be pleaded in abatement in the Federal courts if the State court is within the district of the Federal court: Earl *v.* Raymund, 4 McLean C. C. 233; [Hughes *v.* Green, 75 F. 693; *contra*, North Muskegon *v.* Clark, 22 U. S. App. 522; Rejall *v.* Greenhood, 60 F. 784; Wonderly *v.* Lafayette County, 77 id. 665; Short *v.* Hepburn, 41 U. S. App. 520; Marshall *v.* Otto, 59 F. 249. Pendency of a suit for the administration of an estate in a State probate court is no ground for the abatement of a personal suit against the executor in the Federal court: Brendel *v.* Church, 82 F. 262; Zimmerman *v.* Carpenter, 84 id. 747; Brown *v.* Ellis, 86 id. 357. A suit in the State court by a resident taxpayer on behalf of himself and all other taxpayers is no bar to an action of the same character brought by a non-resident taxpayer in the Federal court: Gamble *v.* San Diego, 79 id. 487. Where the Federal court sustains the plea of an action pending in the State court, it will not enter a final order of dismissal, but will stay all proceedings till the cause is determined in the State court, where it is possible that the judgment in the State court may leave some matters at issue undetermined: Zimmerman *v.* So Relle, 49 U. S. App. 387; Green *v.* Underwood, 86 F. 427, U. S. App.; Hughes *v.* Green, 84 F. 833, U. S. App. Whether a suit pending in a Federal court is a bar to another action in a Federal court in another circuit is uncertain; but the second court will, as a matter of comity, suspend proceedings in the second action until the first has been disposed of: Ryan *v.* Seaboard, etc. R., 89 F. 397.] Where the court is not under the same sovereignty the plea must show jurisdiction of the former suit: White *v.* Whitman, 1 Curtis C. C. 494. So the pendency of another action for the same cause, between the same parties, in a Federal court having jurisdiction, is a good plea in abatement in the State courts for the same district: Smith *v.* Atlantic Mutual Fire Insurance Co., 22 N. H. 21; [Wilson *v.* Mulliken, 44 S. W. 660, Ky.; *contra*, Kilpatrick *v.* Kansas City & B. R., 38 Neb. 620. A suit *in personam* in the Federal court does not bar a suit *in rem* in the State court: Ahlhauser *v.* Butler, 50 F. 705.]

Where the two suits are in their nature different, as where the one is *in personam*, and the other *in rem*, the pendency of the one cannot be pleaded in abatement of the other: Harmer *v.* Bell, 22 Eng. Law & Eq. 62; [Hall *v.* Susskind, 109 Cal. 203. So a possessory action brought in a court which has no jurisdiction to try the title, is no bar to an action of ejectment involving the question of title: Campbell *v.* Potts, 110 N. C. 530. A suit by one person on behalf of himself and others of the same class is a bar to a subsequent action by others of that class: Gamble *v.* San Diego, 79 F. 487; Harmon *v.* McRae, 91 Ala. 401.] See also Clark *v.* Wilder, 25 Penn. St. 314. The pendency of one indictment is no good plea in abatement to another indictment for the same cause; but when either indictment is tried, and a judgment rendered thereon, such judgment will afford a good plea in bar to the other indictment: Com. *v.* Drew, 3 Cush. (Mass.) 282; Dutton *v.* State, 5 Ind. 533.

In any case the second suit is the one which will abate. The prior suit is not affected by the fact that a second suit is begun: Wood *v.* Lake, 13 Wis. 84.}

[2] Morton *v.* Webb, 7 Vt. 124; {Archew *v.* Ward, 9 Gratt. 622; Clifford *v.* Cony, 1 Mass. 495. Where two suits, one by declaration and one by attachment, were commenced on the same day between the same parties and for the same cause of action, the court will presume, the record showing nothing to the contrary, that the suit by declaration was first commenced: Wales *v.* Jones, 1 Mich. 254.}

[3] Beach *v.* Norton, 8 Conn. 71; Haight *v.* Holley, 3 Wend. 258. One form of the plea of prior action pending is as follows: "And the said [defendant] comes and defends, etc., when, etc., and says that he ought not to be compelled to answer to the writ and declaration of the plaintiff aforesaid, because, he says, that the plaintiff heretofore, to wit, at the [*here describe the court and term*] impleaded the said [defendant] in a plea of ——, and for the same cause in the declaration aforesaid mentioned; as by the record thereon, in the same court remaining, appears; that the parties in the

not be twice vexed for the same cause of action. If, therefore, the first action was against one of two joint contractors, and the second action is against the other, the pendency of the former is not pleadable in abatement of the latter.[4]

§ 27. **Judgment in Plea in Abatement.** In all cases where a fact is pleaded in abatement, and issue is taken thereon, if it be found for the plaintiff, the judgment is peremptory and in chief, *quod recuperet.*[1] The plaintiff should therefore come prepared to prove his damages; otherwise he will recover nominal damages only.[2] If the issue is found for the defendant, the judgment is that the writ and declaration be quashed.[3]

said former suit and in this suit are the same parties; and that the said former suit is still pending in the said court last mentioned; and this he is ready to verify. Wherefore he prays judgment if he ought to be compelled to answer to the writ and declaration aforesaid, and that the same may be quashed," etc. Story's Pleadings, p. 65; 1 Chitty's Proceedings, p. 201. The last averment, that the former suit is still pending, is generally inserted; but it has been held to be unnecessary, it being sufficient if the plaintiff has counted in the first action, so that it may appear of record that both were for the same cause. See Com. *v.* Churchill, 5 Mass. 177, 178; 39 H. VI. 12, pl. 16; Parker *v.* Colcord, 2 N. H. 36; Gould on Pleading, c. 5, § 125. But see Toland *v.* Tichenor, 3 Rawle 320.

[4] Henry *v.* Goldney, 10 Jur. 439. [So where the first action was against one of two joint tort-feasors, and the second action is against the other: Cumberland County *v.* Central Wharf Co., 90 Me. 95.]

[1] Eichorn *v.* Le Maitre, 2 Wils. 367; Bowen *v.* Shapcott, 1 East 542; Dodge *v.* Morse, 3 N. H. 232; Jewitt *v.* Davis, 6 id. 518.

[2] Weleker *v.* Le Pelletier, 1 Campb. 479; Good *v.* Lehan, 8 Cush. 301.

[3] 1 Saunders's Pl. & Ev., tit. Abatement.

ACCORD AND SATISFACTION.

§ 28. **The Issue.** In the plea of accord and satisfaction, the issue is upon the delivery or acceptance of something, in satisfaction of the debt or damages demanded.[1] In cases of contract for the payment of a sum of money, the payment of a less sum will not be a good satisfaction;[2] unless it was either paid and accepted before the time when it was to have been paid, or at a different place from that appointed for the payment;[3] but in the case of a simple contract for a larger

[1] The plea is, that, "after the making of the promises in the declaration mentioned" (in *assumpsit*), or "after committing the said supposed *grievances* in the declaration mentioned" (in *case*), or "*trespasses*" (in *trespass*), or "after the making of the said writing obligatory" (in *debt* or *covenant*), "to wit, on (etc.), and before (*or after*) the commencement of this suit, he, the said (*defendant*), delivered to the plaintiff, and the plaintiff then accepted and received of and from the said (*defendant*) [*here describing the goods or thing delivered*], of great value, in full satisfaction and discharge of the several promises" [*or* damages, *or* debts and moneys, *as the action may be*], "in the declaration mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance" [*or* non-payment, *as the action may be*] "thereof. And this," etc. The usual form of the replication is by protesting the delivery of the thing, and traversing the acceptance of it in satisfaction: Chitty's Precedents, pp. 205, 444 *a*, 619; Story's Pleadings, pp. 120, 156; Stephen on Pl. 235, 236. [Satisfaction is a question of fact. The retention of money or a check sent in satisfaction of a claim does not operate as a satisfaction where the creditor gives notice that the payment is accepted only on account: Duluth Chamber of Commerce *v.* Knowlton, 42 Minn. 229; Van Dyke *v.* Wilder, 66 Vt. 579; Wellington *v.* Monroe Trotting Park Co., 90 Me. 495; *contra*, Fuller *v.* Kemp, 138 N. Y. 231; Treat *v.* Price, 47 Neb. 875; Ostrander *v.* Scott, 161 Ill. 339.]

[2] [McIntosh *v.* Johnson, 51 Neb. 33; Young *v.* Schofield, 132 Mo. 650; Chambers *v.* Niagara Ins. Co., 58 N. J. L. 216; Leeson *v.* Anderson, 99 Mich. 247; Beaver *v.* Fulp, 136 Ind. 595; Com. Bigham *v.* Cummins, 155 Pa. 30; Fire Ins. Ass'n *v.* Wickham, 141 U. S. 564; Reynolds *v.* Reynolds, 55 Ark. 369. This rule, though well established, has often been criticised. (See Prof. Ames' criticism, 12 Harvard Law Rev. 515.) It has been affirmed, however, by the House of Lords in Foakes *v.* Beer, 9 A. C. 605, and is believed to be the law, unless altered by statute, as in North Carolina (Code, § 575; Kerr *v.* Sanders, 29 S. E. 943, N. C.), in all jurisdictions but Mississippi, where it has recently been repudiated: Clayton *v.* Clark, 74 Miss. 499. But see Carter's Estate, 72 N. W. 826, Minn.]

[3] [The tendency of the courts to restrain the operation of this rule is shown by the remarks of the court in Brooks *v.* White, 2 Metc. (Mass.) 283. "The foundation of the rule seems therefore to be that in the case of the acceptance of a less sum of money, in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import, and wherever the technical reason for its application does not exist the rule itself is not to be applied." The court in Kellogg *v.* Richards, 14 Wend. (N. Y.) 116, says the rule "is technical and not very well supported in reason." [The rule, though apparently technical, is in reality simply an application of the general principle that performance of a legal obligation to the promisor is no consideration for a promise. The rule, of course, does not apply to cases where the consideration varies in any degree, however slight, from the performance of the legal obligation.] Accordingly

sum, a negotiable security given for a less sum may be a good satisfaction.[4] The acceptance of a collateral thing of value, whenever and wherever delivered, is a good satisfaction.[5] And if the action is for general and unliquidated damages, the payment and acceptance of a sum of money as a satisfaction is a good bar.[6] But if the action is upon covenant, the satisfaction must have been made after breach; for if it were before breach, it is not good.[7] And where a duty in certain accrues by deed, *tempore confectionis scripti*, as, by an obligation to pay a certain sum of money, this certain duty having its origin and essence in the deed alone, the obligation, it seems, is not discharged but by deed; and therefore a plea of accord and satisfaction of the bond by matter *en pais* would be bad; but if it were a bond with condition, and the plea in such a case had been in discharge of the sum mentioned in the condition of the bond, it would be good.[8]

§ 28 *a*. **When Effect of Plea Question of Law.** The facts, in respect to the arrangement or accord between the parties being ascertained, their effect is purely a question of law, and is not to be submitted to the jury. Thus where A and B having mutual causes of action in tort, and meeting for the purpose of adjusting the demands of B only, it was insisted by the latter that A should pay him therefor a sum of money and give him a receipt in full of all demands, which was accordingly done, but nothing was said about A's cause of action; it was held that this was a good accord and satisfaction of the demand of A against B.[1]

§ 29. **Accord and Satisfaction may be put in Evidence.** In the United States an accord with satisfaction may be *given in evidence*

payment of a less sum than is due, coupled with payment of the costs and expenses of a suit which had been instituted to recover it, was held a good satisfaction of the whole debt: Mitchell *v.* Wheaton, 46 Conn. 315. So, giving the check or note of a *third party* for a less amount than the debt on which the action is founded: Kellogg *v.* Richards, *supra*.] [Payment of a less sum than the debt by a third party operates as a satisfaction if so accepted: Fowler *v.* Smith, 153 Pa. 639; Clark *v.* Abbott, 53 Minn. 88.]

[4] Sibree *v.* Tripp, 15 M. & W. 23.

[5] [Ridlon, Adm'r, *v.* Davis, 51 Vt. 457.]

[6] Fitch *v.* Sutton, 5 East 230; Steinman *v.* Magnus, 11 id. 390; Co. Lit. 212 *b*; Cumber *v.* Wane, 1 Stra. 426; [Home Fire Ins. Co. *v.* Bredehoft, 49 Neb. 152; McLaughlin *v.* Webster, 141 N. Y. 76.] But this case of Cumber *v.* Wane has recently been limited, in Sibree *v.* Tripp, 15 M. & W. 23, to the naked case of the acceptance of a less sum in satisfaction of a greater: Thomas *v.* Heathorn, 2 B. & C. 477; Pinnel's Case, 5 Co. 117; Smith *v.* Brown, 3 Hawks 580; Wilkinson *v.* Byers, 1 Ad. & El. 113 per Parke, J.; Watkinson *v.* Inglesby, 5 Johns. 391, 392; Seymour *v.* Minturn, 17 id. 169; Bateman *v.* Daniels, 4 Blackf. 71. But payment and acceptance of the principal sum in full, without interest, is sufficient: Johnston *v.* Brennan, 5 Johns. 271. See Donohue *v.* Woodbury, 6 Cush. 148.

[7] Kaye *v.* Waghorne, 1 Taunt. 427; Snow *v.* Franklin, Lutw. 108; Smith *v.* Brown, 3 Hawks 580; Harper *v.* Hampton, 1 H. & J. 675; Batchelder *v.* Sturgis, 3 Cush. 203.

[8] Blake's Case, 6 Co. 43; Neal *v.* Sheffield, Yelv. 192; s. c. Cro. Jac. 254; Story's Plead. 157, n.; Preston *v.* Christmas, 2 Wills. 86; Strang *v.* Holmes, 7 Cow. 224.

[1] Vedder *v.* Vedder, 1 Den. 257.

under the general issue in *assumpsit*, and in actions on the case; but in debt, covenant, and trespass it must be specially pleaded. In England, since the late Rules, it must be specially pleaded in all cases.[1]

§ 30. **Parties to the Accord.** As to the *parties to an accord*, proof of an accord and satisfaction made by one of several joint obligors, or joint trespassers, is good and available to all.[1] So, if it is made to one of several plaintiffs, though no authority appear from the others to make the agreement.[2] If the action is for an act done by the defendant as the servant of another, an accord and satisfaction by the latter is a good defence.[3] And as to the *subject-matter*, it is not necessary that it proceed directly from the defendant; the obligation or security of a third person who is *sui juris* is sufficient,[4] if it be accepted in satisfaction of the whole amount, and not of a part only,[5] though it may be of a less amount than was actually due.[6] It is well settled that an accord alone, not executed, is no bar to an action for a pre-existing demand.[7] And the rule is equally clear that the person who is to be discharged is bound to do the act which is to discharge him, and not the other party.[8]

§ 31. **Accord with Tender of Satisfaction.** Whether an accord with a *tender of satisfaction* is sufficient without acceptance is a point upon which the authorities are not agreed. It is, however, perfectly clear that a mere agreement to accept a less sum in composition of a

[1] Chitty on Pl. 418, 426, 429, 432, 441; Bird *v.* Randall, 3 Burr. 1353; Chitty's Prec. 477, 478; Weston *v.* Foster, 2 Bing. N. C. 693; 1 Stephen's Nisi Prius, 391. Where the plaintiff in an action of slander agreed to waive the action in consideration that the defendant would destroy certain writings relative to the charge, and he accordingly destroyed them; this was held admissible under the general issue as an evidence of accord and satisfaction: Lane *v.* Applegate, 1 Stark. 97. [Generally in this country accord and satisfaction must be specially pleaded, or else due notice of the defence must be given when pleading the general issue: Seaver *v.* Wilder, 68 Vt. 423.]

[1] Strang *v.* Holmes, 7 Cow. 224; Ruble *v.* Turner, 2 Hen. & M. 38. If several tort-feasors are jointly sued, and a sum of money is accepted from one of them, and the action is thereupon dropped, this may be shown as a full satisfaction in bar of a subsequent action against the others: Dufresne *v.* Hutchinson, 3 Taunt. 117; [Snyder *v.* Witt, 99 Tenn. 618; Donaldson *v.* Carmichael, 102 Ga. 40; Spurr *v.* North Hudson Co. R., 56 N. J. L. 346; Vandiver *v.* Pollak, 107 Ala. 547. This is true though several judgments have been obtained: Ashcraft *v.* Knoblock, 146 Ind. 169.]

[2] Wallace *v.* Kelsall, 7 M. & W. 264. But if the payment be to one of the plaintiffs for his part only of the damages, it is no bar to the action: Clark *v.* Dinsmore, 5 N. H. 136.

[3] Thurman *v.* Wild, 11 Ad. & El. 453.

[4] Kearslake *v.* Morgan, 5 T. R. 513; Booth *v.* Smith, 3 Wend. 66; Wentworth *v.* Wentworth, 5 N. H. 410; Bullen *v.* M'Gillicuddy, 2 Dana 90.

[5] Walker *v.* Seaborne, 1 Taunt. 526; Gabriel *v.* Dresser, 29 Eng. Law & Eq. 266; [Chicago *v.* Babcock, 143 Ill. 358.]

[6] Steinman *v.* Magnus, 11 East 390; Lewis *v.* Jones, 4 B. & C. 506, 513; Reay *v.* White, 1 C. & M. 748; Cranley *v.* Hillary, 2 M. & S. 120. {This is true also of the check of a third person: Guild *v.* Butler, 127 Mass. 386; Kellogg *v.* Richards, 14 Wend. (N. Y.) 116.}

[7] {If the plaintiff in putting in his own case is obliged to prove an accord and partial satisfaction, he should put in some evidence that the accord has not been fully satisfied, in order to avoid its operation as a bar to his suit: Browning *v.* Crouse, 43 Mich. 489.}

[8] Cranley *v.* Hillary, 2 M. & S. 120, 122.

debt is not binding, and cannot be set up in bar of action upon the original contract.[1] Thus, where an agreement was made between a debtor and his creditors, that the latter should accept five shillings and sixpence in the pound in full satisfaction of their respective debts, which sum was tendered and refused, it was held that this constituted no bar to an action for the whole debt, for it was without consideration; though it was admitted that had the debtor assigned his effects to a trustee, under an agreement for this purpose, it would have constituted a good consideration, and would have been valid.[2] So, where the agreement was to receive part of the debt in money and the residue in specific articles, no tender of the latter being averred, though it was alleged that the defendant was always ready to perform, the plea was held bad, the accord being only executory.[3] But whether, where the agreement is for the performance of some collateral act, and is upon sufficient consideration, a tender of performance is equivalent to a satisfaction, seems still to be an open question; though the weight of authority is in the affirmative. In one case, which was very fully considered, it was laid down as a rule warranted by the authorities, that a contract or agreement which will afford a complete recompense to a party for an original demand ought to be received, as a substitute and satisfaction for such demand, and is sufficient evidence to support a plea of accord and satisfaction.[4] Therefore, where the holder of a promissory note agreed in writing with the indorser, to receive payment in coals at a stipulated price, and they were tendered accordingly but refused, the agreement and tender were held to be a sufficient accord and satisfaction to bar an action on the note.[5] So, where a man's creditors agreed to take a composition on their respective debts, to be secured partly by the acceptances of a third person and partly by his own notes, and to execute a composition-deed containing a clause of release; it was held by Lord Ellenborough, that an action for the original debt could not be maintained by a creditor, who had promised to come in under the agreement, to whom the acceptances and notes were regu-

[1] Cumber *v.* Wane, 1 Stra. 425; 1 Smith's Leading Cases, p. 146 (Am. ed.); 43 Law Lib. 249–263.

[2] Heathcote *v.* Crookshanks, 2 T. R. 24. To the same effect are Tassall *v.* Shane, Cro. El. 193; Balston *v.* Baxter, ib. 304; Clark *v.* Dinsmore, 5 N. H. 136; Lynn *v.* Bruce, 2 H. Bl. 317.

[3] Rayne *v.* Orton, Cro. El. 305; James *v.* David, 5 T. R. 141.

[4] Coit *v.* Houston, 3 Johns. Cas. 249, per Thompson, J.; Case *v.* Barber, T. Raym. 450; 1 Com. Dig. Accord, B, 4. The latter case of Allen *v.* Harris, 1 Ld. Raym. 122, that an accord upon mutual promises is not binding, because no action lies upon mutual promises, admits the general doctrine of the text, though it differs in its application. The same is true of Preston *v.* Christmas, 2 Wils. 86. But the doctrine in the text is fully supported by the decision in Cartwright *v.* Cooke, 3 B. & Ad. 701. See also Good *v.* Cheeseman, 2 id. 328, 335. *Sed vid.* Bayley *v.* Homan, 3 Bing. N. C. 915, per Tindal, C. J.

[5] Coit *v.* Houston, 3 Johns. Cas. 243. The same principle seems to have been conceded by Ashhurst and Grose, JJ., in James *v.* David, 5 T. R. 141.

larly tendered, and who refused to execute the composition-deed after it had been executed by all the other creditors; the learned judge remarking, that a party should not be permitted to say there is no satisfaction *to whom satisfaction has been tendered,* according to the terms of the accord.[6] But it has since been held in this country, that a readiness to perform a collateral agreement is not to be taken for a performance, or as the satisfaction required by law.[7]

§ 32. **Payment and Acceptance.** If the defendant *pleads payment and acceptance* of a sum of money in satisfaction, and the plaintiff replies, traversing the acceptance in satisfaction, this *puts both facts in issue;* and the defendant must therefore prove the payment as well as the acceptance in satisfaction.[1]

§ 33. **Proof by Lapse of Time.** The plea of accord and satisfaction may often be *proved by the lapse of time* and acquiescence of the parties. Thus, it has been held, in an action upon a covenant against incumbrances, that the lapse of twenty years after damages sustained by the breach, unless rebutted by other evidence, was sufficient proof of the plea.[1]

[6] Bradley *v.* Gregory, 2 Campb. 383. And see, accordingly, Evans *v.* Powis, 11 Jur. 1043.

[7] Russell *v.* Lytle, 6 Wend. 390. But in this case the decision of the same court in Coit *v.* Houston, many years before, was not cited or adverted to, and the question was decided upon the earliest authorities. Yet, in several of these, the reason why an accord without satisfaction is not binding is stated to be, that the plaintiff has no remedy upon the accord; thus tacitly seeming to admit, that, where there is such remedy, the accord with a tender of satisfaction is sufficient: 1 Roll. Abr. tit. Accord, pl. 11-13; Allen *v.* Harris, 1 Ld. Raym. 122; Brook. Abr. tit. Accord, etc., pl. 6; 16 Ed. IV. 8, pl. 6. So, in Lynn *v.* Bruce, 2 H. Bl. 317. See, however, Hawley *v.* Foote, 19 Wend. 516, where an agreement to accept a collateral thing in satisfaction, with a tender and refusal, was held not a good bar. {The course of decision seems to tend towards holding part performance of an accord, with readiness to complete the performance or a tender of full performance, not a valid accord and satisfaction. The Court of Appeals in New York, in Kromer *v.* Heim, 75 N. Y. 574, cite the New York cases referred to by the author in note (2) and the latter case of Tilton *v.* Alcott, 16 Barb. 598, with approval, and sustain the principle. So in Hearn *v.* Kiehl, 38 Pa. St. 147; White *v.* Gray, 68 Me. 579; Young *v.* Jones, 64 id. 563; Clifton *v.* Litchfield, 106 Mass. 34; Pettis *v.* Ray, 12 R. I. 344. The case of Goodrich *v.* Stanley, 24 Conn. 613, supports the view suggested by Mr. Greenleaf in n. 2, that if the accord is of such a nature as to admit a suit upon it, *i. e.* if there is a promise founded on a good consideration, then the accord itself, averred with an allegation of readiness to perform, will be a good plea of accord and satisfaction. For a full discussion of this point see Babcock *v.* Hawkins, 23 Vt. 561.} [The real question in such cases is whether the new contract itself is accepted as a satisfaction of the former obligation, or whether the performance of such contract is to be accepted as a satisfaction. This, of course, depends upon the agreement of the parties in each case. Sharp *v.* Mauston, 92 Wis. 629; Crow *v.* Kimball Lumber Co., 30 U. S. App. 354; Rogers *v.* Spokane, 9 Wash. 168; Hosler *v.* Hursh, 151 Pa. 415; New York, N. H. & H. R. *v.* Martin, 158 Mass. 313; Puffer Mfg. Co. *v.* Lucas, 112 N. C. 377; Gowing *v.* Thomas, 40 A. 184, N. H.]

[1] Ridley *v.* Tindall, 7 Ad. & El. 134.

[1] Jenkins *v.* Hopkins, 9 Pick. 543.

ACCOUNT.

§ 34. **Action not now usual.** The remedy at common law, by the action of account, has fallen into disuse in most of the United States; suits by bill in chancery or by action of *assumpsit* being resorted to in its stead. It is, however, a legal remedy where not abolished by statute.[1]

§ 35. **When it lies.** This action lies at common law between merchants, naming them such, between whom there was privity; also against a guardian in socage by the heir; and against bailiffs and receivers.[1] And by statutes it lies between joint-tenants and tenants in common and their personal representatives, and by and against the executors and administrators of those who were liable to this action.[2] But it does not lie against an infant, nor against a wrong-doer or any other person where no privity exists.[3]

§ 36. **Against Receiver.** Where the action is against one as receiver, it is necessary to set forth by whose hands the defendant received the money; but where he is charged as bailiff it is not nec-

[1] [The common-law action of account is practically obsolete. In some States, however, a statutory action of account is a concurrent remedy with the more common remedy in equity: Ill. St. c. 2.] {The basis of the equitable jurisdiction in a bill for accounting may be either that the parties are so related that a suit at law will not give an adequate remedy, as when they are principal and agent, or partners: Harvey *v.* Varney, 98 Mass. 118; Dunham *v.* Presby, 120 id. 285. Or that the accounts are so complicated that a jury could not examine them with accuracy: Farmers', etc. Bank *v.* Polk, 1 Del. Ch. 167; Carter *v.* Bailey, 64 Me. 458.}

[1] Com. Dig. Accompt, A, B. {"It has been settled by repeated decisions in this State, that the action of account is the proper remedy for the adjustment of controversies growing out of the common mode of leasing farms, where the products and profits are to be divided between landlord and tenant. And a disposition has been shown to require everything growing out of such a contract, affecting the proper settlement and division, to be brought into such accounting. It was decided in Cilley, Adm'r, *v.* Tenny, 31 Vt. 401, that the neglect of the tenant to properly cultivate the crops, whereby they were injured, and thus the joint profits in the products of the farm were diminished, was proper to be adjusted in an action of account. But breaches of contract on either part, whereby the making of profits has been prevented merely, we think need not necessarily be brought into the account, and may be sued for independently:" Poland, C. J., La Point *v.* Scott, 36 Vt. 609.

The action of account does not lie in favor of one partner against another who has received nothing and has no account to render: Spear *v.* Newell, 2 Paine C. C. 267. At common law the action of account would only lie between *two* merchants: Appleby *v.* Brown, 24 N. Y. 143. It will not lie at common law upon a mere equitable title of tenancy in common or joint-tenancy, the object being to recover rents and profits: Carney *v.* Irving, 31 Vt. 606.}

[2] 13 Edw. I. c. 23; 25 Edw. III. c. 5; 31 Edw. III. c. 11; 4 & 5 Anne, c. 16; Sturton *v.* Richardson, 13 M. & W. 17.

[3] Co. Lit. 172 *a*; Harker *v.* Whitaker, 5 Watts 474.

essary.[1] It seems he may be charged in both capacities, in the same action.[2] But where one tenant in common sues his co-tenant in account, charging him as bailiff under the statute of Anne, it must be alleged in the declaration, and of course be proved, that he has received more than his share of the profits.[3] And the receipt, by one co-tenant, of the whole profits is *prima facie* a receipt of more than his share, and will render him liable to account to his companion as bailiff, though, on taking the account, it may turn out that he is a creditor.[4] The pleas in bar appropriate to this action are, that he never was bailiff, or guardian, or receiver; or that he has fully accounted either to the plaintiff or before auditors; or that the money was delivered to him for a specific purpose, which has been accomplished.[5] Whatever admits the defendant once liable to

[1] Co. Lit. 172 *a;* Walker *v.* Holyday, 1 Com. 272; Bull. N. P. 127; Bishop *v.* Eagle, 11 Mod. 186; Jordan *v.* Wilkins, 2 Wash. C. C. 482. For, where the money was received of the plaintiff, the defendant might have waged his law: Hodsden *v.* Harridge, 2 Saund. 65. Nor is it necessary where the action is between merchants: Moore *v.* Wilson, 2 Chipm. 91.

[2] Wells *v.* Some, Cro. Car. 240; 1 Roll. Abr. 119, pl. 10; 1 Com. Dig. Accompt, E, 2. The declaration against a bailiff is as follows: "In a plea of account; for that the said D. was bailiff to the plaintiff of one messuage, with the appurtenances in ——, from —— to ——, and during that time had the care and management thereof, and sufficient power to improve and demise the same, and to collect and receive the issues, rents, and profits of the said premises to the use of the plaintiff; yet, though requested, the said D. hath never rendered to the plaintiff his reasonable account of said moneys, rents, and profits, nor of his doings in the premises, but refuses so to do." The form of charging one as receiver is thus: "For that the said D. was from —— to —— the plaintiff's receiver, and as such had received of the moneys of the plaintiff by the hands of one E. —— dollars, and by the hands of one F. —— dollars, to render his reasonable account thereof on demand. Yet," etc.

[3] Sturton *v.* Richardson, 13 M. & W. 17. Whether a special request and the lapse of reasonable time should be alleged, *quære:* ibid. This provision of the statute of Anne (4 Anne, c. 16, § 27, allowing an action of account where one tenant in common has received more than his just share) applies only to cases where one tenant in common receives the money or something else from another person to which both co-tenants are entitled, simply by reason of their being tenants in common, and in proportion to their interest as such, and of which the one receives and keeps more than his just share according to that proportion. The statute, therefore, includes all cases where two are tenants of land leased to a third party at a rent payable to each, and where the one receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share; and if he has, he becomes as such receiver, in that case, the bailiff of the other, and must account. But when we seek to extend the meaning of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation than the other, we have insuperable difficulties to encounter. There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. And there are many cases where profits are made and are actually taken by one co-tenant, yet it is impossible to say that he has received more than comes to his just share. Examples of both classes of cases are given. See Henderson *v.* Eason, 9 Eng. Law & Eq. 337.

[4] Eason *v.* Henderson, 12 Ad. & El. N. S. 986; 13 Jur. 150.

[5] 1 Com. Dig. Accompt, E, 3, 4, 5. In these cases, the form of pleading is: "That he never was bailiff of the premises, goods, and chattels aforesaid, to render an account thereof to the said plaintiff in manner and form" (etc.); or, "that he never was receiver of the moneys of the plaintiff in manner" (etc.); or, "that, after the time dur-

account, such as payment over by the plaintiff's order, etc., though it goes in discharge, should be pleaded before the auditors and not in bar of the action; excepting the pleas of release, *plene computavit*, and the statute of limitations.[6]

§ 37. **What Evidence supports.** In this case, as in other cases, the *evidence on the part of the plaintiff* must support the material averments in the declaration.[1] There must be evidence of a privity, either by contract, express or implied,[2] or by law; and if the defendant is charged as bailiff, or guardian or receiver, or tenant in common, or joint tenant, he must be proved to have acted in the specific character charged; for the measure of their liability is different; tenants in common and joint-tenants being answerable for what they have actually received, without deducting costs and expenses; receivers being charged in the same manner, but allowed costs and expenses in special cases in favor of trade; and guardians and bailiffs being held to account for what they might with proper diligence have received, deducting reasonable costs and expenses.[3] The property in the money demanded or goods bailed must be precisely stated and proved as laid, it being a material allegation. If, therefore, the declaration is for the money of the plaintiff, and the proof is of money belonging to the plaintiff and others as partners, the declaration is not supported.[4] And if there are several defendants, they must be proved to be jointly and not severally liable.[5] A special demand to account is not necessary to be proved.[6]

§ 38. **Pleas.** If the plea is that the defendant accounted before two, it will be supported by *evidence* that he accounted before one of them only; for the accounting is the substance.[1] In general, to support the plea of *plene computavit*, it is necessary for the defendant

ing which (etc.), to wit, on ——, he fully accounted with the plaintiff of and concerning the said premises, rents (etc.), for the time he was so bailiff as aforesaid;" or, "of and concerning the moneys so by him received, as aforesaid;" or, "fully accounted before A and B, auditors assigned by the court here to audit the account aforesaid," etc.: Story's Pleadings, 71, 72; 3 Chitty's Pl. 1197–1289.

[6] 1 Com. Dig. Accompt, E, 6; Godfrey *v.* Saunders, 3 Wils. 94; Bredin *v.* Divin, 2 Watts 15. {And whatever constitutes a bar to the action must be pleaded in bar before the interlocutory judgment to account; such matter cannot be pleaded before the auditor, *e. g.* statute of limitations: Closson *v.* Means, 40 Me. 337; Black *v.* Nichols, 68 id. 227. If the defendant, by his answer, sets up facts which would make out a valid defence, but does not insist on a jury trial on those facts, and allows the case to be referred to an auditor to take the account, he waives the defence he has set up, and cannot insist on it after the account has been taken: Protchett *v.* Schaefer, 11 Phila. (Pa.) 166.}

[1] An I O U evidence of an account stated between the parties: Fessenmayer *v.* Adcock, 16 M. & W. 449.

[2] King of France *v.* Morris, cited 3 Yeates 251; Co. Lit. 172 *a*.

[3] 1 Selw. N. P. 1–3; Co. Lit. 172 *a*; Sargent *v.* Parsons, 12 Mass. 149; Griffith *v.* Willing, 3 Binn. 317; Wheeler *v.* Horne, Willes 208; Jordan *v.* Wilkins, 2 Wash. C. C. 485; Stat. 4 & 5 Anne, c. 27; Irvine *v.* Hanlin, 10 S. & R. 221.

[4] Jordan *v.* Wilkins, 2 Wash. C. C. 482.

[5] Whelan *v.* Watmough, 15 S. & R. 158.

[6] Sturges *v.* Bush, 6 Day 442

[1] Bull. N. P. 127.

to show a balance, ascertained and agreed upon.[2] But if the course of dealing is such as to call for daily accounts and payments by the defendant, as where the demand is against a servant for the proceeds of daily petty sales, of which it is not the course to take written vouchers, it will be *presumed* that the defendant has accounted; and the burden of proof will lie on the plaintiff to show that this ordinary course of dealing has been violated.[3] If the contract was upon the consignment of goods to the defendant, that he should account for the sales and return the goods which should remain unsold, the plea of *plene computavit* will not be maintained by the evidence of having accounted for the sales, unless it be also proved that the goods unsold have been returned.[4] This plea, and that of *ne unques* bailiff, etc., may be pleaded together; and the plea does not in that case admit the liability of the defendant to account.[5]

§ 39. **Judgment and Reference.** After a judgment *quod computet*, and a reference to auditors, all articles of account between the parties incurred since the commencement of the suit are to be included by the auditors, and the whole is to be brought down to the time when they make an end of the account.[1] But after such judgment, rendered upon confession against a receiver, if the auditors certify issues to be tried, the plaintiff, upon the trial of such issues, cannot give evidence of moneys received by the defendant during any other period than that described in the declaration.[2] The judgment *quod computet*, however, does not conclude the defendant as to the precise sums or times mentioned in the declaration; but the account is to be taken according to the truth of the matter, without regard to the verdict.[3]

[2] Baxter *v.* Hozier, 5 Bing. N. C. 288.
[3] Evans *v.* Birch, 3 Campb. 10.
[4] Read *v.* Bertrand, 4 Wash. 556.
[5] Whelan *v.* Watmough, 15 S. & R. 158.
[1] Robinson *v.* Bland, 2 Burr. 1086; Couscher *v.* Toulam, 4 Wash. 442. The report of the auditor will not be set aside on the ground of error in the account, except on very clear and satisfactory proof of the errors complained of: Stehman's Appeal, 5 Barr 413.
[2] Sweigart *v.* Lowmarter, 14 S. & R. 200.
[3] Newbold *v.* Sims, 2 S. & R. 317; James *v.* Brown, 1 Dall. 339; Sturges *v.* Bush, 5 Day 452.

ADULTERY.

§ 40. **Adultery, how proved.** The proof of this crime is the same, whether the issue arises in an indictment, a libel for divorce, or an action on the case.[1] The *nature of the evidence* which is considered sufficient to establish the charge before any tribunal, has been clearly expounded by Lord Stowell, and is best stated in his own language. "It is a fundamental rule," he observes, "that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely, indeed, that the parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances, that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books; at the same time, it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the

[1] {This statement refers to the *kind* of evidence by which the fact of adultery is proved, for it is proved by the same kind of evidence in all cases: [State *v.* Brink, 68 Vt. 659.] In regard to the quantity of evidence required, however, the rule differs where the issue is raised on an indictment, from that where it arises in a libel for divorce, or an action on the case. On the trial of an indictment, the act of adultery must be established by proof beyond a reasonable doubt; while the rule as to the quantity of evidence required to prove the act of adultery when it is relied on as a ground of divorce, or to support an action on the case, is that the party relying on such act should prove it by a preponderance of the evidence. He is not required to prove it beyond a reasonable doubt, as in an indictment for a criminal offence: Chestnut *v.* Chestnut, 88 Ill. 548; [Stiles *v.* Stiles, 167 id. 576; Lindley *v.* Lindley, 68 Vt. 421; McGrail *v.* McGrail, 51 N. J. Eq. 537; see Vol. I. § 81 *d*.] The rules governing the *admissibility* of evidence, both oral and documentary, which is offered for the purpose of proving the act of adultery are the same in criminal as civil cases; the difference between the two classes of cases is in respect to the *measure* and *weight* of the evidence addressed to the jury on the matters on which they are to pass (see Vol. I. § 2 *a*). On the question whether a document is admissible as evidence to go to the jury in a prosecution for adultery, the *court* determines it by the same rules as when the question is made in a civil case: State *v.* Potter, 52 Vt. 33.}

guarded discretion of a reasonable and just man to the conclusion;[2] for it is not to lead a rash and intemperate judgment moving upon appearances, that are equally capable of two interpretations, — neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature: they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."[3]

§ 41. **Same Subject.** The rule has been elsewhere more briefly stated to require, that there be such *proximate circumstances* proved, as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed.[1] And therefore it has been held that *general cohabitation* excluded the necessity of proof of particular facts.[2] Ordinarily, it

[2] [State *v.* Brink, 68 Vt. 659.]

[3] Loveden *v.* Loveden, 2 Hagg. Con. 2, 3. The husband's remedy against the seducer of his wife may be in trespass, or by an action on the case. The latter is preferable, where there is any doubt whether the fact of adultery can be proved, and there is a ground of action for enticing away or harboring the wife without the husband's consent; because a count for the latter offence may be joined with the former; and a count in trover for wearing-apparel, etc., may also be added: James *v.* Biddington, 6 C. & P. 589.

The declaration for seduction may be as follows: "For that whereas the defendant, contriving and wrongfully intending to injure the plaintiff, and to deprive him of the comfort, society, aid, and assistance of S., the wife of the plaintiff, and to alienate and destroy her affection for him, heretofore, to wit, on" —— [inserting the day on or near which the first act of adultery can be proved to have been committed], "and on divers other days and times after that day and before the commencement of this suit, wrongfully and wickedly debauched and carnally knew the said S., she being then and ever since the wife of the plaintiff; by means whereof the affection of the said S. for the plaintiff was wholly alienated and destroyed; and by reason of the premises the plaintiff has wholly lost the comfort, society, aid, and assistance of his said wife, which during all the time aforesaid he otherwise might and ought to have had." To the damage, etc. {In proving adultery by circumstances, two facts must be established, — a criminal disposition or desire in the mind of both the defendant and the *particeps criminis*, and an opportunity to commit the crime. When both these are shown, guilt is necessarily inferred: 2 Bishop, Marr. & Div. § 619; Black *v.* Black, 30 N. J. Eq. 228. [Emission is not an essential element of the crime: Com. *v.* Hussey, 157 Mass. 415. Insane delusions do not excuse adultery committed when the adulterer was capable of appreciating the nature of the act and its probable consequences: Yarrow *v.* Yarrow, 1892, P. 92.] Proof that parties have carried on a clandestine correspondence, have made strong expressions of attachment, and had secret interviews, will furnish very strong evidence of criminal inclination and desire: 2 Bishop, Marr. & Div. § 616, quoting the language of Shaw, C. J., in Dunham *v.* Dunham, 6 Law Rep. 139, p. 141.} [Where the parties defendant and co-respondent, in a divorce action, live together apparently as husband and wife, after having had prior illicit relations, the fact of adultery is sufficiently established, notwithstanding their testimony that their relations were innocent: Crane *v.* People, 168 Ill. 395.]

[1] Williams *v.* Williams, 1 Hagg. Con. 299; Dunham *v.* Dunham, 6 Law Reporter 141.

[2] Cadogan *v.* Cadogan, 2 Hagg. Con. 4, n.; Rutton *v.* Rutton, ib. 6, n. {The cohabitation which excludes the necessity of proof of particular facts is cohabitation as

is not necessary to prove the fact to have been committed at any particular or certain time or place. It will be sufficient if the circumstances are such as to lead the court, travelling with every necessary caution to this conclusion, which it has often drawn between persons living in the same house, though not seen in the same bed or in any equivocal situation. It will neither be misled by equivocal appearances on the one hand, nor, on the other, will it suffer the object of the law to be eluded by any combination of parties to keep without the reach of direct and positive proof.[3] And in examining the proofs, they will not be taken insulated and detached; but the whole will be taken together.[4] Yet, in order to infer adultery from general conduct, it seems necessary that a *suspicio violenta* should be created.[5] But the adulterous disposition of the parties being once established, the crime may be inferred from their afterwards being discovered together in a bed-chamber, under circumstances authorizing such inference.[6]

§ 42. **Opinion ; Belief.** The nature of this crime has occasioned a slight departure, at least in the ecclesiastical courts, from the general rule of evidence as to matters of opinion; it being the course to interrogate the witnesses who speak of the behavior of the parties, as to their *impression and belief*, whether the crime has been committed or not. For it is said, that in cases of this peculiar character, the court, though it does not rely on the opinions of the witnesses, yet has a right to know their impression and belief.[1] On the other hand, in the ecclesiastical courts, it is reluctantly held that the testimony of one witness alone, though believed to be true, is not legally sufficient to establish the charge of adultery.[2] But in the courts of common law in America, no such rule is known to have been adopted, even in cases of an ecclesiastical nature.[3]

§ 43. **Presumption of continued Criminal Intercourse, when.** Where criminal intercourse is once shown, it must be *presumed*, if the parties are still living under the same roof, that it *still continues*,

man and wife: Pollock *v.* Pollock, 71 N. Y. 137. See also Allen *v.* Allen, 101 N. Y. 659. In Hart *v.* Hart, 2 Edw. Ch. (N. Y.) 207, it was proved that the husband was living separate from his wife, and had a woman residing with him. No other cohabitation, *i. e.* no cohabitation in the technical meaning of living together as man and wife, was shown. Vice-Chancellor Edwards said he would not grant a decree in such a case upon conjectures, and that he must have stronger proof before he made a decree. This case was questioned by Mr. Bishop in the fourth edition of his work on Marriage and Divorce, § 646, but the unfavorable comment was suppressed in the fifth edition, § 628. See sixth edition, § 628.]

[3] Burgess *v.* Burgess, 2 Hagg. Con. 226, 227; Hammerton *v.* Hammerton, 2 Hagg. Eccl. 14; Rix *v.* Rix, 3 id. 74; Com. *v.* Pitsinger, 110 Mass. 101.

[4] Durant *v.* Durant, 1 Hagg. Eccl. 748.

[5] Such seems to have been the view of Lord Stowell in Loveden *v.* Loveden, 2 Hagg. Con. 7, 8, 9, 16, 17; and in Burgess *v.* Burgess, ib. 227, 228.

[6] Soilleaux *v.* Soilleaux, 1 Hagg. Con. 373; Van Epps *v.* Van Epps, 6 Barb. S. C. 320.

[1] Crewe *v.* Crewe, 3 Hagg. Eccl. 128.

[2] Evans *v.* Evans, 1 Rob. Eccl. 165; Simmons *v.* Simmons, 11 Jur. 830.

[3] *Ante*, Vol. I. § 260.

notwithstanding those who dwell under the same roof are not prepared to depose to that fact.[1] The circumstance, that witnesses hesitate and pause about drawing that conclusion, will not prevent the court, representing the law, from drawing the inference to which the proximate acts proved unavoidably lead.[2]

§ 44. **Facts tending to prove Adultery.** Adultery of the *wife* may be proved by the birth of a child and non-access of the husband, he being out of the realm;[1] and if adultery is alleged to have been continued for many years and with divers particular individuals, it is sufficient to prove a few of the facts, with identity of her person.[2] Adultery of the *husband*, on the other hand, may be proved by habits of adulterous intercourse, and by the birth, maintenance, and acknowledgment of a child.[3] A married man going into a known *brothel* raises a suspicion of adultery, to be rebutted only by the very best evidence.[4] His going there and remaining alone for some time in a room with a common prostitute, is sufficient proof of the crime.[5] The circumstance of a woman going to such a place with a man, furnishes similar proof of adultery.[6] The venereal disease, long after marriage, is *prima facie* evidence of this crime.[7]

§ 45. **Confession.** As to proof by the *confession* of the party, no difference of principle is perceived between this crime and any other. It has already been shown that a *deliberate and voluntary confession of guilt* is among the most weighty and effectual proofs in the law.[1]

[1] Turton *v.* Turton, 3 Hagg. Eccl. 350; [see Vol. I. § 28.]
[2] Elwes *v.* Elwes, 1 Hagg. Con. 278.
[1] Richardson *v.* Richardson, 1 Hagg. Eccl. 6.
[2] Ibid.
[3] D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 777, n.
[4] Astley *v.* Astley, 1 Hagg. Eccl. 720; Loveden *v.* Loveden, 2 Hagg. Con. 24; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114, 124, 132. {Obviously, however, such a visit is open to explanation, as it may be one of philanthropy, or of accident, or even of lawful business which should not be construed into an act of guilt: 2 Bishop, Marr. & Div. § 626. So held in Latham *v.* Latham, 30 Gratt. (Va.) 307. The consorting with prostitutes by a married man raises the presumption of adultery, unless explained and rebutted by the character of the man; and when character is relied upon, as a defence, and fails in that respect, the presumption is increased: Ciocci *v.* Ciocci, 26 Eng. Law & Eq. 604.} [Mere proof that the husband was at one time in a house of ill-fame is insufficient: Locke *v.* Locke, Ky., 18 S. W. 233.]
[5] Astley *v.* Astley, 1 Hagg. Eccl. 719; {Daily *v.* Daily, 64 Ill. 329; [Cooke *v.* Cooke, 152 id. 286.] In a recent case in Massachusetts, the Court instructed the jury that if a married man is found with a woman not his wife in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him, and these instructions were held to be correct by the Supreme Court, as meaning that there was, in such a case, evidence to be considered by the jury, and that they might infer guilt from it if that inference seemed to them to be the correct one: Com. *v.* Clifford, 145 Mass. 97.} [For cases where the evidence raised a strong presumption of adultery, see State *v.* Mecum, 95 Ia. 433; Eldridge *v.* State, 97 Ga. 192; Starke *v.* State, ib. 193; Morrison *v.* Morrison, 95 Ala. 309; Cornelius *v.* Hambay, 150 Pa. 359.]
[6] Eliot *v.* Eliot, cited 1 Hagg. Con. 302; Williams *v.* Williams, ib. 303.
[7] Durant *v.* Durant, 1 Hagg. Eccl. 767; {2 Bishop, Marr. & Div. § 632 *et seq.*}
[1] *Ante*, Vol. I. §§ 214–219; Mortimer *v.* Mortimer, 2 Hagg. Con. 315; {2 Bishop, Marr. & Div. c. 16; Williams *v.* Williams, 35 L. J. Mat. Cas. 8.}

Where the consequences of the confession are altogether against the party confessing, there is no difficulty in taking it as indubitable truth.[2] But where these consequences are more than counterbalanced by incidental advantages, it is plain that they ought to be rejected. In suits between husband and wife, where the principal object is separation, these countervailing advantages are obvious, and the danger of collusion between the parties is great. This species of evidence, therefore, though not inadmissible, is regarded in such cases with great distrust, and is on all occasions to be most accurately weighed.[3] And it has been held, as the more rational doctrine, that confession, proved to the satisfaction of the court to be perfectly free from all suspicion of a collusive purpose, though it may be sufficient to found a decree of divorce *a mensa et thoro*, is not sufficient to authorize a divorce from the bonds of matrimony, so as to enable a party to fly to other connections.[4] It is never admitted alone for this purpose;[5] nor must it be ambiguous.[6] But it need not refer to any particular time or place; it will be applied to all times and places, at which it appears probable, from the evidence, that the fact may have been committed.[7] And it is admissible, when made under apprehension of death, though it be afterwards retracted.[8] Where, in cross-libels for divorce *a vinculo* for adultery, each respondent pleaded in recrimination of the other, it has been held that these pleas could not be received as mutual admissions of the facts articulated in the libels.[9] But the record of the conviction of the respondent, upon a previous indictment for that offence, has been

[2] {Thus, where a man indicted for adultery said that he had left a wife in England, and had a wife and child at the time of the indictment, in Massachusetts, this was held sufficient evidence that he had adulterous sexual intercourse with the woman in Massachusetts: Com. *v.* Holt, 121 Mass. 61.

On an indictment for adultery, the crime may be proved by the direct confession of the defendant, corroborated by evidence of an opportunity to commit it, and of his subsequent acts making it probable that he did commit it: Com. *v.* Tarr, 4 Allen (Mass.) 315. So, where the confessions were made in a criminal prosecution of a person making them, the woman not being his wife, it was held that the confessions were admissible: Com. *v.* Flood, 152 Mass. 529.}

[3] Williams *v.* Williams, 1 Hagg. Con. 304. {So it has been held that confessions, by letter or otherwise, ought to be corroborated by circumstances tending to show guilt, as that the wife is living apart from the husband (Lord Cloncurry's Case, Macq. Pr. in H. of L. 606), or that she was living with a paramour, and meanwhile was grossly deceiving her husband (Miller's Case, ib. 620). See also Doyly's Case, ib. 654; Dundas' Case, ib. 610; Grant *v.* Grant, 2 Curt. 16; Lord Ellenborough's Case, Macq. Pr. in H. of L. 655.}

[4] Mortimer *v.* Mortimer, 2 Hagg. Con. 316.

[5] Searle *v.* Price, 2 Hagg. Con. 189; Mortimer *v.* Mortimer, ib. 316; Betts *v.* Betts, 1 Johns. Ch. 197; Baxter *v.* Baxter, 1 Mass. 346; Holland *v.* Holland, 2 id. 154; Doe *v.* Roe, 1 Johns. Cas. 25. But where the whole evidence was such as utterly to exclude all suspicion of collusion, and to establish the contrary, a divorce has been decreed upon confession alone: Vance *v.* Vance, 8 Greenl. 132; Owen *v.* Owen, 4 Hagg. Eccl. 261.

[6] Williams *v.* Williams, 1 Hagg. Con. 304.

[7] Burgess *v.* Burgess, 2 Hagg. Con. 227.

[8] Mortimer *v.* Mortimer, 2 Hagg. Con. 317, 318.

[9] Turner *v.* Turner, 3 Greenl. 398.

held sufficient proof of the libel, both as to the marriage and the fact of adultery.[10]

§ 46. **Paramour's Testimony and Confessions.** The paramour is an admissible witness; but, being *particeps criminis*, his evidence is but weak.[1] His confession may be used in evidence against her, if connected with some act of confession of her own, in the nature of a joint acknowledgment; but independently and alone, it is inadmissible.[2]

§ 47. **Other Acts of Adultery admissible, when.** Where the fact of adultery is alleged to have been committed *within a limited period* of time, it is not necessary that the evidence be confined to that period; but proof of acts anterior to the time alleged may be ad-

[10] Anderson *v.* Anderson, 4 Greenl. 100; Randall *v.* Randall, ib. 326. The conviction could not have been founded upon the testimony of the party offering it in evidence.

[1] Soileaux *v.* Soileaux, 1 Hagg. Con. 376; Croft *v.* Croft, 2 Hagg. Eccl. 318; {State *v.* Colby, 51 Vt. 291. In Turney *v.* Turney, 4 Edw. Ch. (N. Y.) 566, the Court refused to grant a divorce on the unsupported testimony of two prostitutes. So, in Ginger *v.* Ginger, 34 L. J. Mat. Cases, 9, where the petition was supported only by the testimony of the alleged paramour, a woman of loose character. See Brown *v.* Brown, 5 Mass. 320.}

[2] Burgess *v.* Burgess, 2 Hagg. Con. 235, n.; Derby *v.* Derby, 31 N. J. Eq. 36. {Another class of evidence commonly used to prove the crime of adultery is that of hired private detectives. The credibility of such a witness, when he testifies to facts which he has observed, while he was in the employment of one of the parties for such observation, must necessarily be very slight, if his evidence stands alone and is not corroborated by other direct testimony or by the circumstances of the case. The practice is well commented on by Sir Cresswell Cresswell, in Sopwith *v.* Sopwith, 4 Swab. & T. 243, p. 246. "I feel bound to make one or two observations upon the subject of the employment of men of the class to which Shaw (a private detective) belongs. They may be very useful for some purposes, — they may be instrumental in detecting malpractices which would otherwise remain concealed, — but they are most dangerous agents. Police detectives are most useful. They are employed in a government establishment, they are responsible to an official superior, they have no pecuniary interest in the result of their investigations beyond the wages which they receive for the occupation that they follow, and they may be and are constantly employed not only with safety, but with benefit to the public. But when a man sets up as a hired detective of supposed delinquencies, when the amount of his pay depends on the extent of his employment, and the extent of his employment depends on the discoveries he is able to make, then that man becomes a most dangerous instrument." Such testimony is to be received with caution. Cf. Browning, Marr. & Div. p. 70, 71.

In Massachusetts, by statute (Acts of 1857, c. 305), in all suits for divorce, except those in which a divorce is sought on the ground of alleged criminal conduct of either party, the parties may be permitted to testify in their own favor, and may be called as witnesses by the opposite party; but they shall not be allowed to testify as to private conversations with each other. Under the English statute, allowing a wife to testify for or against her husband, she may, in an action against the husband for necessaries supplied to aid her, testify to her own adultery: Cooper *v.* Lloyd, 6 Com. B. N. S. 519. A similar decision, founded on a statute removing the incompetency of witnesses by reason of interest, was rendered in Derby *v.* Derby, 21 N. J. Eq. 36. It is to be observed that where, by statute, a person accused of a crime may testify in his own defence, by so doing he waives his constitutional privilege of not being obliged to criminate himself, and may be cross-examined on all facts relevant and material to the issue, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses: Com. *v.* Lannan, 13 Allen (Mass.) 563. And if one indicted for adultery becomes a witness in his own behalf, he cannot object to answer questions material to the trial of the issue, on the ground that the answers would tend to criminate him: Com. *v.* Nichols, 114 Mass. 285.}

duced, in explanation of other acts of the like nature within that period.[1] Thus, where the statute of limitations was pleaded, the plaintiff was permitted to begin with proof of acts of adultery committed more than six years preceding, as explanatory of acts of indecent familiarity within the time alleged.[2] So, where one act of adultery was proved by a witness, whose credibility the defendant attempted to impeach, evidence of prior acts of improper familiarity between the parties has been held admissible to corroborate the witness.[3] But, where the charge is of one act of adultery only, in a single count, to which evidence has been given, the prosecutor is not permitted afterwards to introduce evidence of other acts, committed at different times and places.[4]

§ 48. **Not indictable at Common Law.** By the *common law*, the simple act of adultery is not punishable by *indictment*, but is left to the cognizance of the spiritual courts alone. It is only the open lewdness or public indecency of the act which is indictable.[1] But in many of the United States it is now made *indictable by statutes.* Whether, to constitute this crime, it is necessary that both the guilty parties be married persons, is a point not perfectly agreed by authorities;[2] but the better opinion seems to be, that the act of criminal intercourse, where only one of the parties is married, is adultery in that one, and fornication in the other.[3] Some of the statutes, upon a divorce *a vinculo* for adultery, disable the guilty party from contract-

[1] See Vol. I. § 14 *o*.

[2] Duke of Norfolk *v.* Germaine, 12 Howell's St. Tr. 929, 945. It has, however, been held that the proof of acts within the period must first be adduced: Gardiner *v.* Madeira, 2 Yeates 466; {Com. *v.* Horton, 2 Gray 354; Com. *v.* Thrasher, 11 id. 453. In Thayer *v.* Thayer, 101 Mass. 111, other acts of adultery are held admissible, whether occurring before or after the act charged, for the purpose of showing an adulterous disposition, overruling Com. *v.* Meriam, Com. *v.* Horton, and Com. *v.* Thrasher, *supra*, so far as they are to the contrary. See also Boody *v.* Boody, 30 L. J. N. S. P. & A. 23, and *ante*, § 41. So proof of other acts of adultery committed near the time of the alleged offence, though in a different county, is admissible for the same purpose: Com. *v.* Nichols, 114 Mass. 285;} [Brown *v.* State, 108 Ala. 18.]

[3] Com. *v.* Meriam, 14 Pick. 518; Com. *v.* Lahey, 14 Gray 91.

[4] Saunte *v.* Pricket, 1 Campb. 473; Downes *v.* Skrymsher, 1 Brownl. 233; 19 H. VI. 47; State *v.* Bates, 10 Conn. 372.

[1] 4 Bl. Comm. 64, 65; Anderson *v.* Com., 6 Rand. 627; State *v.* Brunson, 2 Bayley 149; Com. *v.* Isaaks, 5 Rand. 634.

[2] State *v.* Pierce, 2 Blackf. 318; Respublica *v.* Roberts, 2 Dall. 124; 1 Yeates 6. {By the Roman laws the crime of adultery was limited to the illicit sexual intercourse of a married woman with a man, and both the woman and her paramour were guilty of adultery, but by the common law a married man also is guilty of adultery if he has sexual intercourse with a woman other than his wife: Wharton, Cr. Law, Vol. II. §§ 1718, 1719. The rule to which Prof. Greenleaf inclines in the text, that the act of criminal intercourse, where only one of the parties is married, is adultery in that one and fornication in the other, is the prevailing rule in the United States: State *v.* Fellows, 50 Wis. 65; though cases in which the act is held to be adultery in both are not uncommon: State *v.* Colby, 51 Vt. 291;} [Kendrick *v.* State, 100 Ga. 360.]

[3] Bouvier's Law Dict. verb. Adultery; Hull *v.* Hull, 2 Strobh. Eq. 174. In The State *v.* Wallace, 9 N. H. 515, it was held that adultery was committed whenever there was unlawful intercourse, from which spurious issue might arise; and that, therefore, it was committed by an unmarried man, by illicit connection with a married woman. See also Com. *v.* Call, 21 Pick. 509.

ing a lawful marriage during the life of the other; but it has been held that a second marriage does not, in such case, render the party guilty of the crime of adultery, but only exposes to a prosecution under the particular provisions of the statute, whatever they may be.[4] And if such second marriage is had in another State, where it is not unlawful, the parties may lawfully cohabit in either State.[5]

§ 49. **Proofs of Marriage.** Upon every charge of adultery, whether in an indictment or a civil action, the case for the prosecution is not made out without *evidence of the marriage.* And it must be proof of an actual marriage, in opposition to proof by cohabitation, reputation, and other circumstances, from which a marriage may be inferred, and which in these cases are held insufficient; for otherwise persons might be charged upon pretended marriages set up for bad purposes.[1] Whether the *defendant's admission* of the marriage may be given in evidence against him has been doubted; but no good reason has been given to distinguish this from other cases of admission, where, as we have already shown,[2] the evidence may be received, though it may not amount to sufficient proof of the fact. Thus in a civil action for adultery, where the defendant, being asked where the plaintiff's wife was, replied, that she was in the next room, this was held insufficient to prove a marriage, for it amounted only to an admission that she was reputed to be his wife.[3] But any recognition of a person standing in a given relation to others is *prima facie* evidence, against the person making such recognition, that such relation exists;[4] and if the defendant has seriously and solemnly admitted the marriage, it will be received as sufficient proof of the fact.[5] Thus, where the defendant deliberately declared that he knew that the female was married to the plaintiff, and that with full knowledge of that fact he had seduced and debauched her, this was held sufficient proof of the marriage.[6]

[4] Com. *v.* Putnam, 1 Pick. 136. [Intercourse with the person so remarrying constitutes adultery: State *v.* Shattuck, 69 Vt. 403.]

[5] Putnam *v.* Putnam, 8 Pick. 433.

[1] Morris *v.* Miller, 4 Burr. 2059, exponnded in 1 Doug. 174. In a libel for divorce, the Court will require proof of the marriage, even though the party accused makes default of appearance: Williams *v.* Williams, 3 Greenl. 135. {By statute in Massachusetts, when the fact of marriage is required or offered to be proved before a Court, evidence of the admission of such fact by the party against whom the process is instituted, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, is competent: Pub. Stat. c. 145, § 31. As to the proof of marriage in general, see also, *infra,* titles Marriage and Bastardy.}

[2] *Ante,* Vol. I. § 209; Cook *v.* State, 11 Ga. 53; Cameron *v.* State, 14 Ala. 546. In an indictment for adultery, where the defendant was married in a foreign country, his admission of that fact has been held sufficient proof of the marriage: Cayford's Case, 7 Greenl. 57; S. P. R. *v.* Simmonsto, 1 Car. & Kirw. 164; *infra,* § 461.

[3] Bull. N. P. 28.

[4] Dickenson *v.* Coward, 1 B. & Ald. 679, per Ld. Ellenborough.

[5] Rigg *v.* Curgenven, 2 Wils. 399.

[6] Forney *v.* Hallacher, 8 S. & R. 159.

§ 50. **Same Subject.** In indictments, and actions for criminal conversation, as the prosecution is against a wrong-doer, and not a claim of right, it is sufficient to prove the *marriage according to any form* of religion, as Jews, Quakers, and the like.[1] The evidence on this head will be treated hereafter, under the appropriate title. But in whatever mode the marriage was celebrated or is proved, there must be satisfactory proof of the identity of the parties.[2]

§ 51. **Defence; Collusion.** In *defence of a libel for divorce*, or of an *action for criminal conversation*, it may be shown that the adultery was committed, or the act of apparent criminality was done, by *collusion* between the parties, for the purpose of obtaining a separation, or of supporting an action at law. For the law permits no such co-operation, and refuses a remedy for adultery committed with such intent.[1] But the non-appearance of the wife, and a judgment by default against the paramour, are held no proof of collusion.[2] *Passive sufferance* or *connivance* of the husband may also be shown in bar, both of a libel and a civil action. But mere negligence, inattention, confidence, or dulness of apprehension are not sufficient for this purpose; there must be passive acquiescence and consent, with the intention and in the expectation that guilt will follow.[3] The proof, from the nature of the case, may be made out by a train of conduct and circumstances; but it is not necessary to show connivance at actual adultery, any more than it is necessary to prove an actual and specific fact of adultery; for if a system of connivance at improper familiarity, almost amounting to proximate acts, be established, the court will infer a corrupt intent as to the result.[4] But if the evidence falls short of actual connivance, and only establishes negligence, or even loose and improper conduct, in the husband, not amounting to consent, it is no bar to an action for criminal conversation, but goes only in reduction of the damages.[5] It is not always

[1] Bull. N. P. 28. But it must be actually, and not merely *prima facie* a valid marriage according to the law under which it was celebrated: Catherwood *v.* Caslon, 13 M. & W. 261. {But a *valid* marriage must be proved. So if on an indictment for adultery the proof of the marriage shows that at the time of the celebration of the ceremony one of the parties was not of sufficient age to be legally capable of contracting marriage, and it also appears that the parties afterwards separated and ceased to cohabit as man and wife, though it does not appear whether the cessation was before or after the parties were both of legal age to ratify the marriage, yet this is not sufficient proof of the marriage. The prosecution should show that the separation was not a rescission of the marriage contract: People *v.* Bennett, 39 Mich. 208.}

[2] See *infra*, tit. Marriage.

[1] Crewe *v.* Crewe, 3 Hagg. Eccl. 128, 130; {2 Bishop on Marr. & Div. c. 3.}

[2] Ibid.

[3] Rogers *v.* Rogers, 3 Hagg. Eccl. 58; Timmings *v.* Timmings, ib. 76; Lovering *v.* Lovering, ib. 85; Pierce *v.* Pierce, 3 Pick. 299; Duberley *v.* Gunning, 4 T. R. 655; Bull. N. P. 27; Hodges *v.* Windham, Peake's Cas. 38; 1 Selw. N. P. 8, 9 (10th ed.).

[4] Moorsum *v.* Moorsum, 3 Hagg. Eccl. 95.

[5] Foley *v.* Lord Peterborough, 4 Doug. 294; Duberley *v.* Gunning, 4 T. R. 655. {In Boulting *v.* Boulting, 3 Swab. & T. 335. the judge says, "Connivance is an act of

necessary that the husband be proved to have connived at the particular acts of adultery charged; for if he suffers his wife to live as a prostitute, and criminal intercourse with a third person ensues, he can have no action; it is *damnum absque injuria.*[6] Nor will an action lie for criminal conversation, had after the husband and wife have separated by articles of agreement, and the husband has released all claim to the person of his wife; for the *gist* of this action is the loss of the comfort, society, and assistance of the wife.[7]

§ 52. **Recrimination.** *Recrimination* is also a good defence to a libel for divorce;[1] though it is no bar to an action for criminal conversation.[2] The principle upon which this plea of *compensatio criminis* is allowed is, that the party cannot justly complain of the breach of a contract which he has himself violated.[3] This plea may be sustained on evidence, not as strong as might be necessary to sustain a suit for adultery;[4] and it makes no difference whether the offence,

the mind; it implies knowledge and acquiescence. I prefer the word 'acquiescence' to 'consent,' because the latter, in some respects, carries with it an idea of leave or license conveyed or signified to the erring party. As a legal doctrine, connivance has its source and its limits in this principle, *volenti non fit injuria;* a willing mind, this is all that is necessary. Such is the result of the decisions. They are brought together in Sir Herbert Jenner's judgment, in Phillips *v.* Phillips, 4 Notes of Cas. 528. But how is knowledge and acquiescence to be proved? The answer is, like any other conclusion of fact. It may be proved by express language, or by inference deduced from facts and conduct."} [Procurement of a woman to tempt the husband into adultery by detectives employed by the wife to obtain evidence constitutes connivance: Dennis *v.* Dennis, 68 Conn. 186.]

[6] Smith *v.* Alison, Bull. N. P. 27, per Ld. Mansfield; Sanborn *v.* Neilson, 4 N. H. 591. If the husband connive at adultery with A, he cannot have a divorce for an act of adultery, nearly contemporaneous, with B. Lovering *v.* Lovering, 3 Hagg. Eccl. 85. [Connivance in wife's adultery with one person is no bar to a divorce for previous adultery with another: Bailey *v.* Bailey, N. H. 29 A. 847.]

[7] Weedom *v.* Timbrell, 5 T. R. 357; Chambers *v.* Cauldfield, 6 East 244; Winter *v.* Henn, 4 C. & P. 494; Bartelot *v.* Hawker, Peake's Cas. 7; Wilton *v.* Webster, 7 C. & P. 198; Harvey *v.* Watson, 7 M. & G. 644. But if the separation was without any relinquishment by the husband of his right to the society of the wife, so that a suit for restitution of conjugal rights is still maintainable, it is no bar: Graham *v.* Wigley, 2 Roper on Hus. & Wife, 323, n. Some of the earlier cases seem to favor the idea, that, if the separation was by deed, the action would not lie; but this notion is not now favored, the true question being, whether the husband has or has not released his right to her person and society.

[1] Beeby *v.* Beeby, 1 Hagg. Eccl. 789; Forster *v.* Forster, 1 Hagg. Con. 144; [Mathewson *v.* Mathewson, 18 R. I. 456.] Cruelty is no answer to a charge of adultery: [Stiles *v.* Stiles, 167 Ill. 576;] but is pleadable together with a counter-charge of adultery: Coxedge *v.* Coxedge, 8 Jur. 935; Bishop on Marriage and Divorce, c. 20. [Cruelty and desertion held sufficient: Tillison *v.* Tillison, 63 Vt. 411. Cruelty is no answer unless it amounts to cause for divorce: Bailey *v.* Bailey, N. H., 29 A. 847.]

[2] Bromley *v.* Wallace, 4 Esp. 237. It goes only to the damages in the civil action; though Lord Kenyon formerly held it good in bar: Wyndham *v.* Wycombe, 4 Esp. 16.

[3] Beeby *v.* Beeby, 1 Hagg. Eccl. 789; Forster *v.* Forster, 1 Hagg. Con. 153. [Where the wilful neglect and misconduct of the husband conduces to the offence set up in his plea of recrimination, the defence will be rejected: Symons *v.* Symons, 1897, P. 167. In Texas recrimination must grow out of the fact that the acts or conduct for which the divorce is sought were induced by, or were in retaliation for, plaintiff's conduct: Trigg *v.* Trigg, Tex., 18 S. W. 313.]

[4] Forster *v.* Forster, *supra;* Astley *v.* Astley, 1 Hagg. Eccl. 714, 721. {This statement has not been received with entire satisfaction in England: Turton *v.* Turton, 3 Hagg. 338; Goodall *v.* Goodall, 2 Lee 384; Sopwith *v.* Sopwith, 2 Swab. & T. 160.}

pleaded by way of compensation, were committed before or after the fact charged in the libel.[5] It has been questioned whether a single act of adultery is sufficient to support this plea against a series of adulteries proved on the other side; but the better opinion seems to be that it is.[6]

§ 53. **Condonation.** *Condonation* is a sufficient answer to the charge of adultery, in a *libel;*[1] but it does not follow that it is a good answer to a recriminatory *plea;* for circumstances may take off the effect of condonation, which would not support an original suit for the same cause.[2] Thus, facts of cruelty will revive a charge of adultery, though they would not support an original suit for it.[3] Condonation is forgiveness,[4] with an implied condition that the injury shall not be repeated, and that the party shall be treated with conjugal kindness; and on breach of this condition the right to a remedy for former injuries revives.[5] It must be free; for, if obtained by force

[5] Proctor *v.* Proctor, 2 Hagg. Con. 299; Astley *v.* Astley, *supra*; [Gooch *v.* Gooch, 1893, P. 99.] If the act pleaded by way of recrimination has been forgiven, the condonation is a sufficient answer to the plea: Anichini *v.* Anichini, 2 Curt. 210. [Adultery is a bar though committed in the belief that a divorce has been granted: Gordon *v.* Gordon, 141 Ill. 160. Marriage after a divorce *nisi* will prevent a decree absolute (Darrow *v.* Darrow, 159 Mass. 262); unless the marriage was due to a mistake of fact involving no negligence or fault: Pratt *v.* Pratt, 157 Mass. 503. Mistake of law is no excuse: Darrow *v.* Darrow, *supra*.]

[6] Astley *v.* Astley, 1 Hagg. Eccl. 722, 724; Naylor *v.* Naylor, ib. cit.; Brisco *v.* Brisco, 2 Addams 259. {A plea of recrimination to a libel for divorce may state any facts which would be good grounds to support a libel for divorce in favor of the party who pleads them. Thus where, as in Massachusetts, a sentence to imprisonment for a certain term is classed with adultery and other causes which are good grounds for divorce, as soon as one party to a marriage is sentenced to such imprisonment, the other party's right to a divorce is complete, and therefore this is a good defence to a libel for divorce brought by the party so imprisoned on the ground of subsequent adultery: Handy *v.* Handy, 124 Mass. 394; Clapp *v.* Clapp, 97 id. 531; and of similar purport are Conant *v.* Conant, 10 Cal. 249; Adams *v.* Adams, 2 C. E. Green 324, p. 328.}

[1] [Condonation does not bar the action for damages against the wife's seducer: Smith *v.* Meyers, 52 Neb. 70. Otherwise in England, by St. 1857: Bernstein *v.* Bernstein, 1893, P. 292.]

[2] Beeby *v.* Beeby, 1 Hagg. Eccl. 789; D'Aguilar *v.* D'Aguilar, ib. 782; Bishop on Marriage and Divorce, c. 19.

[3] Ibid.

[4] [Evidence of matrimonial connection is necessary: Smith *v.* Smith, 154 Mass. 262. A covenant in a deed of separation that no action shall be brought for any cause arising before its date does not constitute condonation: Gooch *v.* Gooch, 1893, P. 99.]

[5] Durant *v.* Durant, 1 Hagg. Eccl. 761; Ferrers *v.* Ferrers, 1 Hagg. Con. 130. {Condonation is always conditional; the condition being that the pardoned party shall in the future treat the other with conjugal kindness, and by this is meant that he shall not only refrain from a repetition of the offence forgiven, but shall also refrain from committing any other offence which falls within the cognizance of a matrimonial court. Chancellor Walworth at one time held a much more restricted view. He thought that nothing short of a repetition of the offence forgiven, or the doing an injury *ejusdem generis*, should operate as a revival of the first offence: Johnson *v.* Johnson, 4 Paige (N. Y.) 460. But the Court of Errors, on appeal in the same case, 14 Wend. 643, say, "The good sense of the condition which accompanies condonation is that the offending husband shall not only abstain from adultery, but shall in the future treat his wife with conjugal kindness. Hence cruelty is a breach of the condition and revives the adultery." This rule is the accepted doctrine of the English courts, and also in the United States: Durant *v.* Durant, 3 Eng. Eccl. 323; Eldred *v.* Eldred, 7 id. 144; Warner *v.*

and violence, it is not binding; and if made upon an express condition, the condition must be fulfilled.[6] It must also appear that the injured party had full knowledge, or at least an undoubting belief, of all the adulterous connection, and that there was a condonation subsequent to that knowledge.[7]

§ 54. **Same Subject.** Where the parties have separate beds, there must, in order to show condonation, be some *evidence of matrimonial connection* beyond mere dwelling under the same roof.[1] But if a wife overlooks one act of human infirmity in the husband, it is not a legal consequence that she pardons all others. It is not necessary for her to withdraw from cohabitation on the first or second instance of misconduct; on the contrary, it is legal and meritorious for her to be patient as long as possible; forbearance does not weaken her title to relief, especially where she has a large family, and endures in the hope of reclaiming her husband.[2] But, on the other hand, the situation and circumstances of the husband do not usually call for such forbearance; and a facility of condonation of adultery on his part leads to the inference that he does not duly estimate the injury; and if he is once in possession of the fact of adultery, and still continues cohabitation, it is proof of connivance and collusion.[3] In either case, to establish a condonation, knowledge of the crime must be clearly and distinctly proved.[4]

Warner, 31 N. J. Eq. 225; Odom *v.* Odom, 36 Ga. 286;] [Heist *v.* Heist, 48 Neb. 794; Lutz *v.* Lutz, N. J. Eq., 28 A. 315; Andrews *v.* Andrews, 52 P. 298, Cal.]

[6] Popkin *v.* Popkin, 1 Hagg. Eccl. 767, n.

[7] Turton *v.* Turton, 3 Hagg. Eccl. 351; Anon., 6 Mass. 147; Perkins *v.* Perkins, ib. 69; North *v.* North, 5 id. 320; Backus *v.* Backus, 3 Greenl. 136; [Beeler *v.* Beeler, 44 S. W. 136, Ky. Reason to believe is sufficient: Brougham *v.* Brougham, 1895, P. 288; or notice of the facts: Phillips *v.* Phillips, 91 Ga. 551; unless there is actual disbelief: Polson *v.* Polson, 140 Ind. 310; Gosser *v.* Gosser, 183 Pa. 499. Suspicion is insufficient: Bailey *v.* Bailey, N. H., 29 A. 847; Graham *v.* Graham, 50 N. J. Eq. 701. Condonation of adultery with one person is not avoided by the fact of previous adultery with another person of which the party condoning is ignorant: Bernstein *v.* Bernstein, 1893, P. 292.]

[1] Beeby *v.* Beeby, 1 Hagg. Eccl. 794; Westmeath *v.* Westmeath, 2 id. 118, Supt.

[2] D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 786; Durant *v.* Durant, ib. 752, 768; Beeby *v.* Beeby, ib. 793; Turton *v.* Turton, 3 id. 351.

[3] Timmings *v.* Timmings, 3 Hagg. Eccl. 78; Dunn *v.* Dunn, 2 Phill. 411. [It is held that the lapse of a long time between the commission of the offence and the bringing a suit for divorce is not in itself conclusive proof of condonation, but it is such as to demand a full and satisfactory explanation of the delay, to rebut the inferences of insincerity in the complainant, or acquiescence in the injury or condonation of it: Kremelberg *v.* Kremelberg, 52 Md. 553; Ferrers *v.* Ferrers, 1 Hagg. Con. 130; Coode *v.* Coode, 1 Curteis 755. Proof of the execution of a deed of separation is not, by itself, proof of a condonation: J. G. *v.* H. G., 33 Md. 406. But the execution of a voluntary deed of separation, combined with lapse of time and other circumstances, have been held enough to show that the application for a divorce was not *bona fide*, but for some sinister and fraudulent purpose: Matthews *v.* Matthews, 1 Swab. & T. 499; Williams *v.* Williams, 35 L. J. 85.

It has been held that cruelty is not a subject of condonation: Perkins *v.* Perkins, 6 Mass. 69; Hollister *v.* Hollister, 6 Barr (Pa.) 449. But the English rule, and the better American rule, is otherwise: Snow *v.* Snow, 2 Notes of Cas. Supp. 15; Burr *v.* Burr, 10 Paige (N. Y.) 20; Gardner *v.* Gardner, 2 Gray (Mass.) 434.]

[4] Durant *v.* Durant, 1 Hagg. Eccl. 733.

§ 55. **Damages.** In proof of *damages on the part of the plaintiff*, in a civil action for adultery, evidence is admissible showing the state of domestic happiness in which he and his wife had previously lived;[1] and a marriage settlement or other provision, if any, for the children of the marriage;[2] the relations, whether of friendship, blood, confidence, gratitude, hospitality, or the like, which subsisted between him and the defendant;[3] and the circumstances attendant upon the intercourse of the parties.[4] But it seems that evidence of the defendant's property cannot be given in chief, in order to acquire damages, the true question being, not how much money the defendant is able to pay, but how much damage the plaintiff has sustained.[5] The state of the affections and feelings entertained by the husband and wife towards each other prior to the adulterous intercourse may be shown by their previous conversations, deportment, and letters;[6] and the language and letters of the wife, addressed to other persons, have been received as evidence for the same object.[7] Conversations, also, and letters, between the wife and the defendant, and a draft of a letter from her to a friend, in the defendant's handwriting, have been admitted in evidence against him.[8] But her confessions alone, when not a part of the *res gestæ*, are not admissible.[9] If the wife dies, pending the suit, the husband is still entitled to damages for the shock which has been given to his feelings, and for the loss of the society of the wife down to the time of her death; and this, though he was unaware of his own dishonor until it was disclosed to him by the wife upon her death-bed.[10]

§ 56. **Damages; Character.** As the husband, by bringing the action, puts the wife's character in issue, the defendant may show, in

[1] [Plaintiff may recover as "services" of his wife for whatever aid, comfort, and society she would be expected to render or bestow on her husband in the condition in which they may be placed: Long *v.* Booe, 106 Ala. 570.]

[2] Bull. N. P. 27; 1 Stephen's N. P. 24. It has been said that the rank and circumstances of the plaintiff may be given in evidence by him; but this has been denied; for the character of the husband is not in issue, except merely as far as that relation is concerned: Norton *v.* Warner, 6 Conn. 172.

[3] Ibid.

[4] Duke of Norfolk *v.* Germaine, 12 How. State Tr. 927.

[5] James *v.* Biddington, 6 C. & P. 589. [Evidence of the defendant's wealth, rank, or social position is inadmissible: Bailey *v.* Bailey, 94 Ia. 598; *contra*, Matheis *v.* Mazet, 164 Pa. 580.] But in an action for breach of promise to marry, such evidence is material, as showing what would have been the station of the plaintiff in society, if the defendant had not broken his promise: ibid. That the wealth and standing of the party are admissible, see *post*, §§ 89, 269.

[6] *Ante*, Vol. I. § 162 *d*.

[7] *Ante*, Vol. I. § 162 *d*; Jones *v.* Thompson, 6 C. & P. 415. Even though the letters contain other facts, which of themselves could not properly be submitted to the jury: Willis *v.* Bernard, 8 Bing. 376.

[8] Baker *v.* Morley, Bull. N. P. 28; Wilton *v.* Webster, 7 C. & P. 198.

[9] Ibid.; Aveson *v.* Lord Kinnaird, 6 East 188; Walter *v.* Green, 1 C. & P. 621; Winsmore *v.* Greenbank, Willes 577.

[10] Wilton *v.* Webster, 7 C. & P., 198, per Coleridge, J.

what is called *mitigation of damages*,[1] the *previous* bad character and conduct of the wife, whether in general or in particular instances of unchastity;[2] her letters to and deportment towards himself, tending to prove that she made the first advances;[3] the husband's connivance at the adulterous intercourse;[4] his criminal connection with other women;[5] the bad terms on which he previously lived with his wife; his improper treatment of her; his gross negligence and inattention in regard to her conduct with respect to the defendant; and any other facts tending to show either the little intrinsic value of her society, or the light estimation in which he held it.[6] The evidence produced by the husband to show the harmony previously subsisting between him and his wife may be rebutted by evidence of her declarations prior to the criminal intercourse, complaining of his ill treatment; and general evidence of similar complaints may be also given in reduction of damages.[7] But no evidence of the misconduct of the wife subsequent to her connection with the defendant can be received.[8]

§ 57. **Letters of Wife.** The letters of the wife, in order to be admitted in favor of the husband, must have been written before any attempt at adulterous intercourse had been made by the defendant.[1] And whenever her letters are introduced as expressive of her feelings, they must have been of a period anterior to the existence of any facts, tending to raise suspicions of her misconduct, and when there existed no ground to impute collusion.[2] But in all these cases the time when the letters were written must be accurately shown; the dates not being sufficient for this purpose, though the postmarks may suffice.[3]

§ 58. **When Plaintiff may give Evidence of Good Character of the Wife.** Though the *general character of the wife* is in issue in this action, the plaintiff cannot go into general evidence in support of it, until it has been impeached by evidence on the part of the defendant, either in cross-examination or in chief; but whether the plaintiff can rebut the proof of particular instances of misconduct, by proof of

[1] See *infra*, tit. Damages, §§ 265–267.
[2] Bull. N. P. 296; ib. 27; Hodges *v.* Windham, Peake's Cas. 39; Gardiner *v.* Jadis, 1 Selw. N. P. 24; *ante*, Vol. I. §§ 14 *d*, 14 *h*.
[3] Elsam *v.* Fawcett, 2 Esp. 562.
[4] 1 Steph. N. P. 26; *supra*, § 51; 1 Selw. N. P. 23, 24. The representation made by his wife to her husband, on the eve of her elopement, is admissible, as part of the *res gestæ*, to repel the imputation of connivance: Hoare *v.* Allen, 3 Esp. 276.
[5] Bromley *v.* Wallace, 5 Esp. 237.
[6] Trelawney *v.* Coleman, 2 Stark. 191; 1 B. & Ald. 90; Jones *v.* Thompson, 6 C. & P. 415; Winter *v.* Wroot, 1 M. & Rob. 404.
[7] Winter *v.* Wroot, 1 M. & Rob. 404.
[8] Elsam *v.* Fawcett, 2 Esp. 562.
[1] Wilton *v.* Webster, 7 C. & P. 198.
[2] Edwards *v.* Crock, 4 Esp. 39.
[3] Edwards *v.* Crock, 4 Esp. 39; 1 Steph. N. P. 27.

general good character, may be doubted; and the weight of authority seems against its admission.[1]

[1] Banfield *v.* Massey, 1 Campb. 460; Dodd *v.* Norris, 3 id. 519; Doe *dem.* Farr *v.* Hicks, Bull. N. P. 296; s. c. 4 Esp. 51; Stephenson *v.* Walker, 4 Esp. 50, 51; Bate *v.* Hill, 1 C. & P. 100; *ante*, Vol. I. §§ 14 *d*, 14 *h*; 1 Steph. N. P. 26. {Even after the adultery of the wife: Shattuck *v.* Hammond, 46 Vt. 466; Smith *v.* Masters, 15 Wend. (N. Y.) 270.

On the trial of an indictment for adultery, evidence of the character or reputation for chastity of the person with whom the adultery of the defendant is alleged to have been committed is admissible. The defendant may show that the character of such person for chastity is good: Com. *v.* Gray, 129 Mass. 474.}

AGENCY.

§ 59. **Agency defined.** An *agent* is one who acts in the place and stead of another. The act done, if lawful, is considered as the act of the principal. It is not always necessary that the authority should precede the act; it may become in law the act of the principal, by his subsequent ratification and adoption of it.[1] The vital principle of the law of agency lies in the legal identity of the agent and the principal, created by their mutual consent. If the agent does an act within the scope of his authority, and at the same time does something more which he was not authorized to do, and he two matters are not so connected as to be inseparable, even though both may relate to the same subject; that which he had authority to do is alone binding, and the other is void.[2]

§ 60. **Evidence of Agency.** The *evidence of agency* is *either direct* or *indirect*. Agency is directly proved by express words of appointment, whether orally uttered or contained in some deed or other writing. It is directly established by evidence of the relative situation of the parties, or of their habit and course of dealing and intercourse, or it is deduced from the nature of the employment or from subsequent ratification.[1]

§ 61. **Authority, how proved.** As a *general rule*, it may be laid down that the authority of an agent may be proved by parol evidence; that is, either by words spoken, or by any writing not under seal, or by acts and implications.[1] But to this rule there are some *exceptions*. Thus, whenever an act is required to be done *under seal*, the authority of the agent to do it must also be proved by an instrument under seal.[2] A writing without seal will not be sufficient at law to give validity to a deed, though a court of equity might, in such case, compel the

[1] Maclean *v.* Dunn, 4 Bing. 722; Story on Agency, §§ 239–260.

[2] Hammond *v.* Michigan State Bank, 1 Walker Ch. 214.

[1] Story on Agency, § 45; 2 Kent Comm. 612, 613; Paley on Agency, p. 2; *ante*, Vol. I. § 14 *n*.

[1] Story on Agency, § 47; 3 Chitty on Comm. & Man. p. 5; Coles *v.* Trecothick, 9 Ves. 250; {Drumright *v.* Philpot, 16 Ga. 424. If an agency be proved, and there is no evidence that it was a limited agency, the presumption is that it was a general agency: Methuen Co. *v.* Hayes, 33 Me. 169.}

[2] [One partner may bind the firm by deed without authority under seal: McGahan *v.* Bank of Rondout, 156 U. S. 218. The presumption in favor of ancient deeds which dispenses with proof of execution, does not dispense with proof of authority to execute: *Re* Aney, 1897, 1 Ch. 164.]

principal to confirm and ratify the deed.[3] The principle of this exception, however, is not entirely followed out in the common law; for an authority to sign or indorse promissory notes may be proved by mere oral communications, or by implication;[4] and even where the Statute of Frauds requires an agreement to be in writing, the authority of an agent to sign it may be verbally conferred.[5]

§ 62. **When Corporation is Principal.** Where a *corporation aggregate* is the principal, it was formerly held that the authority of its agent could be proved only by deed, under the seal of the corporation. But this rule is now very much relaxed both in England and America; and however necessary it still may be to produce some act under the corporate seal, as evidence of the authority of a special agent, constituted immediately by the corporation, to transact business affecting its essential and vital interests; yet, in all matters of daily necessity, within the ordinary powers of its officers, or touching its ordinary operations, the authority of its agents may be proved as in the case of private persons.[1] And where a deed is signed by one as the agent

[3] Story on Agency, § 49; Harrison *v.* Jackson, 7 T. R. 207; Paley on Agency, by Lloyd, 157, 158. If the deed is executed in the presence of the principal, no other authority is necessary: Story on Agency, § 51. {Though a power of attorney not under seal is not a sufficient authority to execute an instrument under seal, yet it is not therefore wholly void. If it authorizes a sale of land, the sale will be valid, and if the purchaser under such a sale pays his money for the land, he thereby completes an equitable title to the land, and a court of equity will enforce this title, either by compelling the vendor to make out sufficient deeds and conveyances of the land, or by enjoining process of law brought to eject the vendee when he is in possession: Watson *v.* Sherman, 84 Ill. 263. Cf. Baker *v.* Freeman, 35 Me. 485. Where a statute makes it indispensable to a good conveyance of land that the deed shall be witnessed by two subscribing witnesses, a power of attorney to convey lands under such statute is not good, unless witnessed by two subscribing witnesses: Gage *v.* Gage, 30 N. H. 420.}

[4] Story on Agency, § 50.

[5] Maclean *v.* Dunn, 4 Bing. 722; Coles *v.* Trecothick, 9 Ves. 250; Paley on Agency, by Lloyd, 158–161; Emmerson *v.* Heelis, 2 Taunt. 48; Story on Agency, § 50. If an instrument, executed by an agent, be one which, without seal, would bind the principal, it will bind him, if it be under seal: Wood *v.* Auburn & Rochester R. R. Co., 4 Selden (N. Y.) 160. See Wheeler *v.* Nevins, 34 Me. 54. {Although an authority to make a written contract to sell and convey land need not itself be in writing, but may be made orally, yet a mere authority to sell will not authorize the agent to sign a written contract for conveyance: Milne *v.* Kleb, 44 N. J. Eq. 378;} [Lindley *v.* Keim, 54 N. J. Eq. 418.]

[1] Story on Agency, § 53; East London Water Works Co. *v.* Bailey, 4 Bing. 283; Bank of Columbia *v.* Patterson, 7 Cranch 299–305; Smith *v.* Birmingham Gas Light Co., 1 Ad. & El. 526; Bank of the United States *v.* Dandridge, 12 Wheat. 67–75; Randal *v.* Van Vetchen, 19 Johns. 60; Dunn *v.* St. Andrew's Church, 14 id. 118; Perkins *v.* Washington Ins. Co., 4 Cow. 645; Troy Turnpike Co. *v.* M'Chesney, 21 Wend. 296; Angell & Ames on Corp. 152, 153; R. *v.* Bigg, 3 P. Wms. 427; {Melledge *v.* Boston Iron Co., 5 Cush. 179; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. 282. In a recent case in Maine, it was held that it is not necessary that the agent of a corporation should be authorized by instrument under seal, or even by formal vote, when the act or acts which he is to perform do not involve the affixing of a seal to any written instrument: Fitch *v.* Steam Mill Co., 80 Me. 34. Where no one is specially authorized by any statute, or by the by-laws, to call meetings of a trading corporation, in the absence of any special authority, it is competent for the general agent of such corporation to notify meetings when, in his judgment, the interest and business of the corporation require it: Stebbins *v.* Merritt, 10 Cush. 33.} [The modern rule is that a seal is no more essential to authorize one to act as agent for a

of a corporation, if the seal of the corporation is affixed thereto, it will be presumed, in the absence of contradictory evidence, that the agent was duly authorized to make the conveyance.[2]

§ 63. **When Authority is in Writing.** If the authority of the agent is in writing, the *writing* must be *produced* and proved; and if, from the nature of the transaction, the authority must have been in writing, parol testimony will not be admissible to prove it, unless as secondary evidence, after proof of the loss of the original.[1] Where the authority was verbally conferred, the agent himself is a competent witness to prove it;[2] but his declarations, when they are no part of the *res gestæ*, are inadmissible.[3]

§ 64. **When it is inferred from the Relations of the Parties.** Where the agency is *inferred from the relative situation* of the parties, it is generally sufficient to establish the fact that the relationship in question was actually created; and this must be proved by the kind of evidence appropriate to the case. Thus, where the sheriff was sued for the wrongful act of a bailiff, it was held not enough to prove him a general bailiff, by official acts done by him as such; but proof was required of the original warrant of execution, directed by the sheriff to the bailiff, which is the only source of a bailiff's authority, he not being the general officer of the sheriff.[1] If the relation is one which may be created by parol, it may be shown by evidence of the servant or agent, acting in that relation, with the knowledge and acquiescence of the principal, whether express or implied.[2]

§ 64 *a*. **Extent of Agency.** The mere existence of the relation, however, establishes an agency no further than is necessary for the discharge of the duties ordinarily belonging to it. Thus, the actual command of a ship, as master, renders the owner chargeable only for all such acts as are done by the master in the ordinary course of his

corporation than for an individual: Green Co. *v.* Blodgett, 159 Ill. 169; Cook, Corporations, § 721.]

[2] Flint *v.* Clinton Co., 12 N. H. 430; [Finwright *v.* Nelson, 105 Ala. 399; Gutzeil *v.* Pennie, 95 Cal. 598; Gorder *v.* Plattsworth Co., 36 Neb. 548.]

[1] *Ante*, Vol. I. §§ 86–88; Johnson *v.* Mason, 1 Esp. 89. {The agency as a question of fact, in a *collateral proceeding*, may be proved by the acts or declarations of the principal and agent, and the proof is not confined to the writing itself: Columbia, etc. Co. *v.* Geisse, 38 N. J. L. 39.}

[2] *Ante*, Vol. I. §§ 416, 417, and cases there cited.

[3] *Ante*, Vol. I. § 184 *c*; Clark *v.* Baker, 2 Whart. 340. {Declarations of the agent to third parties, stating his agency and its scope, are not competent evidence to prove the existence or scope of the agency. Nor are his acts done without the knowledge or authority of the alleged principal, and not ratified subsequently by him, evidence of the agency: Whiting *v.* Lake, 91 Pa. St. 349; Reynolds *v.* Continental Insurance Co., 36 Mich. 131. While the declarations of an agent are not evidence of his employment by the principal, yet a series of continuous acts performed by him in the business of his alleged principals, and their recognition and acquiescence in this conduct by him, furnish evidence of his employment: The Odorilla *v.* Baizley, 128 Pa. St. 292.}

[1] Drake *v.* Sykes, 7 T. R. 113.

[2] Price *v.* Marsh, 1 C. & P. 60; R. *v.* Almon, 5 Burr. 2686; Garth *v.* Howard, 5 C. & P. 346; s. c. 8 Bing. 451; Story on Agency, § 55; White *v.* Edgman, 1 Overton (Tenn.) 19.

employment.[1] But the marital relation alone will not render a husband liable, by raising a presumption of agency in the wife, where her orders for goods are of an extravagant nature, disproportionate to the husband's apparent ability.[2]

[1] Story on Agency, §§ 116–123; Abbott on Shipping, part 2, cc. 2, 3; {Rogers *v.* McCune, 19 Mo. 557. The master of a ship has no general authority as such to sign a bill of lading for goods which are not put on board the vessel, and if he does so, the owners are not responsible therefor: Grant *v.* Norway, 2 Eng. Law & Eq. 337; Hubbersty *v.* Ward, 18 id. 551; Coleman *v.* Riches, 29 id. 323.} [The same principle applies to fictitious bills of lading issued by other agents: Friedlander *v.* Texas, etc. R., 130 U. S. 416; *contra*, Bank of Batavia *v.* New York, etc. R., 106 N. Y. 195; St. Louis, etc. R. *v.* Larned, 103 Ill. 293.]

[2] Lane *v.* Ironmonger, 1 New Pr. Cas. 105; Freestone *v.* Butcher, 9 C. & P. 643. [The goods must be necessary, as well as suitable: Dolan *v.* Brooks, 168 Mass. 350.] {In a recent case in Maine on this subject, it is said that there is apparently a presumption that a wife, so long as she lives with her husband, has an implied authority to act as his agent in the purchase of such articles as are reasonably necessary for herself or the family. This implied authority arises from the necessity of the case and from the ordinary course of affairs, and does not extend to subjects which would fall outside the natural scope of the wife's business; for instance, mere contracts for the purchase of household articles, or apparel grossly unsuitable to the station in life of the family: Baker *v.* Carter, 83 Me. 133.

There is no presumption that the husband is the agent of the wife, to manage her separate property, and there must be direct evidence of the fact: Jefferds *v.* Alvard, 151 Mass. 94; Binney *v.* Globe Nat. Bank, 150 id. 578; [American Mortgage Co. *v.* Owens, 64 F. 249.] Upon the question of the husband's agency to manage the property belonging to his wife, evidence that the husband employed a person to work upon the property, and the wife knew that such person was working there and directed him as to part of the work, will justify the finding that the wife authorized the husband to employ the person for herself: Wheaton *v.* Trimble, 145 Mass. 345. So, on the question of the authority of the husband to act as the agent of his wife, it has been held that if the wife deliver to the husband a check payable to the order of a third person, this is not conclusive evidence that the husband was the agent of the wife to receive the amount of the check, although it would undoubtedly constitute strong evidence of the fact: Hunt *v.* Poole, 139 id. 224. The husband acting as the wife's agent to purchase materials for the erection of houses upon her premises is not thereby authorized to adjust with the contractor who builds the houses the amount of his claim against the wife so as to bind her from disputing the amount: Parker *v.* Collins, 127 N. Y. 185. For cases when slight evidence was held to establish the agency of the husband, see Anderson *v.* Ames, 151 Mass. 12, and Jefferds *v.* Alvard, *supra*. There is no presumption that a son is agent for his father merely from the relationship: Corr *v.* Greenfield, 134 Pa. St. 503. The question is one of fact, and may be proved by circumstances showing such agency as well as by direct evidence. Among such circumstances are the fact that the father is very old and has considerable property, that his son has very little property, that a contract signed by the son, and being the contract in question, was told to the father after being made, and that the work done under the contract is turned over by the son to the father, under circumstances showing that it is improbable that the son intended to make his father a gift: Ford *v.* Linehan, 146 Mass. 284. There is no presumption that the daughter is the agent of the mother, but slight evidence in support of this point in addition to the confidential relations between them would justify the finding of the agency: Gannon *v.* Ruffin, 151 id. 206. And probably in all cases of domestic relations less evidence would warrant a finding of the agency than between strangers: [Sheanon *v.* Pacific Ins. Co., 83 Wis. 507.] A general selling agent is authorized to sell goods in the usual manner, and only in the usual manner in which goods or things of that sort are sold: Shaw *v.* Stone, 1 Cush. (Mass.) 228. But such agent has no implied authority to bind his principals by a special warranty; as that flour sold by him on their account will keep sweet during a sea voyage, in the absence of any business usage to that effect: Upton *v.* Suffolk County Mills, 11 id. 586. See also Nash *v.* Drew, 5 id. 422. But see Ezell *v.* Franklin, 2 Sneed (Tenn.) 236. An agent to purchase has authority to make representations as to the solvency of his principal: Hunter *v.* Hudson River, etc. Co., 20 Barb. (N. Y.) 493.

An authority to sell and convey lands for cash confers on the agent the right to

§ 65. **Agencies proved by Habit and Course of Dealing.** The most numerous class of cases of agency is that which relates to affairs of

receive the purchase-money: Johnson *v.* McGruder, 15 Mo. 365. [But not to cancel a contract of sale: West End Hotel Co. *v.* Crawford, 120 N. C. 347.] A letter of attorney, which authorizes an agent to purchase goods belonging to A and others, and draw such bills as should be agreed on between him and A, does not authorize the purchase of such goods from other persons: Peckham *v.* Lyon, 4 McLean C. C. 45. An agent employed to buy and sell, has no authority to bind his principal by a negotiable note given for goods bought, unless the giving of such note be indispensable to carrying on the business in which he is employed: Temple *v.* Pomroy *et al.*, 4 Gray (Mass.) 128. The rule to be gathered from the cases is that if proof is given of a distinct kind of agency, the authority of the agent will extend to acts which are fairly within the scope of such agency, but not to acts which are of an entirely distinct character. Thus, where it is proved that one is the agent of another for the cutting of logs in the woods and hauling them to market, or driving them on the stream, this evidence does not inferentially prove an agency to sell the same in the market upon the arrival: Stratton *v.* Todd, 82 Me. 149. The authority of an attorney-at-law who has had placed in his hands a claim for collection, is sufficient to authorize him, after judgment, to take out execution and such supplementary process as may be necessary for the collection of the debt. If, therefore, he causes the judgment debtor to be illegally arrested, his client is liable therefor: Shattuck *v.* Bill, 142 Mass. 56.

As an instance of the supplementary powers which may be inferred from evidence of an agency, may be cited a case in which it was held that a widow, who was authorized by the heirs-at-law of her husband to erect a monument over him, derived from such authority not only a right to enter into a contract for such a monument, but incidentally to license the person who was to construct the monument to enter the burial lot for the purpose of building the monument, and further, to remove it if it was not satisfactory, or if it was not paid for according to the contract; although, in fact, she had no title to or interest in the burial lot: Fletcher *v.* Evans, 140 Mass. 241. Again, as an incident necessary to the proper carrying out of the agency, it was held that a selling agent for a new article of manufacture has implied authority to make a promise binding his principal to continue a system of advertising the article which has been carried on previous to the sale, and which is necessary in order to secure its successful continuance: Ayer *v.* R. W. Bell Manufacturing Co., 147 id. 46. In cases for prosecutions for illegal sale of liquor, where the sale was made by a clerk or employee of the defendant, the question whether the sale was authorized by the principal is one of fact to be submitted to the jury under all the circumstances of the case, the burden of proof in such case being upon the Commonwealth: Com. *v.* Houle, ib. 383. But it has been held that proof of the sale of alcohol by a druggist's clerk, in the regular course of business, is sufficient evidence of an agency in the clerk for such sale: Com. *v.* Perry, 148 id. 162. The delivery of goods by the seller to a common carrier, to be transferred to the buyer, does not constitute the carrier the agent of the buyer, unless that appears upon the evidence affirmatively: Lane *v.* Chadwick, 146 id. 68. If an agent has authority to sell chattels, it may be inferred that he is also to receive pay for the same at the time of, or as part of, the same transaction. This is an inference or presumption arising from the usual course of business under such circumstances: Trainer *v.* Morison, 78 Me. 160.

Where a mortgagee allows his attorney, who negotiates a loan, to retain possession of the mortgage and bond, and the mortgagor, knowing that the attorney has such possession, makes payment under the mortgage, this continued possession by the attorney is sufficient evidence to raise a presumption of his authority to receive the payment, and in order to render the payment of no effect the mortgagee must show not only that the attorney had no authority to receive such payment, but that this lack of authority was known to the mortgagor at the time he made the payment: Crane *v.* Gruneweld, 120 N. Y. 274. It is stated in a recent case in New York that where one is given authority to sell land for another, the authority includes power to execute a deed with general warranty, if that is the common and usual mode of conveying land in the place where the land is situated: Schultz *v.* Griffin, 121 id. 294. [Authority to sell does not give authority to warrant, unless such sale is usually attended with a warranty: Westurn *v.* Page, 94 Wis. 251.] It has been held that proof of authority given to an agent to sell property, implies authority to make such representations in regard to quality and condition as usually accompany such transactions; and the principal is bound by his fraudulent representations, although he did not specially authorize them, and was ignorant of them, and did not intend any fraud: Mayer *v.* Dean,

trade and commerce, where the agency is proved by inference from the *habit and course of dealing* between the parties. This may be such as either to show that there must have been an original appointment, or a subsequent and continued ratification of the acts done; but in either case the principal is equally bound. Having himself recognized another as his agent, factor, or servant, by adopting and ratifying his acts done in that capacity, the principal is not permitted to deny the relation to the injury of third persons who have dealt with him as such.[1] Cases frequently occur in which, from the habit and course of conduct and dealing adopted by the principal, the jury have been advised and permitted to infer the grant of authority to one to act as his salesman,[2] broker,[3] servant,[4] or general agent,[5] and even to

115 N. Y. 556. But in another case it was said that the authority to sell goods sent to an agent on consignment, does not give him implied authority to represent them in any respect other than that which they are; and it is his duty to find out what they are, and represent them accordingly: Argersinger *v.* MacNaughton, 114 id. 535. And in a case in New Jersey it is held that a vendor, who neither authorizes representations to be made in regard to the quality of the articles to be sold, nor instructs the agent to use any artifice to conceal the defects in making the sale, is not liable for any fraudulent representation of the agent as to the value of the property: Decker *v.* Fredericks, 47 N. J. L. 472. Proof of agency to manage a hotel does not, as matter of law, infer an authority to enter into a contract with a livery-stable keeper for the carriages and horses for the use of the occupants of the hotel: Brockway *v.* Mullin, 46 id. 451.

Where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had not been received, the principal was not bound, as it was not within the scope of the agent's authority, in the course of his employment, to give such receipt: Coleman *v.* Riches, 29 Eng. Law & Eq. 323.

The delivery of an account to an agent to collect confers no authority to settle it in any other mode; and if the agent exceeds his authority, the principal does not ratify his act by neglecting to give notice that he repudiates it: Powell *v.* Henry, 27 Ala. 612; Kirk *v.* Hiatt, 2 Carter (Ind.) 322. Authority to an agent to "settle," is not authority to submit to arbitration: Huber *v.* Zimmermann, 21 Ala. 488.

A general agent of an insurance company binds his principal, although he departs from his instructions; unless those with whom he is dealing have notice that he is transgressing his authority: N. Y. Central Ins. Co. *v.* National Pro. Ins. Co., 20 Barb. 468; Hunter *v.* Hudson River, etc. Co., ib. 493. See also Barber *v.* Britton, 26 Vt. 112; Linsley *v.* Lovely, ib. 123; Chouteaux *v.* Leech, 18 Penn. St. 224; Un. Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222; May on Ins. §§ 143, 144. But the authority of an agent, however general, if capable of being executed in a lawful manner, is never to be extended by construction to acts prohibited by law, so as to render his innocent principal liable in a criminal prosecution: Clark *v.* Metropolitan Bank, 3 Duer (N. Y.) 241. After considerable fluctuation of opinion, it now seems to be settled, in England at least, that, where the principal resides abroad, his agent in England cannot, without express authority, pledge his foreign principal's credit. This usage of trade is so well established, that the courts are inclined to treat this rule as matter of law: Armstrong *v.* Stokes, L. R. 7 Q. B. 528; Die Elbinger *v.* Claye, L. R. 8 Q. B. 313; Hatton *v.* Bulloch, ib. 334.]

[1] 2 Kent Comm. 614, 615. The decisions on implied agencies are collected and arranged with just discrimination in 1 Hare & Wallace's American Leading Cases, pp. 398–404.

[2] Story on Agency, § 55; Harding *v.* Carter, Park on Ins. p. 4; Prescott *v.* Flinn, 9 Bing. 19. Evidence that the defendant's son, a minor, had in three or four instances signed for his father, and had accepted bills for him, has been held sufficient *prima facie* evidence of authority to sign a collateral guaranty: Watkins *v.* Vince, 2 Stark 368.

[3] Whitehead *v.* Tuckett, 15 East 400.

[4] Hazard *v.* Treadwell, 1 Stra. 506.

[5] Burt *v.* Palmer, 5 Esp. 145; Peto *v.* Hague, 5 ib. 134.

his wife,[6] to transact business in his behalf; and he has been accordingly held bound. A single payment, without disapprobation, for what a servant bought upon credit, has been deemed equivalent to a direction to trust him in future;[7] and the employer has been held bound in such case, though he sent him the second time with ready money, which the servant embezzled.[8] In regard to the payment of moneys due, the authority to receive payment is inferred from the possession of a negotiable security; and, in regard to bonds and other securities not negotiable, the person who is intrusted to take the security, and to retain it in his custody, is generally considered as intrusted with power to receive the money when it becomes due.[9]

[6] Palethrop *v.* Furnish, 2 Esp. 511; *ante*, Vol. I. § 185, and cases there cited; Emerson *v.* Blondon, 1 Esp. 142; Anderson *v.* Sanderson, 2 Stark. 204; Clifford *v.* Burton, 1 Bing. 199; 1 Bl. Comm. 430; Fenner *v.* Lewis, 10 Johns. 38; Lord *v.* Hall, 8 M. G. & S. 627.

[7] 1 Bl. Comm. 430; Bryan *v.* Jackson, 4 Conn. 291; Story on Agency, § 56.

[8] Rushby *v.* Scarlett, 5 Esp. 76; Hazard *v.* Treadwell, 1 Stra. 506; Story on Agency, § 56.

[9] Story on Bills, § 415; Story on Agency, §§ 98, 104; Wolstenholm *v.* Davies, 2 Freem. 289; 2 Eq. Cas. Abr. 709; Duchess of Cleveland *v.* Dashwood, 2 Freem. 249; 2 Eq. Cas. Abr. 708; Owen *v.* Barrow, 1 New Rep. 101; Kingman *v.* Pierce, 17 Mass. 247; Anon., 12 Mod. 564; Gerard *v.* Baker, 1 Ch. Cas. 94. [If possession was attained surreptitiously the owner is not bound: Lawson *v.* Nicholson, 52 N. J. Eq. 821.] {The principal is bound by any act proved to have been done by the agent done within the apparent scope of his employment, unless it is shown that the party with whom the transaction was had, has actual knowledge of the fact that the act was not within the scope of the agent's authority: Wachter *v.* Phœnix Assurance Co., 132 Pa. St. 438; [Brocklesby *v.* Temperance Ass'n, 1893, 3 Ch. 130.] Therefore, if action is brought against a principal on contract made for him through an agent, and it is proved that the principal informed the other party to the contract, before it was entered into, that the agent was to act for him in the transaction during his intended absence, the powers of agency cannot be limited by conversations between the principal and agent not known to the other party to the contract: Jackson *v.* Emmens, 119 Pa. St. 356. And generally the agent may bind his principal by an act within the scope of his authority, although it may be contrary to special instructions given him by the principal: Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415. There is no avoiding the responsibility of the principal for the acts of the agent so long as the acts complained of are those which were included within the scope of the agent's authority, as represented by the principal to third parties: Haskell *v.* Starbird, 152 Mass. 120; Paige *v.* Barrett, 151 id. 68. But while a principal is bound by the acts of his agent, so far as he has given to the agent either authority or the appearance of authority, he is not bound by acts of the agent not within the actual or apparent scope of his authority merely because the evidence shows that the agent said to the person with whom he transacted such acts that he had authority from the principal so to do: Edwards *v.* Dooley, 120 N. Y. 540. The principal is also entitled to the best efforts of the agent to carry out the business *bona fide:* Albertson *v.* Fellows, 45 N. J. Eq. 310. Therefore if it is proved that an agent for the sale of land, having been given a definite price by his employer, sells the land for more, he must account to his principal for the difference between the prices: Kramer *v.* Winslow, 130 Pa. St. 498. So, if an agent in the ignorance of his employer acts also for the other party to a sale, the employer can recover back any commission paid him for effecting the sale: Cannell *v.* Smith, 142 id. 31. It is, however, possible for the agent to act for both parties, if the proof shows that it was clearly understood by the persons who employed him on both sides of the transaction: Rice *v.* Davis, 136 id. 439. But when an agent, appointed by the owner of land to make sale thereof for him, consents to be employed also for an intending purchaser of the land, and to act for him in negotiating the sale, his concealment from the intending purchaser of the fact that he acts also as agent for the owner of the land for making the sale is a concealment of a material fact, and is such fraud as will prevent enforcement of the contract of sale by a

§ 66. **Ratification.** Where the agency is to be proved by the *subsequent ratification* and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts.[1] The act of an unauthorized person in such cases is not void, but voidable;[2] but when the principal is once fully informed of what has been done in his behalf, he is bound, if dissatisfied, to express his dissatisfaction within a reasonable time, and if he does not, his assent will be presumed.[3] But where the act of the agent was by deed, the ratification also must in general be by deed;[4] or, more generally speaking, wherever the adoption of any particular form or mode is necessary to confer the authority in the first instance, the same mode must be pursued in the ratification.[5] The acts and conduct of the principal, evincing an assent to the act of the agent, are interpreted liberally in favor of the latter, and slight circumstances will sometimes suffice to raise the presumption of a ratification, which becomes stronger in proportion as the conduct of the principal is inconsistent with any other supposition.[6] Thus, if goods are sold without authority, and the owner receives the price, or pursues his remedy for it by action

court of equity, even though it is shown that the price paid by the purchaser is a fair one for the value of the land, and the owner is and was entirely ignorant of his agent's fraud: Marsh *v.* Buchan, 46 N. J. Eq. 595. On the same general principle it is held that if the agent takes title from the principal to property of which he has been placed in charge by the principal, and claims it as his own, he will be presumed to have obtained it fraudulently; and the burden will be on him to prove that the transaction by which he acquired the property was a fair and well-understood contract between him and his principal; and even to such an extent that in order to keep what he has obtained, he must show that in the particular transaction he served his principal against himself with the same fidelity he would have been required to use against a third person. [*Contra*, Brown *v.* Brown, 154 Ill. 135.] This rule applies equally when the agent is a child of the principal as well as when he is a stranger to him: Le Gendre *v.* Byrnes, 44 N. J. Eq. 372.]

[1] Owings *v.* Hull, 9 Pet. 607; Bell *v.* Cunningham, 3 id. 81; Courteen *v.* Touse, 1 Camph. 43, n. See also Wilson *v.* Tummon, 6 Scott N. R. 894; Nixon *v.* Palmer, 4 Selden (N. Y.) 398; [Cram *v.* Sickel, 51 Neb. 828; Golinsky *v.* Allison, 114 Cal. 458; Halsey *v.* Monteiro, 92 Va. 581; Moyle *v.* Congregational Soc., 16 Utah, 69; Sherrill *v.* Weisiger, etc. Co., 114 N. C. 436; Davis *v.* Talbot, 137 Ind. 235; Nicklace *v.* Griffith, 59 Ark. 641; Haynes *v.* R. R. Co., 7 Wash. 211; Eggleston *v.* Mason, 84 Ia. 630. The burden of proof is on the party alleging such knowledge: Moore *v.* Ensley, 112 Ala. 228; Schoellhamer *v.* Rometsch, 26 Or. 394; Nebraska Wesleyan U. *v.* Parker, 72 N. W. 470, Neb. But knowledge of the law is unnecessary: Kelly *v.* R. R. Co., 141 Mass. 26.]

[2] Denn *v.* Wright, 1 Pet. C. C. 64. [This is inaccurate: State N. B. *v.* Union N. B., 168 Ill. 519.]

[3] Cairnes *v.* Bleecker, 12 Johns. 300; Bradin *v.* Dubary, 14 S. & R. 27; Amory *v.* Hamilton, 17 Mass. 103; Ward *v.* Evans, 2 Salk. 442; [Farmers', etc. Bank *v.* Farmers', etc. Bank, 49 Neb. 379; Litchfield *v.* Brown, 36 U. S. App. 130.] If he assents while ignorant of the facts, he may disaffirm when informed of them: Copeland *v.* Merchants' Ins. Co., 6 Pick. 198.

[4] Blood *v.* Goodrich, 9 Wend. 68; s. c. 12 id. 525; Story on Agency, § 252; [Attorney-General *v.* Murphy, 1896, 1 Ir. 65; *contra*, Bless *v.* Jenkins, 129 Mo. 647; McIntyre *v.* Park, 11 Gray 102.]

[5] Despatch Line, etc. *v.* Bellamy Man. Co., 12 N. H. 205; Boyd *v.* Dodson, 5 Humphr. 37; [Kozel *v.* Dearlove, 144 Ill. 23; *contra*, Hammond *v.* Hammin, 21 Mich. 374.]

[6] Story on Agency, § 253; Ward *v.* Evans, 2 Salk. 442.

at law against the purchaser, or if any other act be done in behalf of another, who afterwards claims the benefit of it, this is a ratification.[7] Payment of a loss, upon a policy subscribed by an agent, is evidence that he had authority to sign it.[8] Proof that one was in the habit of signing policies in the name and as the agent of another, and with his knowledge, is evidence of his authority to sign the particular policy in question;[9] and if the principal has been in the habit of paying the losses upon policies so signed in his name, this has been held sufficient proof of the agency, though the authority was conferred by an instrument in writing.[10] And an authority to sign a policy is sufficient evidence of authority to adjust the loss.[11] Where the principal, in an action against himself on a policy signed by an agent, used the affidavit of the agent to support a motion to put off the trial, in which the agent stated that he subscribed the policy for and on account of the defendant, this was held a ratification of the signature.[12]

§ 67. **Same Subject.** *Long acquiescence* of the principal, after knowledge of the act done for him by another, will also, in many cases, be sufficient evidence of a ratification.[1] If an agency actually existed, the silence or mere acquiescence of the principal may well be taken as proof of a ratification. If there are peculiar relations between the parties, such as that of father and son, the presumption becomes more vehement, whether there was an agency in fact or not, and the duty of disavowal is more urgent. And if the silence of the principal is either contrary to his duty, or has a tendency to mislead the other side, it is conclusive. Such is the case among merchants, when notice of the act done is given by a letter

[7] Peters *v.* Ballister, 3 Pick. 495. But if the action is discontinued or withdrawn, on discovering that the remedy is misconceived, it is not a ratification: ibid. See also Lent *v.* Padelford, 10 Mass. 230; Episcopal Charit. Soc. *v.* Epis. Ch. in Dedham, 1 Pick. 372; Kupfer *v.* Augusta, 12 Mass. 185; Odiorne *v.* Maxey, 13 id. 178; Herring *v.* Polley, 8 id. 113; Pratt *v.* Putnam, 13 id. 361; Fisher *v.* Willard, ib. 379; Copeland *v.* Merchants' Ins. Co., 6 Pick. 198.

[8] Courteen *v.* Touse, 2 Campb. 43, n.

[9] Neal *v.* Irving, 1 Esp. 61.

[10] Haughton *v.* Ewbank, 4 Campb. 88. So of bills of exchange: Hooe *v.* Oxley, 1 Wash. 19, 23.

[11] Richardson *v.* Anderson, 1 Campb. 43, n. See also 2 Kent Comm. 614, 615.

[12] Johnson *v.* Ward, 6 Esp. 47; *ante*, Vol. I. §§ 196, 210.

[1] [Auge *v.* Darlington, 185 Pa. 111.] {Thus, if one is agent of a mining company for the purpose of working its mines, and has no authority to borrow money in its name, but does in fact borrow large sums of money, and the president of the company is informed of such loans, and demand is made by the lender for payment thereof, and within a reasonable time the company fail to disavow the act of its agent in so borrowing the money, this is sufficient evidence of a ratification of the loan: Gold-mining Company *v.* National Bank, 96 U. S. 640; Vianna *v.* Barclay, 3 Cow. (N. Y.) 281. So where the agent was authorized to "sell the goods now in store, and buy other goods in order to keep the stock good," "but not to *buy* on *credit* without an order in writing from the principal," and the agent bought goods on credit, which went into the stock of the defendants and were kept and sold by them, it was held that this was a sufficient ratification of the act of the agent in buying the goods, although the principal was not aware that they were bought on credit: Sartwell *v.* Frost, 122 Mass. 184.}

which is not answered in a reasonable time. Whether a mere voluntary intermeddler, without authority, is entitled to the benefit of the principal's silence, is not clearly agreed; but the better opinion is, that where the act was done in good faith for the apparent benefit of the principal, who has full notice of the act, and has done nothing to repudiate it, the agent is entitled to the benefit of his silence as a presumptive ratification.[2]

§ 68. **When Agent's Act is Unlawful.** If the act of the agent was in itself *unlawful and directly injurious* to another, no subsequent ratification will operate to make the principal *a trespasser;*[1] for an authority to commit a trespass does not result by mere implication of law. The master is liable in trespass for the act of his servant, only in consequence of his previous express command;[2] which may be proved, either by direct evidence of the fact, or by his presence at the time of the transaction, or by any other legal evidence which will satisfy the jury. In the absence of such proof, the master is not liable in *tort;* for the only act of the master is the employment of the servant, from which no immediate prejudice can arise to any one; and the only authority presumed by the law is an authority to do all lawful acts belonging to his employment.[3] But if the servant, in doing such acts, perpetrates a fraud upon another, or occasions a consequential injury, the master is liable in an action on the case.[4] Thus, where the defendant,

[2] Story on Agency, §§ 255–258, *cum notis:* Amory *v.* Hamilton, 17 Mass. 103; Kingman *v.* Pierce, ib. 247; Frothingham *v.* Haley, 3 id. 70; Erick *v.* Johnson, 6 id. 193.

[1] [This is not the law: Forbes *v.* Hagman, 75 Va. 168; Dempsey *v.* Chambers, 154 Mass. 330; Nims *v.* Mt. Hermon School, 166 id. 177.]

[2] See 1 Parsons on Contr. pp. 69, 70, n. {A corporation may be sued for an assault and battery committed by their servant acting under their authority: Moore *v.* Fitchburg Railroad Co., 4 Gray (Mass.) 465. It is now well settled that the principal is liable for the consequences of an unlawful or even criminal act of his agent, done in the course of his employment, as where the servant purposely rings a bell so as to frighten a horse (Chicago, B. & Q. R. R. Co. *v.* Dickson, 63 Ill. 151), or, in the line of his employment, commits an assault and battery (Moore *v.* Fitchburg R. R. Co., 4 Gray (Mass.) 465), or maliciously prosecutes another (Gillett *v.* Mo. V. R. R. Co., 55 Mo. 315), or for criminal negligence (Passenger R. R. Co. *v.* Young, 21 Ohio St. 518. See also Seymour *v.* Greenwood, 6 H. & N. 359; Philadelphia & Read. R. R. Co. *v.* Derby, 14 How. U. S. 468; Ramsden *v.* Boston & A. R. R. Co., 104 Mass. 117. See also *post*, § 222).}

[3] McManus *v.* Crickett, 1 East 106; Middleton *v.* Fowler, 1 Salk. 282; Odiorne *v.* Maxey, 13 Mass. 178; Salem Bank *v.* Gloucester Bank, 17 id. 1; Wyman *v.* Hal. & Augusta Bank, 14 id. 58; Wilson *v.* Tummon, 6 Scott N. R. 894; Southwick *v.* Estes, 7 Cush. 385.

[4] Story on Agency, § 308; 1 Bl. Comm. 431; Foster *v.* Essex Bank, 17 Mass. 479; Gray *v.* Portland Bank, 3 id. 264; Williams *v.* Mitchell, 17 id. 98; Lane *v.* Cotton, 12 Mod. 488; Shaw *v.* Reed, 9 Watts & Serg. 72. The sheriff, however, on grounds of public policy, is liable, in *trespass*, for the act of his deputy: Campbell *v.* Phelps, 17 Mass. 244; 1 Pick. 62. {The principal cannot be permitted to enjoy the fruits of a bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity

being the owner of a house, employed an agent to sell it, and the agent described it as free from rates and taxes, not knowing it to be otherwise; but it was in fact liable to certain rates and taxes, as the owner knew; and, on the faith of the agent's representation, the plaintiff bought the house; it was held, that the purchaser, being actually deceived in his bargain, might maintain case for deceit against the owner, though it did not appear that the latter had instructed the agent to make any representation as to rates and taxes.[5]

§ 68 *a*. **Revocation.** The proof of agency, thereby charging the principal, may be rebutted by showing that his authority was *revoked* prior to the act in question. But if he was constituted by writing, and the written authority is left in his hand subsequent to the revocation, and he afterwards exhibits it to a third person, who deals with him on the faith of it without notice of the revocation, or the knowledge of any circumstances sufficient to have put him on his guard, the act of the agent, within the scope of the written authority, will bind the principal.[1]

on the ground that the fraud was committed by his agent, and not by himself: Ellwell *v.* Chamberlin, 31 N. Y. 619. Where an agent buys an article for his principal, and the price goes down, another agent of the same principal has no authority to repudiate the contract, unless specially directed so to do: Law *v.* Cross, 1 Black (U. S.) 533. To render declarations of an agent admissible in evidence against his principal, it must appear on the evidence: either (*a*) that the agent was specially authorized to make them; or (*b*) that his powers were such as to make him the general representative of his principal, having management of the entire business; or (*c*) that the admissions were part of the consideration of the contract; or (*d*) if they were non-contractual, that they were part of the *res gestæ:* Oil City Fuel Supply Co. *v.* Bonndy, 122 Pa. St. 449. On this latter point the rule is said to be that whenever an agent does an act within the scope of his authority, what he says or does characterizing the act while it is in progress is part of the *res gestæ*, and is admissible in evidence either for or against the principal: Sidney Sch. Furniture Co. *v.* Warsaw Sch. District, 122 Pa. St. 494.}

[5] Fuller *v.* Wilson, 3 Ad. & El. N. S. 56. {As to the effect of fraud on a subsequent ratification of a contract, it has been said that where the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and cannot be permitted; but where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing else, ratification is allowable. Thus, where an indorsement is forged on a promissory note, no ratification of the forgery by the party whose name it purports to be will render the indorsement good: Shisler *v.* Vandike, 92 Pa. St. 447; citing Pearsoll *v.* Chapin, 44 id. 9, and Negley *v.* Lindsay, 67 id. 217.} [The authorities are divided. That a forged signature may be ratified, see Wellington *v.* Jackson, 121 Mass. 157; Hefner *v.* Vandolah, 62 Ill. 483. *Contra,* Workman *v.* Wright, 33 Ohio St. 405; Henry *v.* Heeb, 114 Ind. 275. The real objection to the ratification of a forgery is that in most cases the forger does not purport to act as agent for the one whose name is forged.]

[1] Beard *v.* Kirk, 11 N. H. 397.

Note. — Mr. Justice Story (Story on Agency, c. 18) states the law in regard to the dissolution or determination of agency in substance as follows: An agency may be dissolved, either by the revocation of the principal, or by the renunciation of the agent, or by operation of law, as where the event occurs, or the period expires, to which and by which it was originally limited; or where the state and condition of the principal or agent has changed; or where the principal or agent dies; or where the subject-matter of the agency has become extinct, or the principal's power over it has ceased; or where the trust confided to the agent has been completely executed. In general, a principal may determine or revoke the authority given to his agent, at his mere pleasure; and this is so even if the authority be expressly declared to be irrevocable, unless it be coupled with an interest, or unless it was given for a valid considera-

tion. But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, then, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, irrevocable in contemplation of law, whether it is or is not expressed to be so upon the face of the instrument conferring the authority. If the authority has been in part executed by the agent, and if it admits of severance, or of being revoked as to the part unexecuted, it would seem that the revocation, either as to the agent or as to third persons, is good as to the part unexecuted, but not as to the part already executed. If the authority is not thus severable, the principal, it would seem, cannot revoke the unexecuted part, at least without fully indemnifying the agent; and it would seem, the right of the other contracting party would not be affected by the revocation.

The revocation may be express, as by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances, as where the principal employs another person to do the same act, and the exercise of the authority of both is incompatible; or where the principal should himself collect the debts, which he had previously authorized the agent to collect.

The revocation takes effect as to the agent, when it is made known to him; as to third persons, when it is made known to them, and not before. Hence, if an agent is employed to sign, indorse, or accept bills and notes for his principal, and he is discharged by the principal, if the discharge is not known by persons dealing with him, notes and bills subsequently signed, indorsed, or accepted by the agent will be binding upon the principal, upon the well-known maxim of law and equity, that where one of two innocent persons must suffer, he shall suffer, who, by his confidence or silence or conduct, has misled the other: {Fellows *v.* Steamboat Company, 38 Conn. 197; Tier *v.* Sampson, 35 Vt. 179. So if an agent exhibit to third parties a proper authority which is on its face a continuing authority, and they deal with him on the strength of that authority, they are not affected by a revocation of the authority until it is brought to their notice: Hatch *v.* Coddington, 95 U. S. 48.} [So if the power is recorded and the revocation is not: Grutz *v.* Land Co., 27 U. S. App. 305.]

An instance of the revocation of the authority of an agent, through the operation of law, by a change of condition or of state, producing incapacity in either party, when such authority is not coupled with an interest, is where an unmarried woman, as principal, gives authority to an agent, and afterwards marries, the marriage revokes the authority. So where the principal becomes insane, the lunacy having been established by an inquisition, it would seem that the authority of the agent would or might be revoked or suspended during the continuance of the insanity. The bankruptcy of the principal operates as a revocation of the authority of the agent, touching any rights of property of which he is divested by the bankruptcy. Where the authority is coupled with an interest, as it need not be executed in the name of the principal, but is valid if executed in the name of the agent, it is not revoked by the marriage, or insanity, or bankruptcy of the principal.

The death, either of the principal or agent, operates as a revocation of the authority of the agent, if such authority is not coupled with an interest: {Merry *v.* Lynch, 68 Me. 94; [Kern's Estate, 176 Pa. 373.] Where one constitutes two persons jointly as his agents, for a salary, and one of them becomes incapacitated for work, the principal may revoke the authority of both: Salisbury *v.* Brisbane, 61 N. Y. 617;} even though the authority is declared in express terms to be irrevocable: Hunt *v.* Rousmaniere's Adm'r, 8 Wheat. 174. See also Wilson *v.* Edmonds, 23 N. H. 360; Dick *v.* Page, 17 Mo. 234; McDonald *v.* Black, 20 Ohio 185. {Where one is made agent by a power of attorney, which power contains a power of substitution, and the attorney accordingly creates a substitute, the power of such substitute is withdrawn by the death of his principal; for the attorney being accountable for the acts of his substitute, since he appoints him on his own responsibility to do those things which he was authorized to do, it follows that, when his death occurs, the source of the substitute's power is cut off and fails. The only exception to this rule is where from express terms or from the nature of the power an inference arises, that the principal intends the substitute shall act for him, notwithstanding the revocation of the authority of the original agent: Story, Agency, § 469; Peries *v.* Aycinena, 3 W. & S. (Pa.) 64, p. 79; Lehigh, etc. Co. *v.* Mohr, 83 Pa. St. 228.} The payment of money to an agent after the death of the principal, the death being unknown to both parties, is a good payment, and binds the estate of the principal: Cassiday *v.* McKinzie, 4 Watts & Serg. 282. [The law is now settled the other way: Long *v.* Thayer, 150 U. S. 520; Weber *v.* Bridgman, 113 N. Y. 600.] See *post*, § 518.

ARBITRATION AND AWARD.

§ 69. **Submission to Arbitration.** A submission to arbitration may be by parol, with mutual promises to perform the award; or by deed or by rule of court;[1] or by any other mode pointed out by statute. In the first case, the remedy may be by an action of *assumpsit*, upon the promise to perform the award; in the second, it may be by *debt* for the penalty of the arbitration bond,[2] or by *covenant*, upon the agreement or indenture of submission; in the third case, it may be by *attachment*, or by *execution* upon the judgment entered up pursuant to the rule of court, or to the statute; and in any case it may be by an action of *debt upon the reward*. An award duly made and performed may also be pleaded in bar of any subsequent action for the same cause.[3]

[1] {The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law: Newcomb *v.* Wood, 97 U. S. 581. The submission and the award may both be by parol: [Green *v.* Canfield, 38 Neb. 169. Unless it is with reference to the title to land: Fort *v.* Allen, 110 N. C. 183.] The law requires no particular form to establish a valid submission. When it is by parol, the fact must be established to the satisfaction of the jury by a preponderance of the evidence: Gay *v.* Waltman, 89 Pa. St. 453.

Any agreement in a contract to submit any questions arising under the contract to arbitration in such a way as to entirely oust the courts of jurisdiction will not be supported at law or in equity: [Jones *v.* Brown, 50 N. E. 648, Mass. The contract is valid, but will not be specifically enforced. See Harriman on Contracts, 113; Century Digest, iv. 30–36;] but those which are only preliminary or auxiliary thereto, such as respect the mode of settling the amount of damage, or the time of paying it, or the like, will be sustained: Wood *v.* Humphrey, 114 Mass. 185; Cobb *v.* N. E. Insurance Co., 6 Gray (Mass.) 192; Trott *v.* City Insurance Co., 1 Cliff. C. Ct. 439; Scott *v.* Avery, 5 H. of L. Cas. 811. If a person agrees to pay another for an article if it accomplishes a certain purpose, and a third party is to make the test, his decision is in the nature of an award: Robbins *v.* Clark, 129 Mass. 145.} [Statutes in many States provide for making the submission a rule of court. See Century Digest, iv. 42–44. The mere fact that the submission relates to matters in litigation will not make it a rule of court: Minneapolis, etc. R. *v.* Cooper, 59 Minn. 290. A stipulation for submission of an action to a particular judge does not make the judge an arbitrator: Brown *v.* Galesburg Pressed-Brick Co., 132 Ill. 648. Nor does a stipulation limiting the issues to be tried: Randall *v.* Burk Tp., 4 S. D. 337. As to submission by attorneys, see German-American Ins. Co. *v.* Buckstaff, 38 Neb. 135. For the distinction between appraisal and arbitration, see Missouri, etc. R. *v.* Elliott, 56 F. 772.]

[2] [Rass *v.* Critcher, 112 N. C. 405.]

[3] In the simplest form of arbitration, namely, a *verbal submission* to a single arbitrator, the declaration is as follows: "For that on —— there were divers controversies between the plaintiff and the said D, concerning their mutual accounts, debts, and dealings, and thereupon they then, at ——, by their mutual agreement, appointed one

§ 70. **Form of Action.** The action of *debt on the award* itself is sometimes *preferable* to any other form of action, inasmuch as, if judgment goes by default, it is final in the first instance, the sum to be recovered being ascertained through the medium of the award; whereas in debt on the bond, breaches must be suggested and a hearing had pursuant to statutes; and in *assumpsit*, and in covenant, the judgment by default is but interlocutory.[1] But this is only where the award is for a single sum of money; for if it is to do any other thing, the remedy should be sought in some other mode. Where the submission is by deed, with a penalty, the best form of action is debt for the penalty; for, by declaring on the award, the plaintiff takes upon himself the burden of proving a mutual sub-

E to hear and determine for them all the said controversies, and mutually promised each other to stand to, abide by, and perform the award of the said E thereupon. And the said E afterwards, on ——, there heard the plaintiff and the said D, and adjudged upon the premises, and awarded that the said D should pay to the plaintiff a balance of —— on demand, and publish [and notified the said parties of] the same. Yet," etc.

The following form is proper, where the agreement is *in writing without seal*, and the submission is to *three persons*, with power in any two to make an award: "For that whereas on —— there were divers controversies between the plaintiff and the said D concerning their mutual accounts, debts, and dealings, and thereupon they then, by their mutual agreement in writing, submitted and referred said controversies [and all other mutual demands between them] to the final award and determination of A, B, and C, and in and by said writing further agreed [*here set out any other material parts of the agreement*] that the award of the said A, B, and C, or any two of them, being duly made in the premises [in writing, and ready to be delivered to the said parties or either of them on or before —— (*or*) and duly notified to the parties, *as the case may have been*], should be binding and final; and the plaintiff and the said D then and there mutually promised each other to stand to, abide by, and perform the award so made. And the plaintiff avers, that the said A, B, and C afterwards heard the plaintiff and the said D upon all the matters referred to them as aforesaid, and thereupon, on —— the said [A and B, two of said] referees [the said C refusing to concur therein] made and published their award [in writing] of and concerning the premises [and then and there duly notified the said parties of the same], and did thereby award and finally determine that there remained a balance due from the said D to the plaintiff of ——, to be paid to the plaintiff [on demand], (etc.). Yet," etc.

The account in *covenant* contains averments similar to that in *assumpsit*.

The count in *debt on an award* is as follows: "For that whereas the said D on —— was indebted to the plaintiff in the sum of ——, upon and by virtue of an award made by one E, on a submission before that time made by the plaintiff and the said D to the award and determination of the said E, concerning certain matters in difference then depending between the plaintiff and the said D, and upon which said reference the said E awarded that the said D should pay to the plaintiff the sum of money aforesaid, upon request; whereby, and by reason of the non-payment whereof, an action has accrued to the plaintiff, to demand and have of and from the said D the sum aforesaid. Yet the said D has not paid the same, nor any part thereof. The damage," etc. An allegation of mutual *promises* to abide the award would vitiate *this* declaration: Sutcliffe *v.* Brooke, 9 Jur. 1112; 14 M. & W. 855.

{The tendency of modern jurisprudence is to give force, conclusiveness, and effect to all awards, where there is no corruption or misconduct on the part of referees, and where no deception has been practised upon them. By Shaw, C. J., in Fairchild *v.* Adams, 11 Cush. 550; Strong *v.* Strong, 9 id. 560; Kendrick *v.* Tarbell, 26 Vt. 416; Ebert *v.* Ebert, 5 Md. 353;} [Hartford F. I. Co. *v.* Bonner Merc. Co., 15 U. S. App. 134; Patton *v.* Garrett, 116 N. C. 847.]

[1] Steph. N. P. 180. In those of the United States, in which the damages, upon default, are made up forthwith by the court, or by a jury impanelled on the spot, without a writ of inquiry, this mode of remedy does not seem to possess any practical advantage over others.

mission; but, by declaring on the bond, he transfers the burden to the defendant, on whom it will then lie to discharge himself of the penalty, by showing a performance of the conditions.[2]

§ 71. **Authority of Arbitrator.** In proving an award, it must first appear that the arbitrators had *sufficient authority* to make it.[1] If the agreement of submission was in writing, it must be produced, and its execution by all the parties to the submission must be proved.[2] Therefore, where four persons, being co-partners, agreed to refer all matters in difference between them, or any two of them, to certain arbitrators, who made an award in which they found several sums due to and from the partnership, and also divers private balances due among the partners from one to another; in an action between two of them upon the award to recover one of these private balances, it was held necessary to prove the execution of the deed of submission by them all; the execution of each being presumed to have been made upon the condition that all were to be bound equally with himself.[3] If the submission was by rule of court, an office copy of the rule will be sufficient proof of the judge's order.[4] But if the agreement of submission is attested by witnesses, and its execution is denied, the rule or order by which the agreement was made a rule of court is not the proper evidence of the signature of the agreement, but it must be proved by the attesting witnesses.[5]

§ 72. **Submission.** If the *submission* was *by parol*, it is material to prove not only that both parties promised to abide by the award, but that the promises were concurrent and mutual; for otherwise each promise is but *nudum pactum*.[1]

§ 73. **Umpire.** If the award was made by an *umpire*, his appointment must also be proved.[1] The recital of his authority in the award

[2] Ferrer *v.* Oven, 7 B. & C. 427, per Bayley, J.

[1] Antram *v.* Chase, 15 East 209. [If the arbitrators are not named, the submission is void: Greiss *v.* State Investment Co., 98 Cal. 241; Northwestern Guaranty Co. *v.* Channell, 53 Minn. 269.] An attorney has no sufficient authority to refer on behalf of an infant plaintiff: Biddell *v.* Dowse, 6 B. & C. 255. Nor has one partner authority to bind the firm: Stead *v.* Salt, 3 Bing. 101. Proof of the submission has been held necessary even after the lapse of forty years: Burghardt *v.* Turner, 12 Pick. 534.

[2] Ferrer *v.* Oven, 7 B. & C. 427; [Fortune *v.* Killebrew, 86 Tex. 172.] {The submission and award must be in writing in all cases where a contract in relation to the subject-matter is required to be in writing, but an oral submission and award on the question of how much rent is due for the past occupation of a building is not such a question involving an interest in land as need be in writing under the Statute of Frauds Peabody *v.* Rice, 113 Mass. 31.}

[3] Antram *v.* Chase, 15 East 209. See also Brazier *v.* Jones, 8 B. & C. 124.

[4] Still *v.* Halford, 4 Campb. 17; Gisborne *v.* Hart, 5 M. & W. 50.

[5] Berney *v.* Read, 9 Jur. 620; 7 Ad. & El. N. S. 79.

[1] Keep *v.* Goodrich, 12 Johns. 397; Livingstone *v.* Rogers, 1 Caines 583; Kingston *v.* Phelps, Peake's Cas. 227; {Somerville *v.* Dickerman, 127 Mass. 272.} An arbitrator is a competent witness to prove the matters submitted to arbitration, and the award made thereon: Allen *v.* Miles, 4 Harring. 234. And see Graham *v.* Graham, 9 Barr 254.

[1] [The appointment of an umpire must be authorized by the parties: Allen-Bradley Co. *v.* Anderson Co., 99 Ky. 311. The parties must have notice of his appointment and an opportunity to appear before him: Coons *v.* Coons, 95 Va. 434. For the distinction between an umpire and an arbitrator, see Hartford F. I. Co. *v.* Bonner Merc. Co., 15 U. S. App. 134.]

signed by himself and the arbitrators is not sufficient.[2] He cannot be selected by the arbitrators by lot, without consent of the parties.[3] His appointment will be good, though made before the arbitrators enter on the business referred to them;[4] and they may well join with him in making the award.[5] And if the arbitrators appoint an umpire without authority, yet, if the parties appear and are heard before him without objection, this is a ratification of his appointment.[6]

§ 74. **Execution of the Award.** The next point in the order of evidence is the *execution of the award;* which must be proved, as in other cases, by the subscribing witness, if there be any, and if not, then by evidence of the handwriting of the arbitrators.[1] If the award does not *pursue the submission*, it is inadmissible.[2] If, therefore, the submission be to several, without any authority in the majority to decide, and the award is not signed by all, it is bad.[3] And though a majority have power to decide, yet, in an award by a majority only, it must appear that all the arbitrators heard the parties, as well those who did not as those who did concur in the decision.[4] It will be presumed that all matters, included within the

[2] Still *v.* Halford, 4 Campb. 18. Nor is such recital necessary: *semble*, Rison *v.* Berry, 4 Rand. 275.

[3] Young *v.* Miller, 3 B. & C. 407; Wells *v.* Cooke, 2 B. & A. 218; Harris *v.* Mitchell, 2 Vern. 485; *In re* Cassell, 9 B. & C. 624 (overruling Neale *v.* Ledger, 16 East 51); Ford *v.* Jones, 3 B. & Ad. 248; [Hart *v.* Kennedy, 47 N. J. Eq. 51.] But if the parties agree to a selection by lot, it will be good: *In re* Tunno, 5 B. & Ad. 488.

[4] Roe d. Wood *v.* Doe, 2 T. R. 644; Bates *v.* Cooke, 9 B. & C. 407; McKinstry *v.* Solomons, 2 Johns. 57; Van Cortlandt *v.* Underhill, 17 id. 405; [Chandoo *v.* American F. I. Co., 84 Wis. 184; *contra*, Christenson *v.* Carleton, 69 Vt. 91.]

[5] Soulsby *v.* Hodgson, 3 Burr. 1474; s. c. 1 W. Bl. 463; Beck *v.* Sargent, 4 Taunt. 232, {"An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators on which they have failed to agree, and to make an award thereon, which is his sole award. Neither of the original arbitrators is required to join in the award, in order to make it valid and binding on the parties. In the absence of any agreement or assent by the parties to the controversy, dispensing with a full hearing by the umpire, it is his duty to hear the whole case, and to make a distinct and independent award thereon, as the result of his judgment. He stands, in fact, in the same situation as a sole arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination:" Bigelow, C. J., Haven *v.* Winnisimmet Co., 11 Allen (Mass.) 384.} [A stipulation that the arbitrators shall view the premises applies to the umpire: Palmer *v.* Van Wyck, 92 Tenn. 397.]

[6] Matson *v.* Tower, Ry. & M. 17; Norton *v.* Savage, 1 Fairf. 456.

[1] *Ante*, Vol. I. §§ 569–581. [The award may be oral: Skrable *v.* Pryne, 93 Ia. 691.]

[2] [Palmer *v.* Van Wyck, 92 Tenn. 397; Leslie *v.* Leslie, 50 N. J. Eq. 103; 52 id. 332. Acceptance by the parties gives no validity to an award which does not pursue the submission: Hubbell *v.* Bissell, 13 Gray 298.]

[3] Towne *v.* Jaquith, 6 Mass. 46; Baltimore Turnp. Case, 4 Binn. 481; Crofoot *v.* Allen, 2 Wend. 494; [United Kingdom Ass'n *v.* Houston, 1896, 1 Q. B. 567;] {Quimby *v.* Melvin, 28 N. H. 250.}

[4] Short *v.* Pratt, 6 Mass. 496; Walker *v.* Melcher, 14 id. 148; {Maynard *v.* Frederick, 7 Cush. (Mass.) 247. In Bulson *v.* Lohnes, 2 N. Y. 291, where the submission was to three arbitrators, with a provision that the award should be in writing, signed by the three, "or any two of them," and ready for delivery by a certain day fixed, Johnson, J., says: "There can be no doubt that, at common law, before the Revised Statutes, under such a submission, two arbitrators might lawfully meet, and

terms of the submission, were laid before the arbitrators, and by them considered; but this presumption is not conclusive, evidence being admissible to prove that a particular matter of claim was not in fact laid before them, nor considered in their award.[5]

§ 75. **Notice.** If the submission required that *notice of the award* should be given to the parties, this notice, as it must in that case have been averred in the declaration, is the next point to be proved; but if it was not required by the submission, both the averment and the proof are superfluous.[1] If is essential, however, to allege, and therefore to prove, that the award was *published;*[2] and an award is published whenever the arbitrator gives notice that it may be held on payment of his charges.[3] If the agreement is that the award shall be ready to be *delivered* to the parties by a certain day, this is satisfied by proof of the delivery of a *copy* of the award, if it be accepted without objection on that account;[4] and if it be only *read* to the losing party, who thereupon promises to pay the sum awarded, this is sufficient proof of the delivery of the award, or rather is evidence of a waiver of his right to the original or a copy, even though it was afterwards demanded and refused.[5]

§ 76. **Demand.** It is not necessary to allege, nor, of course, to prove, a *demand* of payment; except where the obligation is to pay a collateral sum upon request, as where the defendant promised to pay a certain sum upon request, if he failed to perform an award; in which case an actual request must be alleged and proved. In

hear the proofs and allegations of the parties, where the third had notice and refused to attend and take part in the proceedings; and that an award made by the two who heard the matters submitted, under such circumstances, was a valid and binding award. This was settled in England, at an early day, and upon full deliberation. (Goodman *v.* Sayres, 2 Jac. & Walk. 261; Delling *v.* Matchett, Willis 215; s. c. Barnes 57; Sallows *v.* Girling, Cro. Jac. 278; Watson on Arbitration, 115; Kyd on Awards, 106, 107; Green *v.* Miller, 6 Johns. 39; Crofoot *v.* Allen, 2 Wend. 495.) It was held that, by the latter clause of the submission, the entire authority was disjoined, so as to make it a submission to the lesser number to hear, as well as to determine."} But upon a rehearing, if one of the arbitrators refuses to attend, the others are competent to reaffirm the former award, Peterson *v.* Loring, 1 Greenl. 64; though not to revise the merits of the case, Cumberland *v.* North Yarmouth, 4 Greenl. 459; {Tallman *v.* Tallman, 5 Cush. (Mass.) 325; Clement *v.* Comstock, 2 Mich. 359;} [Witz *v.* Tregallas, 82 Md. 351.]

[5] Martin *v.* Thornton, 4 Esp. 180; Ravee *v.* Farmer, 4 T. R. 146; Webster *v.* Lee, 5 Mass. 334; Hodges *v.* Hodges, 9 id. 320; Smith *v.* Whiting, 11 id. 445 (Rand's ed.), and cases cited in note (*a*); Bixby *v.* Whitney, 5 Greenl. 192.

[1] Juxon *v.* Thornhill, Cro. Car. 132; Child *v.* Horden, 2 Bulstr. 144; 2 Saund. 62 *a*, n. (4), by Williams.

[2] Kingsley *v.* Bill, 9 Mass. 198; Thompson *v.* Mitchell, 35 Me. 281.

[3] McArthur *v.* Campbell, 5 B. & Ad. 518; Musselbrook *v.* Dunkin, 9 Bing. 605. See also Munroe *v.* Allaire, 2 Cai. 320; [New York Lumber Co. *v.* Schneider, 119 N. Y. 475.]

[4] Sellick *v.* Adams, 15 Johns. 197; Low *v.* Nolte, 16 Ill. 475; {Gidley *v.* Gidley, 65 N. Y. 169.} [The copy must be furnished when stipulated: Anderson *v.* Miller, 108 Ala. 171.] In strictness, to constitute the proper service of an award, so as to authorize an attachment for not performing it, a copy must not only be delivered, but the original must also, at the same time, be shown to the party: Loyd *v.* Harris, 8 M. G. & Sc. 63.

[5] Perkins *v.* Wing, 10 Johns. 143.

all other cases, where the award is for money which is not paid, the burden of proof is on the defendant to show that he has paid the sum awarded, the bringing of the action being a sufficient request.[1] The averment of a promise to pay will be supported by evidence of an agreement to abide by the decision of the arbitrators.[2]

§ 77. **Performance.** Where the thing to be done by the defendant depends on a *condition precedent*, to be performed by the plaintiff, such performance must be averred and proved by the plaintiff.[1] And if by the terms of the award acts are to be done by both parties on the *same day*, as where one is to convey land, and the other to pay the price, there, in an action for the money, the plaintiff must aver and prove a performance, or an offer to perform, on his part, or he cannot recover; for the conveyance, or the offer to convey, from the nature of the case, was precedent to the right to the price.[2]

§ 78. **Defence.** In *defence* of an *action* on an award, or for not performing an award, the defendant may avail himself of any material error or defect, apparent on the face of the award; such as excess of power by the arbitrators;[1] defect of execution of power, as by omitting to consider a matter submitted;[2] want of certainty to a common intent;[3] or plain mistake of law as allowing a claim of freight,

[1] Birks *v.* Trippet, 1 Saund. 32, 33, and n. (2), by Williams. If the reference is general, and the arbitrator directs the payment to be made at a certain time and place, this direction may be rejected as surplusage. Rees *v.* Waters, 4 D. & L. 567; 16 M. & W. 263.

[2] Efner *v.* Shaw, 2 Wend. 567.

[1] [Gray *v.* Reed, 65 Vt. 178.]

[2] Hay *v.* Brown, 12 Wend. 591.

[1] Morgan *v.* Mather, 2 Ves. 18; Fisher *v.* Pimbley, 11 East 189; Macomb *v.* Wilbur, 16 Johns. 227; Jackson *v.* Ambler, 14 id. 96. See also Com. *v.* Pejepscot Prop'rs, 7 Mass. 399.

[2] Mitchell *v.* Stavely, 16 East 58; Bean *v.* Farnam, 6 Pick. 269. But not unless the omission is material to the award: Davy *v.* Faw, 7 Cranch 171; Harper *v.* Hough, 2 Halst. 187; Doe *v.* Horner, 8 Ad. & El. 235. {In submissions to arbitrations a clause is often inserted, called the "*ita quoad*" clause, which is, in effect, a condition that the award shall not be valid unless it decides all the questions submitted to it; whether a partial award, under a submission which has no such clause in it, is valid or not, depends on the construction of the submission. The earlier decisions were in favor of the validity, but Willes, J., in Bradford *v.* Bryan, Willes 270, says: "Were it not for the cases, I should be of opinion that when all matters are submitted, though without such condition, all matters must be determined, because it plainly was not the intention of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest." The prevalent rule is thus stated by Morse, on Arbitration, p. 342. "The court will look at the language of the submission in its every part, and, from a consideration of the whole, will determine the matter of intent. If the reasonable construction appears to be that the parties intended to have everything decided, if anything should be, then a decision of all matters submitted will be imperatively required; but if anything in the submission indicates a contrary purpose, a partial award will be sustained."}

[3] Jackson *v.* Ambler, 14 Johns. 96; [Herbst *v.* Hagenaers, 137 N. Y. 290; Flannery *v.* Sahagian, 134 N. Y. 85; Mather *v.* Day, 106 Mich. 371;] {Clark *v.* Burt, 4 Cush. (Mass.) 396; Ross *v.* Clifton, 9 Dowl. Prac. Cas. 360. An award defining a boundary will be defeated by proof that there were no such monuments as are referred to in the award, for the purpose of locating the boundary. But a want of certainty in the award in this respect alone will not affect another portion of the same award,

where the ship had never broken ground;[4] and the like. In regard to corruption or other misconduct or mistake of the arbitrators in making their award, the common law seems not to have permitted these to be shown in bar of an action at law for non-performance of the award; but the remedy must be pursued in equity.[5] But in this country, in those States where the jurisdiction in equity is not general, and does not afford complete relief in such cases, it has been held that, if arbitrators act corruptly, or commit gross errors or mistakes in making their award, or take into consideration matters not submitted to them, or omit to consider matters which were submitted, or the award be obtained by any fraudulent practice or suppression of evidence by the prevailing party, the defendant may plead and prove any of these matters in bar of an action at law to enforce the award.[6] And though arbitrators, ordinarily, are not bound to dis-

determining that one party had trespassed upon the land of the other, and awarding to the latter party his damages and costs, though the trespass was upon the same land to which the disputed boundary had reference: Giddings *v.* Hadaway, 28 Vt. 342. An award is not valid which provides for the payment, by one of the parties to the submission, of a certain sum, after making deductions therefrom of sums not fixed by, or capable of being ascertained from, the award: Fletcher *v.* Webster, 5 Allen (Mass.) 566. In Waite *v.* Barry, 12 Wend. (N. Y.) 377, Sutherland, J., said, "It is essential to the validity of an award that it should make a final disposition of the matters embraced in the submission, so that they may not become the subject or occasion of future litigation between the parties. It is not indispensable that the award should state, in words or figures, the precise amount to be paid. If nothing remain to be done, in order to render it certain and final, but a mere ministerial act, or an arithmetical calculation, it will be good:" cf. Wakefield *v.* Llanelly Railway & Dock Compauy, 11 Jur. N. S. 456; Tidswell, *in re*, 33 Beav. 213; Ellison *v.* Bray, 9 L. T. N. S. 730;} [Parker *v.* Dorsey, 38 A. 785, N. H.]

[4] Kelly *v.* Johnson, 3 Wash. 45. See also Gross *v.* Zorger, 3 Yeates 521; Ross *v.* Overton, 3 Call 309; Norris *v.* Ross, 2 H. & M. 408; Greenough *v.* Rolfe, 4 N. H. 357; Ames *v.* Milward, 8 Taunt. 637.

[5] Watson on Arbitrations, p. 153, in 11 Law Lib. 79; Shepherd *v.* Watrous, 3 Caines 166; Barlow *v.* Todd, 3 Johns. 367; Cranston *v.* Kennedy, 9 id. 212; Van Cortlandt *v.* Underhill, 17 id. 405; Kleine *v.* Catara, 2 Gallis. 61; Sherron *v.* Wood, 5 Halst. 7; Newland *v.* Douglas, 2 Johns. 62; [Hartford F. I. Co. *v.* Bonner Merc. Co., 44 F. 151.] In practice, where no suit is pending, arbitrations are now generally entered into under the statutes, enacted for the purpose of making the submission a rule of court; and in all cases where the submission is made a rule of court, the court will generally administer relief, wherever it could be administered in equity.

[6] Bean *v.* Farnam, 6 Pick. 269; Brown *v.* Bellows, 4 Pick. 183; Parsons *v.* Hall, 3 Greenl. 60; Boston Water Power Co. *v.* Gray, 6 Metc. 131; Williams *v.* Paschall, 3 Yeates 564; {Strong *v.* Strong, 9 Cush. (Mass.) 560; Lincoln *v.* Taunton Copper Manuf. Co., 8 id. 415; Leavitt *v.* Comer, 5 id. 129; French *v.* Richardson, ib. 450; Briggs *v.* Smith, 20 Barb. (N. Y.) 409; French *v.* New, ib. 481; Taylor *v.* Sayre, 4 Zabr. (N. J.) 647; Tracy *v.* Herrick, 25 N. H. 381. See also Morgan *v.* Smith, 9 Mees. & W. 427; Angus *v.* Redford, 11 id. 69; Cramp *v.* Adney, 3 Tyrwhitt 370. An award made in pursuance of a reference under a rule of court will not be set aside for alleged mistakes of law on the part of the referees, unless they have themselves been misled, or unless they refer questions of law to the court: Fairchild *v.* Adams, 11 Cush. (Mass.) 549; Bigelow *v.* Newell, 10 Pick. (Mass.) 348. When all claims and demands between the parties are submitted to arbitration, it will be intended that the arbitrators have decided all matters submitted to them, although they do not so state in their award, unless the contrary appears: Tallman *v.* Tallman, 5 Cush. (Mass.) 325; Clement *v.* Comstock, 2 Mich. 359. An award made twelve years after the submission is invalid, unless sufficient reason is shown for the delay: Hook *v.* Philbrick, 23 N. H. 288. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he thinks he has sufficient evi-

close the grounds of their award,[7] yet they may be examined to prove that no evidence was given upon a particular subject;[8] or, that certain matters were or were not examined, or acted on by them, or that there is mistake in the award;[9] and also as to the time and circumstances under which the award was made,[10] and as to any facts which transpired at the hearing.[11] Fraud in obtaining the submission may be given in evidence under the plea of *non assumpsit*, or *nil debet*, by the common law.[12]

dence without them: Phipps *v.* Ingram, 3 Dowl. 669; Halstead *v.* Seaman, 82 N. Y. 27;] [McDonald *v.* Lewis, 18 Wash. 300. So if he refuses to hear any relevant evidence: Hurdle *v.* Stallings, 109 N. C. 6. But there must be an actual offer of evidence: Stemmer *v.* Scottish Ins. Co., 53 P. 498, Or.]

[7] *Ante*, Vol. I. § 254 *c*; [Henry *v.* Hilliard, 120 N. C. 479.]

[8] Martin *v.* Thornton, 4 Esp. 180.

[9] Roop *v.* Brubacker, 1 Rawle 304; Alder *v.* Savill, 5 Taunt. 454; Zeigler *v.* Zeigler, 2 S. & R. 286. If, upon a submission of "all matters in difference," the parties omit to call the attention of the arbitrator to a matter not necessarily before him, they cannot object to the award on the ground that he has not adjudicated upon it: Rees *v.* Waters, 16 M. & W. 263.

[10] Woodbury *v.* Northy, 3 Greenl. 85; Lincoln *v.* Taunton Manuf. Co., 8 Cush. 415. [As that no notice of hearing was given: Warren *v.* Tinsley, 2 U. S. App. 507.]

[11] Gregory *v.* Howard, 3 Esp. 113. [They may testify to any facts tending to show that the award is void for legal cause: Strong *v.* Strong, 9 Cush. (Mass.) 560; as that they did not suppose the reference was final: Huntsman *v.* Nichols, 116 Mass. 521. The testimony of referees is admissible to identify matters submitted to them, and to show that they acted on them; but a written submission or award cannot be varied or explained by parol: Buck *v.* Spofford, 35 Me. 526. Declarations by an arbitrator, some days after making and publishing his award, are incompetent to impeach it: Hubbell *v.* Bissell, 2 Allen (Mass.) 196.] [An award may be binding though the arbitrators meet outside the State: Edmundson *v.* Wilson, 108 Ala. 118. It is not binding where the arbitrators strike an average between their opinions as to the amount due: Luther *v.* Medbury, 18 R. I. 141.]

[12] Sackett *v.* Owen, 2 Chitty 39. [It has been considered, in courts of law in some States, contrary to the general practice, that all defences to awards, where the submission and award were in writing and under seal, for matters not apparent upon the papers, must be pursued in equity. And this rule has been considered to rest, as to mistake of the arbitrators, and irregularity of conduct by them, upon the same ground that courts have refused to set aside a written contract between parties in a trial at law, upon the alleged grounds that, by mistake, the contract did not read as it was intended to. And in regard to the conduct of the arbitrators, it has been considered, in some of the cases certainly, that the arbitrators were necessary parties to any proceedings based upon such a charge. [*Contra*, Hartford F. I. Co. *v.* Bonner Merc. Co., 44 F. 151.] Mere mistakes, or irregularity, short of positive corruption, might not require any explanation at the hands of the arbitrators: [Mayberry *v.* Mayberry, 28 S. E. 349, N. C.] And it is difficult to perceive how, in any case, they are proper parties to a litigation, in regard to the validity of the award, and we doubt whether, upon principle, any corruption in the arbitrator or judge, unless with the procurement or privity of the prevailing party, is any defence to an award, in a court of law. And if the corruption of the arbitrator be with the privity of the party, it is fraud, and is equally a defence of law and in equity, as well to specialties as simple contracts. But this is perhaps not yet determined as to awards. See Woodrow *v.* O'Connor, 28 Vt. 776. An award which is operative as a final and conclusive adjustment of all matters between the parties, is not vitiated by an order requiring them to execute mutual releases: Shepherd *v.* Briggs, 28 id. 81. An award is rightly rejected, if, previously to the selection of the arbitrators, a portion of them made an *ex parte* examination of the matter afterwards submitted to them at the request of one of the parties, to whom the substance of the result at which they arrived was known, and these facts were not communicated to the other party. So, also, if they decided upon the matters submitted to them before giving notice of a hearing to one of the parties: Conrad *v.* Massasoit Insurance Co., 4 Allen (Mass.) 20. See Wilson *v.* Concord Railroad Company, 3 id.

§ 79. **Revocation.** The defendant may also show that the authority of the arbitrators was *revoked* before the making of the award.[1] And the *death* of either of the parties to a submission at common law, before the award made, will amount to a *revocation*;[2] unless it is otherwise provided in the submission.[3] Whether *bankruptcy* is a revocation, is not clearly settled.[4] Where the submission is at common law, and even where it is under the statute, but is not yet made a rule of court, it seems that either *party may revoke* the authority of the arbitrators; though he may render himself liable to an action for so doing.[5] But if the submission is by two, a revocation by one only is void.[6] If the reference is made an order of a court of equity, the revocation of the authority of the arbitrators is a high contempt of the court, and, upon application of the other party, will be dealt with accordingly.[7] If a *feme sole*, having entered into a submission to arbitration, takes a husband, the marriage is a revocation of the submission; but it is also, like every other revocation, by the voluntary act of the party, a breach of the covenant to abide by the award.[8]

§ 80. **Disability.** The defendant may also show, in defence, that one or more of the parties to the submission was a *minor*, or a *feme covert*, and that therefore the submission was void for want of mutuality.[1] So, he may show that the arbitrators, before making

194. See Tidswell, *in re*, 33 Beav. 213; Brook *et al.*, *in re*, 15 C. B. N. S. 403; 10 Jur. N. S. 704; Proctor *v.* Williams, 8 C. B. N. S. 386; Angus *v.* Smythies, 2 F. & F. 381. It seems that arbitrators may decline to hear counsel: Macqueen, *in re*, 9 C. B. N. S. 793.]

[1] [Butler *v.* Greene, 49 Neb. 230. But not afterwards: Com. *v.* Allen, 156 Mass. 113; Connecticut F. I. Co. *v.* O'Fallon, 49 Neb. 740.]

[2] Edmunds *v.* Cox, 2 Tidd's Pr. 877; s. c. 3 Doug. 406; s. c. 2 Chitty 422; Cooper *v.* Johnson, 2 B. & Ald. 394; Potts *v.* Ward, 1 Marsh. 366; Toussaint *v.* Hartop, 7 Taunt. 571. [So if one refuses to act: Wolf *v.* Augustine, 181 Pa. 376.] But if the submission is under a rule of court, and the action survives, it is not revoked by death: Bacon *v.* Crandon, 15 Pick. 79.

[3] Macdougall *v.* Robertson, 2 Y. & J. 11; s. c. 4 Bing. 435.

[4] Marsh *v.* Wood, 9 B. & C. 659; Andrews *v.* Palmer, 4 B. & Ald. 450; *Ex parte* Remshead, 1 Rose 149.

[5] Skee *v.* Coxon, 10 B. & C. 483; Milne *v.* Gratrix, 7 East 608; Clapham *v.* Higham, 1 Bing. 27; 7 Moore 703; Greenwood *v.* Misdale, 1 McCl. & Y. 276; Brown *v.* Tanner, id. 464; s. c. 1 C. & P. 651; Warburton *v.* Storer, 4 B. & C. 103; Vynior's Case, 8 Co. 162; Frets *v.* Frets, 1 Cow. 335; Allen *v.* Watson, 16 Johns. 205; Fisher *v.* Pimbley, 11 East 187; Peters *v.* Craig, 6 Dana 307; Marsh *v.* Bulteel, 5 B. & Ald. 507; Grazebrook *v.* Davis, 5 B. & C. 534, 538; Brown *v.* Leavitt, 13 Shepl. 251; Marsh *v.* Packer, 5 Washb. 198; [Rison *v.* Moon, 91 Va. 384. This is true though the matters submitted are in litigation: Minneapolis, etc. R. *v.* Cooper, 59 Minn. 290.] [A submission to arbitrators, if it is not founded on any consideration, may be revoked by the party submitting at any time before the award is delivered; but it is not so when it is made under an agreement founded on sufficient consideration: Paist *v.* Caldwell, 75 Pa. St. 161. When the submission has been made a rule of court, it cannot be revoked, though not founded on any consideration: Lewis's Appeal, 91 Pa. St. 359.]

[6] Robertson *v.* McNeill, 12 Wend. 578.

[7] Haggett *v.* Welsh, 1 Sim. 134; Harcourt *v.* Ramsbottom, 1 Jac. & Walk. 511.

[8] Charnley *v.* Winstanley, 5 East 266; Andrews *v.* Palmer, 4 B. & Ald. 252.

[1] Cavendish *v.* ——, 1 Chan. Cas. 279; Biddell *v.* Dowse, 6 B. & C. 255. But it is not a good objection that one was an executor or administrator only, for he has authority to submit to arbitration: Coffin *v.* Cottle, 4 Pick. 454; Bean *v.* Farnam, 6 id. 269; Dickey *v.* Sleeper, 13 Mass. 244.

their award, declined that office; for thereupon they ceased to be arbitrators.[2]

§ 81. **Pleadings.** Where the action is *assumpsit upon a submission by parol*, the plea of *non assumpsit*, where it is not otherwise restricted by rules of court, puts in issue every material averment. Under this issue, therefore, the defendant may not only show those things which affect the original validity of the submission, or of the award, such as infancy, coverture, want of authority in the arbitrators, fraud, revocation of authority, intrinsic defects in the award, and, if there is no other mode of relief, extrinsic irregularities also, such as want of notice and the like; but he may also show anything which at law would defeat and destroy the action, though it operate by way of confession and avoidance, such as a release, payment, or performance.[1] And sometimes, where *assumpsit* has been brought upon the original cause of action, either party has been permitted to show the submission and award under the general issue, as evidence of a statement of accounts and an admission of the balance due, or of a mutual adjustment of the amount in controversy.[2]

[2] Relyea *v.* Ramsay, 2 Wend. 602; Allen *v.* Watson, 16 Johns. 203. {In debt upon an award of arbitrators, it is proper to show by parol, under the general issue, that the arbitrators had no power to make and publish their award at the time and in the manner they did; and therefore, under that plea, the question may be raised, whether an award is valid which was made on Sunday morning, after a hearing completed just before twelve o'clock on Saturday night, and parol evidence may be introduced to show that it was so made. A judgment rendered on Sunday is void at common law; but an award is not a judgment, but the consummation of a contract between the parties to the submission; and if the submission make no provision for an award on Sunday, and the parties complete the hearing before the arbitrators previous to twelve o'clock on Saturday night, and then cease to exercise any control as to the time of making the award, its validity as to them will not be affected either at common law, or under the Vermont statute, regulating the observance of the Sabbath, by the fact that the arbitrators make and publish their award at three o'clock on Sunday morning. Blood *v.* Bates, 31 Vt. 147.}

[1] Stephen on Pleading, pp. 179–182 (Am. ed. 1824); Taylor *v.* Coryell, 12 S. & R. 243, 251; Allen *v.* Watson, 16 Johns. 203.

[2] Keene *v.* Batshore, 1 Esp. 194; Kingston *v.* Phelps, Peake's Cas. 228. {Arbitrators are not bound to follow the strict rules of law, or even what they deem to be such, unless it be a condition of the submission that they shall do so; and when there is no such condition courts will not refuse to enforce an award, on the ground that the arbitrators have not followed strictly legal rules in hearing and deciding a case, unless it be shown that thereby manifest injustice has been done. Remelee *v.* Hall, 31 Vt. 583; [School Dist. *v.* Sage, 13 Wash. 352; Raymond *v.* Farmers' Ins. Co., 72 N. W. 254, Mich.; Henry *v.* Hilliard, 120 N. C. 479.] "We think the more modern cases adopt the principle, that, inasmuch as a judicial decision upon a question of right, by whatever forum it is made, must almost necessarily involve an application of certain rules of law to a particular statement of facts, and as the great purpose of a submission to arbitration usually is, to obtain a speedy determination of the controversy, a submission to arbitration embraces the power to decide questions of law, unless that presumption is rebutted by some exception or limitation in the submission. We are not aware that there is anything contrary to the policy of the law, in permitting parties thus to substitute a domestic forum for the courts of law, for any good reason, satisfactory to themselves; and having done so, there is no hardship in holding them bound by the result." Shaw, C. J., Boston Water Power Co. *v.* Gray, 6 Met. (Mass.) 167. See Estes *v.* Mansfield, 6 Allen (Mass.) 69; and Haigh *v.* Haigh, 8 Jur. N. S. 983. See also Horton *v.* Sayer, 5 Jur. N. S. 989, as to agreements of parties, that all disputes that may arise between them shall be referred to arbitration.}

ASSAULT AND BATTERY.

§ 82. **Definition.** An *assault* is *defined* to be an inchoate violence to the person of another, with the present means of carrying the intent into effect.[1] Mere threats alone do not constitute the offence: there must be proof of violence actually offered.[2] Thus, if one ride after another, and oblige him to run to a place of security to avoid being injured;[3] or throw at him any missile capable of doing hurt with intent to wound, whether it hit him or not;[4] or level a loaded gun, or brandish any other weapon in a menacing manner, within such a distance as that harm might ensue;[5] or advance, in a threatening manner, to strike the plaintiff, so that the blow would have reached him in a few seconds if the defendant had not been stopped;[6] in all these cases the act is an assault. So, if he violently attack and strike with a club the horse which is harnessed to a carriage, in which the plaintiff is riding.[7] But to stand in another's way and passively to obstruct his lawful progress, as an inanimate object would, though done by design, is no assault.[8]

§ 83. **Intent to harm.** The *intention to do harm* is of the essence of an *assault;*[1] and this intent is to be collected by the jury from the circumstances of the case.[2] Therefore if the act of the defendant

[1] 1 Steph. N. P. 208; Finch's Law, 202; Stephens *v.* Myers, 4 C. & P. 349. And see also *post*, Vol. III. § 59.

[2] Stephens *v.* Myers, 4 C. & P. 349; Tuberville *v.* Savage, 1 Mod. 3. The declaration for an assault and battery is thus: "In a plea of trespass; for that the said (defendant) on the —— day of ——, at ——, in and upon the plaintiff, with force and arms, made an assault, and him, the said plaintiff, then and there did beat, wound, and ill treat [here may be stated any special matter of aggravation], and other wrongs to the plaintiff, then and there did against the peace. To the damage," etc. The material allegations in an indictment are the same as in a civil action. [In an action for indecent assault, evidence of an assault on the plaintiff's sister-in-law in her presence was admitted, on the ground that the assault on her sister put plaintiff in fear of bodily harm, and so constituted a continuing assault from the beginning: Parker *v.* Couture, 63 Vt. 449.]

[3] Morton *v.* Shoppee, 3 C. & P. 373. {See State *v.* Martin, 85 N. C. 508.}

[4] 2 Hawk. P. C. b. 1, c. 62, § 1.

[5] Ibid. If the gun is not loaded, it is no assault: Blake *v.* Barnard, 9 C. & P. 626; R. *v.* James, 1 C. & K. 530. [Firing a revolver without aiming it, intending simply to frighten a person, is not an assault: Degenhart *v.* Heller, 93 Wis. 662.]

[6] Stephens *v.* Myers, 4 C. & P. 349, per Tindal, C. J.

[7] De Marentille *v.* Oliver, 1 Penning. 380, per Pennington, J. Taking indecent liberties with a female pupil, R. *v.* Nichol, Russ. & Ry. 130; or with a female patient, R. *v.* Rosinski, Ry. & M. 19; though unresisted, is an assault.

[8] Jones *v.* Wylie, 1 C. & K. 257.

[1] But as to battery, see *infra*, § 94.

[2] [Evidence of abusive epithets addressed to the plaintiff fourteen hours after the assault is admissible to show malice: Spear *v.* Sweeney, 88 Wis. 545.]

was merely an interference to prevent an unlawful injury, such as to separate two combatants;[3] or if, at the time of menacing violence, he used words showing that it was not his intention to do it at that time, as in the familiar example of one's laying his hand on his sword, and saying that if it were not assize time he would not take such language;[4] or if, being unlawfully set upon by another, he puts himself in a posture of defence by brandishing his fists or a weapon,[5] — it is no assault. So, where one threw a stick, which struck the plaintiff, but it did not appear for what purpose it was thrown, it was presumed that it was thrown from a proper purpose, and that the striking of the plaintiff was merely an accident.[6]

§ 84. **Battery.** A *battery* is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law:[1] it is only considered by the jury in assessing the damages in a civil action, or by the judge in passing sentence upon indictment.[2] Thus, any touching of the person in an angry, revengeful, rude, or insolent manner;[3] spitting upon the person;[4] jostling him out of the way;[5] pushing another against him;[6] throwing a squib or any missile or water upon him;[7] striking the horse he is riding, whereby he is thrown;[8] taking hold of his clothes in an angry or insolent manner, to detain him,[9] — is a battery. So, striking the skirt of his coat or the cane in his hand,[10] is a battery; for anything attached to the person partakes of its inviolability.[11]

[3] Griffin *v.* Parsons, 1 Selw. N. P. 25, 26.

[4] Bull. N. P. 15; Tuberville *v.* Savage, 1 Mod. 3; 2 Keb. 545; Com. *v.* Eyre, 1 S. & R. 347.

[5] Moriarty *v.* Brooks, 6 C. & P. 684.

[6] Alderson *v.* Waistell, 1 C. & K. 358.

[1] Leame *v.* Bray, 3 East 602. Cutting off the hair of a parish pauper by the parish officers, against her will, was held a battery: Ford *v.* Skinner, 4 C. & P. 239. [A clerk who touches a customer and requests her to enter another room where he accuses her of theft, commits a battery: McDonald *v.* Franchere, 102 Ia. 496.]

[2] {In order to explain to the jury the nature of the battery and its effect upon the plaintiff, a photograph of the plaintiff's back, showing the marks of the stripes inflicted by the defendant, is competent evidence if the photograph is identified by the person who took it, and he testifies that it gives a correct representation of what it purports to represent, and was taken soon after the battery complained of: Reddin *v.* Gates, 52 Iowa, 210.}

[3] 2 Hawk. P. C. b. 1, c. 62, § 2; 4 Bl. Comm. 120.

[4] 1 East P. C. 406; R. *v.* Cotesworth, 6 Mod. 172.

[5] Bull. N. P. 16.

[6] Cole *v.* Turner, 6 Mod. 149.

[7] Scott *v.* Shepherd, 2 W. Bl. 892; s. c. 3 Wils. 403; Pursell *v.* Horn, 8 Ad. & El. 605; Simpson *v.* Morris, 4 Taunt. 821.

[8] Dodwell *v.* Burford, 1 Mod. 24.

[9] U. S. *v.* Ortega, 4 Wash. 534; 1 Baldw. 600.

[10] Respublica *v.* De Longchamps, 1 Dall. 111, 114, per McKean, C. J.; The State *v.* Davis, 1 Hill (S. C.) 46.

[11] Ibid.

§ 85. **Negligence; Unlawful Intent.** And here also the plaintiff must come prepared with evidence to show, either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable.[1] Thus, if one intend to do a lawful act, as to assist a drunken man, or prevent him from going without help, and in so doing a hurt ensue, it is no battery.[2] So, if a horse by a sudden fright runs away with his rider, not being accustomed so to do, and runs against a man;[3] or if a soldier, in discharging his musket by lawful military command, unavoidably hurts another,[4] — it is no battery; and in such cases the defence may be made under the general issue.[5] But, to make out a defence under this plea, it must be shown that the defendant was free from any blame, and that the accident resulted entirely from a superior agency.[6] A defence which admits that the accident resulted from an act of the defendant must be specially pleaded.[7] Thus, if one of two persons fighting unintentionally strikes a third;[8] or if one uncocks a gun without elevating the muzzle, or other due precaution, and it accidentally goes off and hurts a looker-on;[9] or if he drives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse taking fright injures another,[10] — he is liable for the battery. But if the

[1] 1 Bing. 213, per Dallas, C. J.; 1 Com. Dig. 129, tit. Battery, A; 1 Chitty on Pl. 120. See *infra*, § 94, and tit. Damages, §§ 269, 271. [Intention *to injure* is unnecessary: Vosburg *v.* Putney, 80 Wis. 523.]

[2] Bull. N. P. 16. {In Johnson *v.* McConnel, 15 Hun (N. Y.) 293, where it was proved that the plaintiff, while intoxicated, engaged in a scuffle with a third party, and the defendant interfered to keep the plaintiff quiet, and in the subsequent scuffle the plaintiff fell and broke his leg, it was held that an instruction of such a nature that the jury might be led by it to believe that the assault must be made in anger, and that if done in entire good nature, and from good motives, though against the will of the person assaulted, it did not constitute an actionable assault, was erroneous. It is held that where a statute authorizes a police officer to arrest a person without a warrant for being intoxicated on a public street, the officer does not render himself liable criminally for the arrest of a person who is not intoxicated, providing the officer acts in good faith and has reasonable cause to believe the arrested person is intoxicated. Evidence of the circumstances of the case may be offered to show the good faith of the officer and the cause of his belief in the intoxication of the person arrested: Com. *v.* Cheney, 141 Mass. 102.}

[3] Gibbons *v.* Pepper, 4 Mod. 404; Bull. N. P. 16; {Brown *v.* Collins, 53 N. H. 442. This case has some observations worthy of note on the leading case upon this point, of Fletcher *v.* Rylands, L. R. 3 H. of L. 330. See also Holmes *v.* Mather, 23 W. R. Exch. 869; s. c. 16 Am. Rep. 384; *post*, § 94.}

[4] Weaver *v.* Ward, Hob. 134.

[5] 4 Mod. 405.

[6] [One who carries firearms for the lawful purpose of intimidating trespassers is not liable for an injury to a trespasser caused by their accidental discharge: Shriver *v.* Bean, 112 Mich. 508.]

[7] Hall *v.* Fearnley, 3 Ad. & El. N. S. 919. See *infra*, §§ 94, 622, 625; 1 Chitty Pl. 437; Knapp *v.* Salsbury, 2 Campb. 500; Boss *v.* Litton, 5 C. & P. 407.

[8] James *v.* Campbell, 5 C. & P. 372. [Or if one of two players pushes another against plaintiff: Markley *v.* Whitman, 95 Mich. 236.]

[9] Underwood *v.* Hewson, Bull. N. P. 16; s. c. 1 Stra. 596. So, if he negligently discharges a gun: Dickenson *v.* Watson, T. Jones, 205; Taylor *v.* Rainbow, 2 Hen. & Munf. 423; Blin *v.* Campbell, 14 Johns. 432.

[10] Wakeman *v.* Robinson, 1 Bing. 213; {Kennedy *v.* Way, Sup. Ct. Pa., 13 Law Reporter 184.}

injury happened by unavoidable accident, in the course of an amicable wrestling-match, or other lawful athletic sport, if it be not dangerous, it may be justified.[11] If it were done in a boxing-match, or fight, though by consent, it is an unjustifiable battery;[12] the proof of consent being admissible only in mitigation of damages.[13]

§ 86. **Time and Place not essential.** Neither the *time* nor the *place*, laid in the declaration, are ordinarily material to be proved. Evidence of the trespass committed previous to the commencement of the action is sufficient;[1] and it may be proved in any place, the action being personal and transitory.[2] But if the declaration contain only one count, and the plaintiff prove *one assault*, he cannot afterwards *waive* that, and prove another.[3] Nor can he give evidence of a greater number of assaults than are laid in the declaration.[4] If the action is against several for a joint trespass, the plaintiff, having proved a trespass against some only, cannot afterwards be permitted to prove a trespass done at another time, in which all or any others were concerned; but he is bound, by the election which he has made, to charge some only; for, otherwise, some might be charged for a trespass in which they had no concern.[5] So, if he prove a trespass against all the defendants, he cannot afterwards elect to go upon a separate trespass against one.[6] And if he prove a trespass against some, he is bound to elect, before the defendants open their case, against which defendants he will proceed.[7]

§ 87. **Sufficient to prove Assault.** Nor is it necessary to prove an *actual battery*, though it must be alleged in the declaration; for, upon proof of an assault only, the plaintiff will be entitled to recover.[1]

§ 88. **Consequential Injuries.** If the plaintiff would recover for *consequential injuries*, they must be specially laid in the declaration, under a *per quod*.[1] Of these, the loss of the society of his wife, or of

[11] 5 Com. Dig. 795, tit. Pleader, 3 M. 18; Foster Cr. L. 259, 260; {Fitzgerald *v.* Cavin, 110 Mass. 153.} [Otherwise if the plaintiff himself is not playing: Markley *v.* Whitman, 95 Mich. 236.]

[12] Boulter *v.* Clark, Bull. N. P. 16; Stout *v.* Wren, 1 Hawks 420; {Adams *v.* Waggoner, 33 Ind. 531;} [Grotton *v.* Glidden, 84 Me. 589; Willey *v.* Carpenter, 64 Vt. 212.]

[13] Logan *v.* Austin, 1 Stew. 476. See *infra*, tit. Damages.

[1] 1 Saund. 24, n. (1), by Williams; Bull. N. P. 86; Brownl. 233.

[2] Mostyn *v.* Fabrigas, Cowp. 161.

[3] Stante *v.* Pricket, 1 Campb. 473.

[4] Gillon *v.* Wilson, 3 B. Monr. 217.

[5] Sedley *v.* Sutherland, 3 Esp. 202; Hitchen *v.* Teale, 2 M. & Rob. 30. But see Roper *v.* Harper, 5 Scott 250.

[6] Tait *v.* Harris, 1 M. & Rob. 282, per Ld. Lyndhurst, Ch. B. In Hitchen *v.* Teale, 2 M. & Rob. 30, Patteson, J., said he could not very well understand the principle on which this decision was founded.

[7] Howard *v.* Newton, 2 M. & Rob. 509.

[1] Bro. Abr. Tresp. pl. 40; 40 E. III. 40; 1 Steph. N. P. 213; Lewis *v.* Hoover, 3 Blackf. 407.

[1] Pettit *v.* Addington, Peake's Cas. 62; [Kuhn *v.* Freund, 87 Mich. 545. A general allegation that plaintiff was hurt and became sick is sufficient: Morgan *v.* Kendall, 124 Ind. 454. See also § 254, *post*.] But the plaintiff cannot recover in this form for injury for which a separate action lies, either by himself or by another: 1 Chitty on Pl. 347–349; Wallace *v.* Hardacre, 1 Campb. 45, 49; Bull. N. P. 89.

the services of his servant, are examples.[2] The relation of husband and wife is proved in such cases, by evidence of a marriage *de facto*. If the action is for assaulting and beating the plaintiff's son,[3] or for seducing his daughter, *per quod*, it is sufficient to show that the child lived in the parent's family, without proof of actual service;[4] or, if the child lived in a neighbor's family, it is sufficient to prove that he also daily and ordinarily performed services for the parent.[5] If the daughter is emancipated, and resides apart from the parent's family, the parent cannot recover.[6] But if the daughter actually resides with her father, even though she be a married woman, if she lives apart from her husband, the father may maintain the action.[7] In all these cases, it is sufficient to prove the relation of master and servant *de facto;* and proof of very slight acts of service is sufficient.[8]

§ 89. **Same Subject.** It is not, however, necessary to state specially any matters which are the *legal and natural consequence* of the tortious act; for all such consequences of his own actions every man is presumed to anticipate; and as one of the objects of the rule, which requires particularity of averment in pleading, is, to give the other party notice that he may come prepared to meet the charge, such particularity is in these cases superfluous. The plaintiff, therefore, under the usual allegation of assault and battery, may give evidence of any damages naturally and necessarily resulting from the act complained of.[1] But where the law does not imply the damage, as the natural and necessary consequence of the assault and battery, it should be set forth with particularity; such, for example, as the general loss of health, or the contracting of a contagious disease, or being stinted in allowance of food, in an action for an assault and false imprisonment; or an injury to his clothes, in a personal rencounter, and the like.[2] The manner, motives, place, and circumstances of the assault, however, though tending to increase the damages, need not be specially stated, but may be shown in evidence. Thus, where the battery was

[2] Guy *v.* Livesey, Cro. Jac. 501; Woodward *v.* Walton, 2 New Rep. 476; 9 Co. 113 *a;* Ream *v.* Rank, 3 S. & R. 215.

[3] Jones *v.* Brown, Peake's Cas. 233; s. c. 1 Esp. 217.

[4] Maunder *v.* Venn, 1 M. & Malk. 323; Mann *v.* Barratt, 6 Esp. 32.

[5] 1 Steph. N. P. 214.

[6] Dean *v.* Peel, 5 East 45; Anon., 1 Smith 333; Postlethwaite *v.* Parkes, 3 Burr. 1878. If the daughter, being under age, is actually in the service of another, but the father has not divested himself of his right to reclaim her services, it has been held that he may maintain this action: Martin *v.* Payne, 9 Johns. 387. See *infra*, tit. Seduction.

[7] Harper *v.* Luffkin, 7 B. & C. 387.

[8] Fores *v.* Wilson, Peake's Cas. 55; Bennett *v.* Alcott, 2 T. R. 166; Manvell *v.* Thomson, 2 C. & P. 303; Irwin *v.* Dearman, 11 East 23; Nickleson *v.* Striker, 10 Johns. 115. See also 1 Chitty on Pl. 50.

[1] Moore *v.* Adam, 2 Chitty 198, per Bailey, J.; 1 Chitty on Pl. 346. The plaintiff may recover for the damage he is likely to sustain, after the trial, as the natural consequence of the injury; because, for these damages, he can have no other action: Fetter *v.* Beale, 1 Ld. Raym. 339; s. c. 2 Salk. 11.

[2] Chitty on Pl. 346, 347; Lowden *v.* Goodrick, Peake's Cas. 46; Pettit *v.* Addington, id. 62; Avery *v.* Ray, 1 Mass. 12. See *infra*, tit. Damages, §§ 253, 255.

committed in the house of the plaintiff, which the defendant rudely entered, knowing that the plaintiff's daughter-in-law was there sick and in travail, evidence of this fact was held admissible without a particular averment.[3] Nor are the jury confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties,[4] and all the circumstances of the outrage, and thereupon to award such *exemplary* damages as the circumstances may in their judgment require.[5]

§ 90. **Conviction; Confession.** In proof of the trespass, the plaintiff may give in evidence a conviction of the defendant upon an indictment for the same offence, provided the conviction was upon the *plea of guilty;* but not otherwise.[1] And if it was a *joint trespass* by several, the confessions and admissions of any of them, made during the pendency of the enterprise and in furtherance of the common design, may be given in evidence against the others, after a foundation has been laid by proving the fact of conspiracy by them all to perpetrate the offence.[2]

§ 91. **Averment of Alia Enormia.** The *alia enormia* is an averment not essential to the declaration for an assault and battery; its office is merely to enable the plaintiff to give in evidence under it

[3] Sampson *v.* Henry, 11 Pick. 379.

[4] [That the pecuniary and social position of the parties may be considered, see Eltingham *v.* Earhart, 67 Miss. 488.]

[5] Merest *v.* Harvey, 5 Taunt. 442. Heath, J., in this case, remarked that "it goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages:" Wade *v.* Thayer, 40 Cal. 585; Bracegirdle *v.* Oxford, 2 M. & S. 77; Tullidge *v.* Wade, 3 Wils. 19; Davenport *v.* Russell, 5 Day 145; Shafer *v.* Smith, 7 Har. & T. 67; [Beck *v.* Dowell, 111 Mo. 506; Sargent *v.* Caines, 84 Tex. 156; Connors *v.* Walsh, 131 N. Y. 590; White *v.* Barnes, 112 N. C. 323; Lamb *v.* Stone, 95 Wis. 254; *contra*, Stuyvesant *v.* Wilcox, 92 Mich. 233.] Previous threats of the defendant, in the presence of the plaintiff, may also be shown: Sledge *v.* Pope, 2 Hayw. 402. See *infra*, tit. Damages, §§ 253, 267, etc.; McNamara *v.* King, 2 Gilm. 432; Reed *v.* Davis, 4 Pick. 216. {Exemplary damages may be given notwithstanding the defendant has been proceeded against criminally: Hoadley *v.* Watson, 45 Vt. 289; Corwin *v.* Walton, 18 Mo. 71; [Rhodes *v.* Rodgers, 151 Pa. 634.] See also *post*, § 266 *et seq.* And the amount of the fine paid by him should not be considered in the civil action: Reddin *v.* Gates, 52 Iowa 210. In Maine, on the trial of an action for assault and battery with a deadly weapon, exemplary damages may be proved, and in this connection it is admissible to show the pecuniary status of the defendant so as to arrive at what sum will be punitive in its nature: Webb *v.* Gilman, 80 Me. 177. [This evidence is inadmissible on the question of actual damages: Roach *v.* Caldbeck, 64 Vt. 593.] As to the damages of the plaintiff where the assault and battery complained of was the illegal arrest of the plaintiff, he is entitled to recover not only for the actual battery but for the loss of his time during the arrest and the injury to his feelings from the indignity wrongfully offered him thereby: Morgan *v.* Curley, 142 Mass. 107.}

[1] *Ante*, Vol. I. § 537 n.; R. *v.* Morean, 12 Jur. 626; {Corwin *v.* Walton, 18 Mo. 71.} [The defendant's refusal to testify on the ground that his answer may tend to criminate him may be considered by the jury in connection with the plaintiff's testimony: Morgan *v.* Kendall, 124 Ind. 454. Where the defence is an alibi, plaintiff may show that defendant pleaded guilty in an action for assault upon another person at the same time and place; but such admission is not conclusive: Parker *v.* Couture, 63 Vt. 449; Hauser *v.* Griffith, 102 Ia. 215.]

[2] *Ante*, Vol. I. § 184 *a*.

such circumstances belonging to the transaction as could not conveniently be stated on the record.[1] Things which naturally result from the act complained of may, as we have seen, be shown under the other averments.

§ 92. **Matters of Defence.** Matters of *defence* in this action are usually distributed under three heads; namely, first, *Inficiation*, or denial of the fact, which is done only by the plea of not guilty; secondly, *Excuse*, which is an admission of the fact, but saying it was done accidentally, or by superior agency, and without any fault of the defendant; and this may be either specially pleaded, or given in evidence under the general issue; and, thirdly, *Justification*, which must always be specially pleaded.[1] To these may be added matters in *discharge*, such as a *release*, *accord and satisfaction*, *arbitrament*, *former recovery*, the *statute of limitations*, and the like, which also must be specially pleaded.[2] But it should be observed that these rules apply only to suits against private persons. For, where actions are brought against public officers, for acts done by virtue of their office, they are permitted by statutes to plead the general issue, with a brief statement in writing of the special matter of justification to be given in evidence.

§ 93. **What provable under General Issue.** Under the *general issue*, the defendant, in mitigation of damages, may give in evidence a *provocation* by the plaintiff, provided it was so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff.[1] Indeed, the defendant, in mitigation of damages,

[1] 1 Chitty on Pl. 348; Lowden *v.* Goodrick, Peake's Cas. 45. See *infra*, tit. Damages, § 276; *supra*, § 85.

[1] Bull. N. P. 17; [Hathaway *v.* Hatchard, 160 Mass. 296.]

[2] Chitty on Pl. 441.

[1] Dennis *v.* Pawling, 12 Vin. Abr. 159, tit. Evid. 1, b, pl. 16, per Price, B.; Lee *v.* Woolsey, 19 Johns. 319; Cushman *v.* Waddell, 1 Bald. 58; Avery *v.* Ray, 1 Mass. 12; Matthews *v.* Terry, 10 Conn. 455; Fullerton *v.* Warrick, 3 Blackf. 219; Anderson *v.* Johnson, 3 Har. & J. 162. In Fraser *v.* Berkley, 2 M. & Rob. 3, Lord Abinger admitted evidence of provocation; namely, a libel published some time previous to the battery. [The fact that the evidence of provocation, which the defendant wishes to use in mitigation of damages, was offered to prove a justification of self-defence, which has failed, does not deprive the defendant of the benefit of it. The jury, in estimating the damages, must ascertain from the whole evidence how far the plaintiff also was in fault, if in fault at all, as well as the defendant, and give damages accordingly: Burke *v.* Melvin, 45 Conn. 243. In a recent case it is held that evidence of previous provocation is not admissible in mitigation of damages in a case of assault and battery, unless it is so recent and immediate as to form a part of the transaction; or, in other words, it must be provocation happening at the time of the assault: Dupee *v.* Lentine, 147 Mass. 580. But in Vermont it is held that such facts cannot be given in evidence in mitigation of actual injury suffered by the plaintiff, but only upon the question of punitive damages: Goldsmith *v.* Joy, 61 Vt. 488. Proof of former controversies independent of the assault complained of, and not so recent as to be reasonably supposed to have provoked it, is not admissible: Richardson *v.* Hine, 42 Conn. 206; Collins *v.* Todd, 17 Mo. 537; Dolan *v.* Fagan, 63 Barb. (N. Y.) 73. It is well-settled law that mere words do not constitute a sufficient provocation to justify an assault; but they may be given in evidence in mitigation of damages: Richardson *v.*

may, under this issue, rely on any part of the *res gestæ*, though, if pleaded, it would have amounted to a justification; notwithstanding the general rule, that whatever is to be shown in justification must be specially pleaded; for everything which passed at the time is part of the transaction on which the plaintiff's action is founded, and therefore he could not be surprised by the evidence.[2] And it is also laid down, as a general rule, that whatever cannot be pleaded may be given in evidence under this issue.[3] Therefore, where the beating in question was by way of punishment for misbehavior on board a ship, and for the maintenance of necessary discipline, this evidence was held not admissible in mitigation of damages, because the facts might have been pleaded in justification.[4] Where the action was for assault and false imprisonment, evidence of *reasonable suspicion of felony* has been held admissible, in mitigation of damages.[5]

§ 94. **Unlawful Intention essential.** In the case of a mere assault, the *quo animo* is material, as, without an unlawful intention, there is no assault. Any evidence of *intention*, therefore, is admissible under the general issue.[1] But in the case of a battery, innocence of intention is not material, except as it may go in mitigation of damages; unless it can be shown that the defendant was wholly free from fault; because every man who is not entirely free from all blame is responsible for any immediate injury done by him to the person of another, though it were not wilfully inflicted. Therefore, if the act of the defendant was done by inevitable necessity, as if it be caused by ungovernable brute force, his horse running away with him without his fault;[2] or, if a lighted squib is thrown upon him, and to save himself he strikes it off in a new direction,[3] — in these and the like cases the necessity may be shown under the general issue, in dis-

Zuntz, 26 La. An. 313; Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Dolan *v.* Fagan, 63 Barb. (N. Y.) 73; Riddle *v.* State, 49 Ala. 389. Cf. Collins *v.* Todd, 17 Mo. 537. If libellous words are used by the plaintiff of the defendant, and sometime afterward the plaintiff repeats the libel, and the defendant immediately thereafter commits the assault and battery complained of, this repetition of the words may be given in evidence in mitigation of damages: Davis *v.* Franke, 33 Gratt. (Va.) 413. In an action for assault, evidence that complaint of the same assault had been made before the grand jury and no indictment had been returned is not admissible in behalf of the defendant: Bonino *v.* Caledonio, 144 Mass. 299.]

[2] Bingham *v.* Garnault, Bull. N. P. 17; [Crosby *v.* Humphreys, 59 Minn. 92. Whether the provocation is to be considered a justification or simply in mitigation is for the jury: Cross *v.* Carter, 100 Ga. 632.]

[3] 2 B. & P. 224, n. (*a*).

[4] Watson *v.* Christie, 2 B. & P. 224.

[5] Chinn *v.* Morris, 2 C. & P. 361; s. c. 1 Ry. & M. 324. The law of damages, in actions *ex delicto*, in regard to evidence in aggravation or mitigation, is treated with great ability and just discrimination, in an article in 3 Am. Jurist, pp. 287–313.

[1] Griffin *v.* Parsons, 1 Selw. N. P. 25, 26; *supra*, § 83.

[2] Wakeman *v.* Robinson, 1 Bing. 213; Gibbons *v.* Pepper, 4 Mod. 404; 1 Salk. 637; Bull. N. P. 16; Hall *v.* Fearnley, 3 Ad. & El. N. S. 919; Vincent *v.* Stinehour, 7 Vt. 62.

[3] Scott *v.* Shepherd, 3 Wils. 403. See also Beckwith *v.* Shordike, 4 Burr. 2092; Davis *v.* Saunders, 2 Chitty 639; *supra*, § 85.

proof of the battery. But if the plaintiff was himself guilty of incautious or improper conduct, he cannot recover, unless the case was such that, by the exercise of ordinary care, he could not have avoided the consequences of the defendant's neglect,[4] or was incapable by want of understanding or discretion of taking such care.[5] In other words, the defendant is answerable only for those consequences which the plaintiff, by ordinary care, could not have prevented; the degree of care required of the plaintiff being limited by his capacity and circumstances.[6]

§ 95. **Plea of Son Assault.** Under the plea of *son assault demesne*, in excuse, with the general replication of *de injuria*, etc., the burden of proof is on the defendant, who will be bound to show that the plaintiff actually committed the first assault; and, also, that what was thereupon done on his own part was in the necessary defence of his person.[1] And even violence may be justified where the safety of the person was actually endangered.[2] If the defendant's battery of the plaintiff was excessive beyond what was apparently necessary for self-defence, it seems by the American authorities that this excess may be given in evidence under the replication of *de injuria*, without either a special replication or a new assignment.[3] For, in such a case, the question is as to the degree and proportion of the beating to the assault. But if the plaintiff's answer to the plea of *son assault demesne* consists of an admission of the fact and a justification of it, this cannot, by the English authorities, be shown in evidence under the replication *de injuria*, but must always be specially

[4] Davis *v.* Mann, 6 Jur. 954; s. c. 10 M. & W. 546; Kennard *v.* Burton, 12 Shepl. 39; {Brown *v.* Kendall, 6 Cush. (Mass.) 292. In a recent case in Massachusetts the introduction of this evidence of intention and motive is said to be merely to affect the damages, not as the essence of the action: Quigley *v.* Turner, 150 Mass. 110.}

[5] Lynch *v.* Nurdin, 1 Ad. & El. N. s. 29; 5 Jur. 797.

[6] See Robinson *v.* Cone, 3 Am. Law J. N. s. 313, where the subject is fully considered by Redfield, J.

[1] Crogate's Case, 8 Co. 66; Cockerill *v.* Armstrong, Willes 99; Jones *v.* Kitchen, 1 B. & P. 79, 80; Reece *v.* Taylor, 4 Nev. & M. 469; Guy *v.* Kitchener, 2 Str. 1271; s. c. 1 Wils. 171; Phillips *v.* Howgate, 4 B. & Ald. 220; Timothy *v.* Simpson, 1 Cr. M. & R. 757; {Fitzgerald *v.* Fitzgerald, 51 Vt. 420;} [Drinkhorn *v.* Bubel, 85 Mich. 532; Shipley *v.* Edwards, 87 Ia. 310. But see Courvoisier *v.* Raymond, 23 Col. 113.]

[2] Cockcroft *v.* Smith, 2 Salk. 642; Bull. N. P. 18. {If the defendant is guilty of an unreasonable and disproportionate degree of violence towards the person of another, he is liable for the excess, though he was acting in self-defence. In such cases the question is not merely whether the defendant was the assaulted party, and so had a right to repel the force by force, but also as to the degree of the beating, and its proportion to the assault of the plaintiff: Brown *v.* Gordon, 1 Gray (Mass.) 182; Close *v.* Cooper, 34 Ohio St. 98.}

[3] Curtis *v.* Carson, 2 N. H. 539. See, where the plea is *moderate castigavit*, Hannan *v.* Edes, 15 Mass. 347; or, *molliter manus imposuit*, Bennett *v.* Appleton, 25 Wend. 371. See also 1 Steph. N. P. 216, 220, 221; Dauce *v.* Luce, 1 Keb. 884; s. c. Sid. 246; 1 Chitty on Pl. 512, n., 545, 627. {It seems that the current of authority is still in the same direction. The court says in Steinmetz *v.* Kelly, 72 Ind. 442 (a case decided in 1880), "It was, however, long ago settled that in trespass for assault and battery, on plea of *son assault demesne* and the common-law replication, *de injuria*, etc., the plaintiff could recover for the excess, no special replication being necessary." And see Brown *v.* Gordon, 1 Gray (Mass.) 182; Mellen *v.* Thompson, 32 Vt. 407.}

replied.[4] If the declaration contains but one count, to which *son assault demesne* is pleaded without the general issue, the defendant may give evidence of an assault by the plaintiff on any day previous to the day alleged in the declaration; and if the plaintiff cannot answer the assault so proved, the defendant will be entitled to a verdict.[5] But if the general issue is pleaded, or the declaration contains charges of several assaults, the plaintiff is not thus restricted, and the defendant's evidence must apply to the assault proved.[6]

§ 96. **Replication De Injuria.** In regard to the replication of *de injuria*, the general rule is, that, as it puts in issue only the matter alleged in the plea, nothing can be given in evidence under it which is beyond and out of the plea. The plaintiff cannot go into proof of new matter, tending to show that the defendant's plea, though true, does not justify the actual injury. He cannot, for example, show that the defendant, being in his house, abused his family and refused to depart, and, upon his gently laying hands on him to put him out, the defendant furiously assaulted and beat him.[1] So, if the defendant justifies in defence of his master, the plaintiff cannot, under this issue, prove that his own assault of the master was justifiable.[2] So, if the defendant, being a magistrate, justifies an assault and imprisonment as a lawful commitment for a bailable offence, the plaintiff cannot show, under this issue, that sufficient bail was offered and refused.[3]

§ 97. **Moderate Castigavit.** To support the plea of *moderate castigavit*, the defendant must show that the plaintiff was his apprentice, by producing the indentures of apprenticeship. He must also produce evidence of misbehavior on the part of the plaintiff, sufficient to justify the correction given.[1] The same rules apply where the relation is that of parent and child, or jailer and prisoner, or schoolmaster and scholar,[2] or shipmaster and seaman. It must also be shown that the correction was reasonable and moderate; though in the case of shipmasters, if the chastisement was salutary and merited, and there was no cruelty, or use of improper weapons, the admiralty courts will give to the terms "moderate correction" more latitude of interpretation.[3]

[4] Penn *v.* Ward, 2 Cr. Mees. & Rosc. 338; Dale *v.* Wood, 7 J. B. Moore 33; Piggott *v.* Kemp, 1 Cr. & Mees. 197; Selby *v.* Bardons, 3 B. & Ad. 1; 1 Cr. & Mees. 500; Bowen *v.* Parry, 1 C. & P. 394; Lamb *v.* Burnett, 1 Cr. & Jer. 291; 2 Chitty's Prec. 731, 732; Oakes *v.* Wood, 3 M. & W. 150.

[5] Randle *v.* Webb, 1 Esp. 38; Gibson *v.* Fleming, 1 Har. & J. 483.

[6] Downs *v.* Skrymsher, Brownl. 233; Bull. N. P. 17; 1 Steph. N. P. 222.

[1] King *v.* Phippard, Carth. 280.

[2] Webber *v.* Liversuch, Peake's Ad. Cas. 51.

[3] Sayre *v.* Earl of Rochford, 2 W. Bl. 1165.

[1] 1 Saund. on Pl. & Ev. 107. In the case of a hired servant, the right to inflict corporal punishment, by way of discipline or punishment, is denied: Matthews *v.* Terry, 10 Conn. 455. If the servant is a young child, placed with a master *in loco parentis*, the ordinary domestic discipline would probably be quite justifiable.

[2] 1 Hawk. P. C. c. 60, § 23.

[3] Watson *v.* Christie, 2 B. & P. 224; Brown *v.* Howard, 14 Johns. 119; Thorn *v.* White, 1 Pet. Adm. 173; Sampson *v.* Smith, 15 Mass. 365.

§ 98. **Molliter Manus Imposuit.** Under the plea of *molliter manus imposuit* the matters justified are of great variety; but they will be found to fall under one of these general heads, namely, the prevention of some unlawful act, or resistance, for some lawful cause. If the force was applied to put the plaintiff out of the defendant's house, into which he had unlawfully entered, or to resist his unlawful attempt to enter by force, it is sufficient to show the unlawfulness of the entry, or of the attempt, without showing a request to depart. But if the entry was lawful, as if the house were public, or, being private, if he entered upon leave, whether given expressly or tacitly and by usage, there it is necessary to show that he was requested to depart, and unlawfully refused so to do, before the application of force can be justified.[1] And in all these cases, to make good the justification, it must appear that no more force was employed than the exigency reasonably demanded.[2] If there was a wilful battery, and it is justified, the defendant must show that the plaintiff resisted by force, to repel which the battery was necessary. And whenever the justification is founded on a defence of the possession of property, it is, ordinarily, sufficient for the defendant to show his lawful possession at the time, without adducing proof of an indefeasible title;[3] and in such cases a temporary right of possession is suffi-

[1] Esp. on Evid. 155, 156; Gregory *v.* Hill, 8 T. R. 299; Bull. N. P. 18, 19; Green *v.* Goddard, 2 Salk. 641; Williams *v.* Jones, 2 Stra. 1049; Green *v.* Bartram, 4 C. & P. 308; Rose *v.* Wilson, 1 Bing. 353; s. c. 8 J. B. Moore 362; Weaver *v.* Bush, 8 T. R. 78; Tullay *v.* Reed, 1 C. & P. 6; Adams *v.* Freeman, 12 Johns. 408.

[2] Imason *v.* Cope, 5 C. & P. 193; Esp. on Evid. 156; Eyre *v.* Norsworthy, 4 C. & P. 502; Simpson *v.* Morris, 4 Taunt. 821; Bush *v.* Parker, 1 Bing. N. C. 72; {Hanson *v.* E. & N. A. R. R. Co., 62 Me. 84; Coleman *v.* N. Y. & N. H. R. R. Co., 106 Mass. 160. And the party who justifies the use of force must prove the circumstances of justification: ibid. See also Brown *v.* Gordon, 1 Gray (Mass.) 182.} [But see Higgins *v.* Minaghan, 78 Wis. 602; Talmage *v.* Smith, 101 Mich. 370; Mengedoht *v.* Von Dorn, 48 Neb. 880. The burden is on the plaintiff to show cruelty: Finnell *v.* Bohannon, 44 S. W. 94, Ky.]

[3] Skeville *v.* Avery, Cro. Car. 138; Esp. on Evid. 156; 1 Saund. on Pl. & Evid. 107. {A Catholic priest has no right, by virtue of his priestly character, to forcibly remove from a room a person lawfully there, though the priest is about to administer an office of religion to a sick person at the latter's request: Cooper *v.* McKenna, 124 Mass. 284; [O'Donnell *v.* McIntyre, 118 N. Y. 156.]

The question whether a landlord, who forcibly enters upon a tenant holding over after the expiration of his term, and expels him, is liable to an action of tort for the entry on the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, is one which has been decided differently in different courts. The early case of Newton *v.* Harland, 1 M. & G. 644, decided in the affirmative as far as trespass for assault and battery is concerned. In Harvey *v.* Brydges, 14 M. & W. 437, Parke, B., says, "When a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification, to say that the plaintiff was in possession of the land against the will of the defendant who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." The doctrine of Newton *v.* Harland was questioned in Davis *v.* Burrell, 10 C. B. 821, and finally overruled in Blades *v.* Higgs, 10 C. B. N. S. 713. The principle thus decided in England is affirmed in Massachusetts

cient. Thus, where no person dwelt in the house, but the defendant's servant had the key, to let himself in to work, this was held sufficient evidence of the defendant's possession, as against every one but the owner.[4] So, where a county jail, the title to which was vested by statute in the justices of the county, was in the actual occupancy of the stewards of a musical festival, as it had been on similar occasions, as they occurred, for several years, but there was no evidence of any express permission from the justices, yet this was held a sufficient possession, against a person intruding himself into the hall without leave.[5]

§ 99. **Justification.** If the assault and battery is justified, as done to *preserve the peace*, or to prevent a crime, the defendant must show that the plaintiff was upon the point of doing an act which would have broken the peace, or would manifestly have endangered the person of another, or was felonious;[1] and if the interference was to prevent others from fighting, he must show that he first required them to desist.[2] If the trespass justified consisted in arresting the plaintiff as a felon, without warrant, the defendant must prove either that a felony was committed by the plaintiff, in his presence; or that the plaintiff stood indicted of felony; or that he was found attempting to commit a felony; or that he had actually committed a felony, and that the defendant, acting with good intentions, and upon such information as created a reasonable and probable ground of suspicion, apprehended the party in order to carry him before a magistrate.[3] It seems also to have been held that the defendant may in like manner justify the detention of the plaintiff, as found walking about suspiciously in the night, until he gave a good account of himself;[4] or because he was a common and notorious cheat, going about the country and cheating by playing with false dice and other tricks, being taken in the fact, to be carried before a magistrate; or that he was found in the practice of other offences, in the like manner scandalous and prejudicial to the public.[5]

in the case of Low *v.* Elwell, 121 Mass. 309; in which the case of Sampson *v.* Henry, 13 Pick. (Mass.) 36, is criticised. And in accord with this decision are Sterling *v.* Warden, 51 N. H. 217; Kellam *v.* Janson, 17 Pa. St. 467; Rich *v.* Keyser, 54 id. 86. *Contra*, Bliss *v.* Johnson, 73 N. Y. 529; Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Dustin *v.* Cowdry, 23 Vt. 631. See 4 Am. Law Rev. 429.]

[4] Hall *v.* Davis, 2 C. & P. 33.

[5] Thomas *v.* Marsh, 5 C. & P. 596.

[1] Handcock *v.* Baker, 2 B. & P. 260.

[2] Hawk. P. C. b. 1, c. 31, § 49; 1 East P. C. 304.

[3] Hawk. P. C. b. 2, c. 12, §§ 18, 19; 4 Bl. Comm. 293; 1 East P. C. 300, 301, 1 Russ. on Crimes, 723–725; 1 Deacon Crim. Law, 48, 49; Ledwith *v.* Catchpole, Cald. 291, per Ld. Mansfield; R. *v.* Hunt, 1 Mood. Cr. Cas. 93; Stonehouse *v.* Elliott, 6 T. R. 315.

[4] Hawk. P. C. b. 2, c. 12, § 20. But this is now doubted, unless the defendant is a peace-officer: 1 East P. C. 303; 1 Russ. on Crimes, 726, 727.

[5] Hawk. P. C. b. 2, c. 12, § 20; Holyday *v.* Oxenbridge, Cro. Car. 234; s. c. W. Jones 249; 2 Roll. Abr. 546.

§ 100. **Same Subject.** It is further to be observed, that, whenever the defendant justifies the laying of hands on the plaintiff, to take him into custody as an offender, he ought to be prepared with evidence to show that he detained him only until an officer could be sent for to take charge of him, or that he proceeded without unnecessary delay to take him to a magistrate, or peace-officer, or otherwise to deal with him according to law.[1]

Defences by magistrates and other officers will be treated hereafter, under appropriate heads.

[1] Esp. on Evid. 158; Rose *v.* Wilson, 1 Bing. 353.

ASSUMPSIT.

§ 101. **Scope of the Chapter.** Under this head it is proposed to consider only those matters which pertain to this form of action, for whatever cause it may be brought, and to the common counts, referring, for the particular causes of special *assumpsit*, such as Bills of Exchange, Insurance, etc., and for particular issues in this action, such as Infancy, Payment, and the like, to their appropriate titles.

§ 102. **Contracts, express and implied.** The distinction between general or *implied contracts*, and special or *express contracts*, lies not in the nature of the undertaking, but in the mode of proof. The action of *assumpsit* is founded upon an undertaking, or promise of the defendant, not under seal,[1] and the averment always is, that he

[1] {When a contract under seal has been modified by a subsequent parol agreement, changing some of the contract provisions, the proper form of action on the modified agreement is *assumpsit*, not covenant. But this is only true when the sealed contract is wholly or partly superseded by the new parol agreement, so that performance by the parties after the parol modification is not an execution of the original contract, but an execution of the modified contract. Thus, where in a sealed contract it is provided that the work shall be finished on a certain day, or, upon the happening of a certain contingency, upon such later day as a third person shall determine, the fact that the time is extended under such provision does not make it proper to sue in *assumpsit*, but the remedy is still in covenant: King *v.* Lamoille Valley R. R. Co., 51 Vt. 369. An action of *assumpsit* on the common money counts will lie to recover the amount of a tax paid by the plaintiff for the use of the defendant, although the duty of the defendant to pay the tax arose upon his contract under seal for the sale of land to the plaintiff; for the action is not based on the contract, which is only evidence of the duty, and this may be established as well by a contract under seal as in any other way: Curtis *v.* Flint, etc. R. R. Co., 32 Mich. 291.

It is a settled rule that when goods are wrongfully taken or detained, the owner may waive the tort and recover on a count for money had and received in *assumpsit*. See *post*, §§ 265, n. 1, 120, n. 9, and 108. [See Keener on Quasi-Contracts, 193.] But in such cases there must be some evidence that the goods have been actually converted into money by the wrong-doer, or that raises a presumption that he has assumed the ownership of the goods as vendee. Thus where the facts were that the plaintiff sent a certain number of logs to the defendant, who owned and operated a saw-mill, to be sawed, and only a part of the lumber was returned to the plaintiff, leaving a large part unaccounted for, and the plaintiff sued on the common counts, Sharswood, J., said that if it had been an action on the case for *negligence*, or there had been a count upon a contract to keep as *bailee*, it might have been well, but that to support the action there must be some evidence that goods have been actually converted into money by the wrong-doer, or the circumstances must be such as to raise a presumption that he had done so: Satterlee *v.* Melick, 76 Pa. St. 62; and to the same effect, Bethlehem *v.* Fire Co., 81 id. 445. In the leading case upon this point, Longchamp *v.* Kelly, Dougl. 137, where the defendant took a masquerade ticket to sell for plaintiff, and neither accounted for the price nor returned the ticket, Lord Mansfield held that it was a fair presumption that the defendant had sold it, and the plaintiff could recover under the count for money had and received.}

undertook and promised to pay the money sued for, or to do the act mentioned. The evidence of the promise may be direct, or it may be circumstantial, to be considered and weighed by the jury; or the promise may be imperatively and conclusively presumed by law, from the existing relations proved between the parties; in which case, the relation being proved, the jury are bound to find the promise. Thus, where the defendant is proved to have in his hands the money of the plaintiff, which, *ex æquo et bono*, he ought to refund, the law conclusively presumes that he has promised so to do, and the jury are bound to find accordingly; and, after verdict, the promise is presumed to have been actually proved.[2]

§ 103. **When Promise implied.** The law, however, presumes a promise only where it does not appear that there is any special agreement between the parties.[1] For if there is a *special contract*, which is still open and unrescinded, embracing the *same subject-matter* with the *common counts*, the plaintiff, though he should fail to prove his case under the special count, will not be permitted to recover upon the common counts.[2] Thus, where the plaintiff paid seventy guineas for a pair of coach-horses, which the defendant agreed to take back if the plaintiff should disapprove them; and, being dissatisfied with them, he offered to return them, but the defendant refused to receive them back; it was held that the plaintiff could not recover the amount paid in an action for money had and received, but should declare upon the special contract.[3] So, where a seaman shipped for a voyage out and home, with a stipulation that his wages should not be paid until the return of the ship, and he was wrongfully discharged in a foreign port; it was held that he could not recover upon the common counts, but must sue for breach of the special contract, it being still in force.[4] But though there is a count on a special agreement, yet if the plaintiff fails altogether to prove its existence, he may then proceed upon the common counts.[5]

[2] [On the whole subject of contracts implied in law, or quasi-contracts, see Keener on Quasi-Contracts.]

[1] Toussaint *v.* Martinnant, 2 T. R. 105, per Buller, J.; Cutter *v.* Powell, 6 T. R. 320.

[2] Cooke *v.* Munstone, 1 New Rep. 365; Bull. N. P. 139; Lawes on Assumpsit, pp. 7, 12; Young *v.* Preston, 4 Cranch 239; Russell *v.* South Britain Society, 9 Conn. 508; Clark *v.* Smith, 14 Johns. 326; Jennings *v.* Camp. 13 id. 94; Wood *v.* Edwards, 19 id. 205; {Sargent *v.* Adams, 3 Gray (Mass.) 72; Streeter *v.* Sumner, 19 N. H. 516. But the contract must necessarily be a valid one. So, if there has been a parol contract for the sale of land, void under the Statute of Frauds, and the land has been conveyed in accordance with that contract, *assumpsit* will lie to recover the price. The action in such a case is based on the *implied* promise, not on the parol contract: Basford *v.* Allen, 9 Allen (Mass.) 387. The plaintiff cannot in such case recover the value of the land as agreed upon in the parol contract, but only what the land is reasonably worth: Long *v.* Woodman, 65 Me. 56.}

[3] Weston *v.* Downes, 1 Doug. 23; Power *v.* Wells, Cowp. 818; Towers *v.* Barrett, 1 T. R. 133.

[4] Hulle *v.* Heightman, 2 East 145.

[5] Harris *v.* Oke, Bull. N. P. 139; Paine *v.* Bacomb, 2 Doug. 651; 1 New Rep. 355, 356; 2 Smith L. C. 1 and n.

§ 104. **Pleading.** The law on this subject may be reduced to these three *general rules.*[1] (1) So long as the contract continues *executory*, the plaintiff must declare specially; but when it has been *executed* on his part, and nothing remains but the payment of the price in money, by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election.[2] If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though on the common counts, must not be brought until the term of credit has expired.[3] This election to sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff. (2) Where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant. Here, the plaintiff may resort to the common counts alone, for remuneration for what he has done under the special agreement. But, in order to do this, it is not enough to prove that the plaintiff was hindered by the defendant from performing the contract on his part; for we have just seen that in such case he must sue upon the agreement itself. It must appear, from the circumstances, that he was at liberty to treat it as at an end.[4] (3) Where it appears that

[1] See Lawes on Assumpsit, pp. 2–12. See also Mead *v.* Degolyer, 16 Wend. 637, 638, per Bronson, J.; Cooke *v.* Munstone, 1 New Rep. 355; Bull. N. P. 139; Tuttle *v.* Mayo, 7 Johns. 132; Robertson *v.* Lynch, 18 id. 451; Linningdale *v.* Livingston, 10 id. 36; Keyes *v.* Stone, 5 Mass. 391; Jennings *v.* Camp, 13 Johns. 94; Clark *v.* Smith, 14 id. 326.

[2] Gordon *v.* Martin, Fitzg. 303; Paine *v.* Bacomb, 2 Doug. 651, cited 1 New Rep. 355, 356; Streeter *v.* Horlock, 1 Bing. 34, 37; Study *v.* Sanders, 5 B. & C. 628, per Holroyd, J.; Tuttle *v.* Mayo, 7 Johns. 132; Robertson *v.* Lynch, 18 id. 451; Felton *v.* Dickenson, 10 Mass. 287; Baker *v.* Corey, 19 Pick. 496; Pitkin *v.* Frink, 8 Met. 16; {New Hampshire, etc. Ins. Co. *v.* Hunt, 10 Foster (N. H.) 219; Hale *v.* Handy, 6 id. 206; Wright *v.* Morris, 15 Ark. 444; [Sands *v.* Potter, 165 Ill. 397; Nicol *v.* Fitch, 72 N. W. 988, Mich. The burden is on the plaintiff to show complete performance: Parmly *v.* Farrar, 169 Ill. 606.] A declaration alleging a promise by the defendant to pay the plaintiff a sum of money is supported by proof of a promise to do certain other things, and pay the money, if the payment of the money is all that remains to be done: Holbrook *v.* Dow, 1 Allen (Mass.) 397.}

[3] Robson *v.* Godfrey, 1 Stark. 220; Moorehead *v.* Fry, 24 Pa. St. 37. {Where goods are sold and delivered, to be paid for by a note or bill payable at a future day, and the note or bill is *not given*, the vendor cannot maintain *assumpsit* on the general count for goods sold and delivered until the credit has expired, but he may sue immediately for a breach of the special agreement. Hanna *v.* Mills, 21 Wend. (N. Y.) 90; Mussen *v.* Price, 4 East 147; Manton *v.* Gammon, 7 Ill. App. 201.}

[4] Giles *v.* Edwards, 7 T. R. 181; Burn *v.* Miller, 4 Taunt. 745; Hulle *v.* Heightman, 2 East 145; Linningdale *v.* Livingston, 10 Johns. 36; Raymond *v.* Bearnard, 12 id. 274; Mead *v.* Degolyer, 16 Wend. 632; Canada *v.* Canada, 6 Cush. 15. {Thus, where one subscribed to stock of a company and paid for it, and the contract was then rescinded by both parties, the subscriber was allowed to recover the money so paid: Woolen Mills Co. *v.* Titus, 35 Ohio St. 253. Cf. Mitchell *v.* Scott, 41 Mich. 108; Cutter *v.* Powell, 2 Sm. Lead. Cas. 1; Howard *v.* Daly, 61 N. Y. 362. In Chicago *v.* Tilly, 103 U. S. 146, the principle is said to be that when the plaintiff has performed part of a contract according to its terms, and he has been prevented from performing the

what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him. Here, the plaintiff cannot recover upon the contract, from which he has departed, yet he may recover upon the common counts,[5] for the reasonable value of the benefit which, upon the whole, the defendant has derived from what he has done.[6]

§ 105. **Consideration.** In all actions upon contracts not under seal, except generally in suits by indorsees, it is incumbent on the plaintiff under the general issue to prove a *consideration*[1] for the alleged promise of the defendant; and this, in actions upon the common counts, can ordinarily be done only by proof of all the circumstances of the transaction. Thus, proof of the relation of landlord and tenant is sufficient proof of consideration for a promise to manage the farm in a husbandlike manner.[2] And this manner is proved by evidence of the prevalent course of husbandry in that neighborhood.[3] The same evidence will also, necessarily, disclose a *privity* existing between the defendant and the plaintiff; for if the plaintiff is a

residue by the failure of the other party to do his part, he may recover compensation for the work actually done; and to support this the following authorities are cited: Planché *v.* Colburn, 8 Bing. 14; Goodman *v.* Pocock, 15 Q. B. 576; Hall *v.* Ripley, 10 Pa. St. 231; Moulton *v.* Trask, 9 Metc. (Mass.) 577; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167; Derby *v.* Johnson, 21 Vt. 17. In Fitzgerald *v.* Allen, 128 Mass. 232, the rule is stated to be that, if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a count upon a *quantum meruit;* in which case, the actual benefit which the defendant receives from the plaintiff is to be paid for independently of the terms of the contract: Hayward *v.* Leonard, 7 Pick. (Mass.) 181, is relied upon as establishing the rule.}

[5] Keck's Case, Bull. N. P. 139; Burn *v.* Miller, 4 Taunt. 745; Streeter *v.* Horlock, 1 Bing. 34, 37; Jennings *v.* Camp, 13 Johns. 94; Jewell *v.* Scroeppel, 4 Cowen, 564; [Columbus Safe Deposit Co. *v.* Burke, 88 F. 630, U. S. App.] {Either *indebitatus assumpsit* or *quantum meruit:* Andre *v.* Hardin, 32 Mich. 324.} If the contract has been performed as far as it extended, but something beyond it has been done, as if a building were erected, with some additions not specified in the written agreement, the party must declare on the special agreement, as far as it goes, and in the common counts for the excess. Pepper *v.* Burland, Peake's Cas. 103; Dunn *v.* Body, 1 Stark. 175; Robson *v.* Godfrey, id. 220.

[6] Taft *v.* Montague, 14 Mass. 282; {Cutter *v.* Powell, 2 Smith L. C. 1 and notes. In cases where, notwithstanding the breach of a special contract, the party in fault can still recover upon a *quantum meruit*, the special contract is sometimes competent evidence upon the question of what the services are reasonably worth: Clark *v.* Gilbert, 32 Barb. (N. Y.) 576.} In an action for work and materials, where it appears that they were furnished pursuant to an express contract, the plaintiff must prove the terms of the contract. He cannot, in the first instance, abandon the contract, and recover on a *quantum meruit:* but must prove its terms, its fulfilment, the deviations, if any, and the additional work: Smith *v.* Smith, 1 Sandf. S. C. 206; {White *v.* Oliver, 36 Me. 92; Davis *v.* Barrington, 30 N. H. 517; Hubbard *v.* Belden, 37 Vt. 645; Patrick *v.* Putnam, id. 759; Bassett *v.* Sanborn, 9 Cush. (Mass.) 58; Gleason *v.* Smith, ib. 484. See Hutchison *v.* Cullum, 23 Ala. 622.}

[1] As to what constitutes a sufficient consideration, see 21 Am. Jurist 257–286; 1 Stephen's Nisi Prius, pp. 240–260; Chitty on Contr. 22–25; 2 Kent Comm. 463–468; Story on Contracts, c. 4. That the entire consideration must be proved, see *ante*, Vol. I. §§ 66–68.

[2] Powley *v.* Walker, 5 T. R. 373.

[3] Leigh *v.* Hewitt, 4 East 154.

stranger to the consideration, he cannot recover.[4] And in all these cases the plaintiff may recover as much as he proves to be due to him, within the sum mentioned in the count. If the contract is in writing, and recites that a valuable consideration has been received, this is *prima facie* evidence of the fact, and the necessity of controlling it is devolved on the defendant. If the action is founded on a document, or memorandum, usually circulating as evidence of property, such as a bank check, or the like, proof of the usage and course of business may suffice as evidence of the consideration, until this presumption is outweighed by opposing proof.

§ 106. **General Issue; Damages.** As the general issue is a traverse of all the *material allegations* in the declaration, it will be further necessary for the plaintiff, under this issue, to prove all the other material facts alleged; such as the performance of conditions precedent, if any, on his own part; notice to the defendant; request; where these are material, and the like; together with the amount of damages sustained by the breach of the agreement. Damages cannot, in general, be recovered beyond the amount of the *ad damnum* laid in the declaration; but in actions for torts to personal chattels, the

[4] The common counts are in this form: "For that the said (defendant), on the —— day of ——, was indebted to the plaintiff in the sum of ——" [if for *goods sold*, say, "for goods then sold and delivered," or, "bargained and sold," if the case be so, "by the plaintiff to the said (defendant) at his request"], "and, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand. Yet," etc.

— [if for *work and materials*, say, "for work then done, and materials for the same provided, by the plaintiff for the said (defendant) at his request," —]

— [if *money lent*, say, "for money then lent by the plaintiff to the said (defendant) at his request," —]

— [if for *money paid*, say, "for money then paid by the plaintiff for the use of the said (defendant) at his request," —]

— [if for *money received*, say, "for money then received by the said (defendant) for the use of the plaintiff," —]

— [if upon an *insimul computassent*, say, "for money found to be due from the said (defendant) to the plaintiff upon an account then stated between them," —]

These counts may now, by the new rules of practice in the English courts, and by those of some of the American States, be consolidated into one. Indeed, it is conceived that they may be consolidated by the general principles of the law of pleading; and it was so practised in Massachusetts for many years. The consolidated count may be as follows: "For that the said (defendant), on the —— day of ——, was indebted to the plaintiff in the sum of —— for goods then sold and delivered by the plaintiff to the said (defendant) at his request; and in the sum of —— for work then done, and materials for the same provided, by the plaintiff for the said (defendant) at his request; and in the sum of —— for money then lent by the plaintiff to the said (defendant) at his request; and in the sum of —— for money then paid by the plaintiff for the use of the said (defendant) at his request; and in the sum of —— for money then received by the said (defendant) for the use of the plaintiff; and in the sum of —— for money found to be due from the said (defendant) to the plaintiff upon an account then stated between them; and, in consideration thereof, then and there promised the plaintiff to pay him the several moneys aforesaid upon demand. Yet the said (defendant) has never paid any of said moneys, but wholly neglects to do so. See 1 Chitty's Prec. p. 43, a, b; Reg. Sup. Jud. Court, Mass., 1836, p. 44. Where the declaration alleges a debt for work and labor, and a debt for goods sold, etc., with one general promise to pay, the statement of each debt is regarded as a separate count; but where there is only one statement of debt, though founded on several considerations, it is one count only: Morse *v.* James, 11 M. & W. 831.

jury are not bound by the value of the goods, as alleged in the count, but may find the actual value, if it do not exceed the *ad damnum*.[1]

§ 107. **When Request must be proved.** In actions upon the common counts for goods sold, work and materials furnished, money lent, and money paid, a *request* by the defendant is material to be proved;[1] for, ordinarily, no man can make himself the creditor of another by any act of his own, unsolicited, and purely officious.[2] Nor is a mere *moral obligation*, in the ethical sense of the term, without any pecuniary benefit to the party, or previous request, a sufficient consideration to support even an express promise;[3] unless where a legal obligation once existed, which is barred by positive statute, or rule of law, such as the statute of limitations, or of bankruptcy, or the law of infancy, coverture, or the like.[4] But where the act done is bene-

[1] Steph. on Pl. 318; Hutchins *v.* Adams, 3 Greenl. 174; Pratt *v.* Thomas, Ware 427; The Jonge Bastiaan, 5 Rob. Adm. 322.

[1] It has, however, recently been held that in an *indebitatus assumpsit* for money lent, and perhaps in a count for goods sold and delivered, a request need not be alleged, though it is otherwise in a count for money paid: Victors *v.* Davis, 1 Dowl. & L. 984. In those cases a request is involved in the nature of the transaction. [The law does not require direct evidence of a request. It may be proved, as other facts in a trial may be proved, by circumstantial evidence. The relations of the parties, the kind and amount of labor performed, and whether with or without the defendant's knowledge, will furnish satisfactory proof on this point: Hill *v.* Packard, 69 Me. 158.]

[2] [To render the defendant liable the plaintiff must show (1) the act for which he seeks compensation; (2) expectation of payment (Johnson *v.* Boston, etc. R., 69 Vt. 521; Lafontain *v.* Hayhurst, 89 Me. 388) from the defendant (Coleman *v.* U. S., 152 U. S. 96) on the part of the plaintiff, or ignorance on the part of the defendant of the absence of such expectation (Thomas *v.* Thomasville Shooting Club, 28 S. E. 293, N. C.; *sed qu.*); (3) knowledge of the plaintiff's expectation, or reason to know thereof on the part of the defendant at the time the act was done (Price *v.* Hay, 132 Ill. 543); (4) in New Hampshire only, that the defendant expected to pay for the act (Clark *v.* Sanborn, 36 A. 14, N. H.). As to the effect of the family relation upon the inference of a promise to pay, see Goodhart *v.* Penn. R., 177 Pa. 1; Arnold *v.* Wise, 37 S. W. 83, Ky.; Bell *v.* Rice, 50 Neb. 547; Cann *v.* Cann, 40 W. Va. 138; Harriman on Contracts, 43–45.]

[3] [Morris *v.* Norton, 43 U. S. App. 739; Com'rs Court *v.* Street, 22 S. 629, Ala.; Wilcox *v.* Arnold, 116 N. C. 708; Harriman on Contracts, 84.]

[4] Chitty on Contracts, pp. 40–42; Story on Contr. § 143; 1 Steph. N. P. 246–249; Eastwood *v.* Kenyon, 11 Ad. & El. 438; Ferrers *v.* Costello, 1 Longf. & Towns. 292; Mellen *v.* Whipple, 1 Gray 317. So, where the drawer of a bill of exchange had not been duly notified of its dishonor, but nevertheless promised the holder that he would pay it, the promise was held binding: Rodgers *v.* Stephens, 2 T. R. 713; Lundie *v.* Robertson, 7 East 231; Story on Bills, § 320. See also Duhammel *v.* Pickering, 2 Stark. 90. The nature of the moral obligation referred to in the text is thus stated in a lucid and highly instructive series of articles on the Law of Contracts, attributed to Mr. Justice Metcalf. "It is frequently asserted in the books, that a moral obligation is a sufficient consideration for an express promise, though not for an implied one. The terms 'moral obligation,' however, are not to be understood in their broad ethical sense; but merely to denote those duties which would be enforced at law, through the medium of an implied promise, if it were not for some positive rule, which, with a view to general benefit, exempts the party, in the particular instance, from legal liability.

"A promise to pay a debt barred by the statute of limitations, or discharged under a bankrupt law, falls into this class of cases. So, of an adult's promise to pay a debt contracted during his infancy, and of a borrower's promise to pay principal and lawful interest of a sum loaned to him on a usurious contract; and of a widow to pay a debt, or fulfil other contracts made during coverture. So of a promise by the drawer of a bill of exchange, or the indorser of a bill or note, to pay it, though he has not received seasonable notice of the default of other parties. So of a promise by a lessor to pay

ficial to the other party, whether he was himself legally bound to have done it or not, his subsequent express promise will be binding; and even his subsequent assent will be sufficient evidence, from which the jury may find a previous request, and he will be bound accordingly.[5] Thus, where an illegitimate child was put at nurse by the mother's friends, after which the father promised to pay the expenses, it was held by Lord Mansfield, that, as he was under an obligation to provide for the child, his bare approbation should be construed into a promise, and bind him.[6] So, where two persons were bail for a debtor, in several actions, and one of them, to prevent being fixed for the debt, pursued the debtor into another State, into which he had gone, and brought him back, thereby enabling the other also to surrender him, after which the latter party promised the former to pay his proportion of the expense of bringing the debtor back, this promise was held binding; for the parties had a joint interest in the act done, and were alike benefited by it.[7]

§ 108. **Assent of Defendant.** It is not necessary for the plaintiff to prove an express assent of the defendant, in order to enable the

for repairs made by a lessee, according to agreement, but not inserted in the lease; and a promise to refund money received in part payment of a debt, the evidence being lost, and the whole original debt having, in consequence of the loss, been recovered by a suit at law.

"In the foregoing cases, there was a good and sufficient original consideration for a promise, — a contract on which an action might have been supported, if there had not been a rule of law, founded on policy (but wholly unconnected with the doctrine of consideration), which entitled the promisor to exemption from legal liability. In most, if not all, these cases, the rule which entitled the party to exemption was established for his benefit. Such benefit or exemption he may waive; and he does waive it, by an express promise to pay. The consideration of such promise is the original transaction, which was beneficial to him, or detrimental to the other party.

"These cases give no sanction to the notion, that an express promise is of any binding validity, where there was nothing in the original engagement which the law regards as a legal consideration." See American Jurist, vol. xxi. pp. 276–278. {In Goulding *v.* Davidson, 26 N. Y. 609, Balcom, J., says: "There are cases where a moral obligation, that is founded upon an antecedent valuable consideration, is sufficient to sustain a promise, though the obligation on which it is founded never could have been enforced at law." See the opinions in this case, and note to the case in 3 Amer. Law Reg. N. S. 44; and Flight *v.* Reed, 9 Jur. N. S. 1016, 1018.} [And see Lawrence *v.* Oglesby, 52 N. E. 945, Ill.]

[5] 1 Saund. 264, n. (1), by Williams; Yelv. 41, n. (1), by Metcalf. [This is not the law: Roscorla *v.* Thomas, 3 Q. B. 234; Dearborn *v.* Bowman, 3 Met. 155; Cleaver *v.* Lenhart, 182 Pa. 285; Harriman on Contracts, 83.] This principle will reconcile some cases which seem to conflict with the general rule previously stated in the text. Thus, in Watson *v.* Turner, Bull. N. P. 129, 147, the overseers who made the express promise were legally bound to relieve the pauper, for whose benefit the plaintiff had furnished supplies. See 1 Selwyn N. P. 50, n. (11). So in Lord Suffield *v.* Bruce, 2 Stark. 175, the money had really been paid to the defendant's house by mistake, and the defendant had received the benefit of the payment, and was legally liable with the others to refund it, at the time of the promise. And, for aught that appears in the report, the promise of indemnity may have been made at the time of the payment, and afterwards repeated in the letter of the defendant. In Atkins *v.* Banwell, 2 East 505, which was an action between two parishes, for relief afforded to a pauper settled in the defendant parish, there was neither legal nor moral obligation, nor express promise, nor subsequent assent, on the part of the defendants. See also Wing *v.* Mill, 1 B. & A. 104.

[6] Scott *v.* Nelson, cited 1 Esp. N. P. 116.

[7] Greeves *v.* McAllister, 2 Binn. 591. See also Seago *v.* Deane, 4 Bing. 459.

jury to find a previous request; they may *infer it* from his *knowledge* of the plaintiff's act, and his silent *acquiescence*.[1] Thus, where the father knew where and by whom his minor daughter was boarded and clothed, but expressed no dissent, and did not take her away; this was held sufficient evidence, on the part of the plaintiff, to charge him for the expenses, unless he could show that they were incurred against his consent.[2] So, also, as is familiarly said, if one see another at work in his field, and do not forbid him, it is evidence of assent, and he will be holden to pay the value of his labor. And sometimes the jury may *infer a previous request*, even *contrary to the fact* on the ground of *legal obligations alone;* as, in an action against a husband for the funeral expenses of his wife, he having been beyond the seas at the time of her burial; or against executors for the funeral expenses of the testator for which they had neglected to give orders.[3] The law, however, does not ordinarily imply a promise, against the express declaration of the party.[4] Thus, a promise will not be implied, on the part of a judgment debtor, to pay for the use and occupation of land taken from him by legal process, where he denies the regularity of the proceedings.[5] But where there is a legal duty, paramount to the will of the party refusing to perform it, there, as we have before intimated, he is bound, notwithstanding any negative protestation. Thus, if a husband wrongfully turns his wife out of doors, or a father wrongfully discards his child, this is evidence sufficient to support a count against him in *assumpsit*, for their necessary support, furnished by any stranger.[6] And if one commit a tort on the goods of another, by which he gains a pecuniary benefit, as if he wrongfully takes the goods and sells them, or otherwise applies them to his own use, the owner may waive the tort, and charge him in *assumpsit* on the common counts, as for goods sold or money received, which he will not be permitted to gainsay.[7]

[1] See 22 Amer. Jurist, pp. 2–11, where the doctrine of the obligation of promises, founded upon considerations executed and past, is very clearly and ably expounded. See also Yelv. 41, n. (1), by Metcalf; Doty *v.* Wilson, 14 Johns. 378, 382, per Thompson, C. J. {The law will not raise an implied contract, conferring authority to do an act, where there existed no legal right to make an express contract authorizing such an act: Simpson *v.* Bowden, 33 Me. 549. See also Lewis *v.* Trickey, 20 Barb. (N. Y.) 387. It is sufficient proof of the employment of the plaintiff as engineer of a corporation, to show that he was recognized and consulted by the officers of the company as its agent, and that his plans, etc., were accepted and acted upon: Moline Water Power, etc. Co. *v.* Nichols, 26 Ill. 90.}

[2] Nichole *v.* Allen, 3 C. & P. 36.

[3] Jenkins *v.* Tucker, 1 H. Bl. 90; Tugwell *v.* Heyman, 3 Campb. 298; 10 Pick. 156. See also Alna *v.* Plummer, 4 Greenl. 258; Hanover *v.* Turner, 14 Mass. 227.

[4] Whiting *v.* Sullivan, 7 Mass. 107.

[5] Wyman *v.* Hook, 2 Greenl. 337.

[6] Robinson *v.* Gosnold, 6 Mod. 171; Valkinburg *v.* Watson, 13 Johns. 480; 20 Am. Jur. p. 9; 22 id. pp. 2–11.

[7] The proposition in the text is stated, in general terms, by Jackson, J., in Cummings *v.* Noyes, 10 Mass. 436; and by Mellen, C. J., in Webster *v.* Drinkwater, 5 Greenl. 323. The propriety of its application against the administrator of the wrongdoer was first established in Hambley *v.* Trott, Cowp. 372; and has since been ad-

§ 109. **Privity.** In regard to the *privity* necessary to be established between the parties, it is in general true, that an *entire stranger* to the consideration, namely, one who has taken no trouble or charge upon himself, and has conferred no benefit upon the promisor, cannot maintain the action in his own name. But it has been said, and after some conflict of opinion it seems now to be settled, that, in cases of simple contract, if one person makes a promise to another, for the benefit of a third, the last may maintain an action upon it, though the consideration did not move from him.[1] It seems, also, that the action may be maintained by either party.[2]

mitted, without hesitation: Cravath *v.* Plympton, 13 Mass. 454. It has, in several cases, been said to apply only to the case of money actually received on sale of the property wrongfully converted. But, in others, it has been further applied, so as to entitle the plaintiff to recover for the *beneficial use* of the thing taken: Chauncey *v.* Yeaton, 1 N. H. 451; 5 Greenl. 323; and for the *services* of his apprentice, seduced by the defendant: Lightly *v.* Clouston, 1 Taunt. 112; Foster *v.* Stewart, 3 M. & S. 191; and to the case where the defendant had received, not money, but a *promissory note*, for the price of the goods sold: Miller *v.* Miller, 7 Pick. 133. And, in other cases, the owner has been permitted to recover in this form of action, where the goods had not been sold by the defendant, but had been *actually applied* and converted by him to his own *beneficial use:* Hitchen *v.* Campbell, 2 W. Bl. 827; 2 Pick. 285, n.; Johnson *v.* Spiller, 1 Doug. 167, n.; Smith *v.* Hodson, 4 T. R. 211; Hill *v.* Davis, 3 N. H. 384. In Jones *v.* Hoar, 5 Pick. 285, where *assumpsit* was held not to lie for the value of timber-trees cut down upon the plaintiff's land, and carried away, it does not appear that the defendant had either sold the trees, or in any manner applied them to his own benefit. In Appleton *v.* Bancroft, 10 Met. 231, the officer was held liable, in *assumpsit* for money had and received, where he had *sold* the goods, but *had received nothing in payment*, it being his duty to sell for ready money. {As stated in the text, the principle is qualified by the restriction that *assumpsit* will only lie where the tort-feasor has either sold the article and received the money (Willett *v.* Willett, 3 Watts (Pa.) 277); or there is evidence to raise a presumption that he has done so: Bethlehem *v.* Fire Co., 81 Pa. St. 445. [See Keener on Quasi-Contracts, 173.]

The measure of damages in such a case will be the market value at the time of the conversion: Wagner *v.* Peterson, 83 Pa. St. 238.}

[1] 1 Com. Dig. 205, Action upon the Case upon Assumpsit, E.; 1 Vin. Abr. 333, pl. 5; ib. 334, 335, pl. 8; Dutton *v.* Poole, 1 Vent. 318, 332; s. c. 2 Lev. 210; s. c. T. Raym. 302, cited and approved by Lord Mansfield, Cowp. 443; 3 B. & P. 149, n. (*a*); Marchington *v.* Vernon, 1 B. & P. 101, n. (*c*); Rippon *v.* Norton, Yelv. 1; Whorewood *v.* Shaw, Yelv. 25, and n. (1), by Metcalf; Carnegie *v.* Waugh, 2 D. & R. 277; Garrett *v.* Handley, 4 B. & C. 664; Hall *v.* Marston, 17 Mass. 575, 579; ib. 404, per Parker, C. J.; Cabot *v.* Haskins, 3 Pick. 83, 92. See also 8 Johns. 58; 13 id. 497; 22 Amer. Jur. pp. 16–19; 11 Mass. 152, n. (*a*), by Rand; Bull. N. P. 133; Chitty on Contr. pp. 45–48.

So where land was conveyed by deed-poll, subject to a mortgage previously made by the grantor, and the deed recites that the sum secured by the mortgage is part of the consideration of the deed, and that the deed is on the condition that the grantee therein shall assume and pay the mortgage debt and the interest thereon, as they severally become due and payable; and the grantee enters upon and holds the estate, and does not pay the interest when it falls due, — the grantor, after paying the interest on the demand of the mortgagee, may maintain *assumpsit* against the grantee to recover the amount so paid: Pike *v.* Brown, 7 Cush. 133. See also Goodwin *v.* Gilbert, 9 Mass. 510; Felch *v.* Taylor, 13 Pick. 133; King *v.* Hutchins, 28 N. H. 561. {In Mellen *v.* Whipple, 1 Gray (Mass.) 317, the question was discussed in a well-considered opinion by Metcalf, J., as follows: "The maxim, that, 'on a promise not under seal, made by A to B for a good consideration to pay B's debt to C, C may sue A,' requires great modification, because it expresses an exception to the general rule, rather than the rule itself. By the recent decisions of the English courts, its operation is restricted

[2] Bell *v.* Chaplain, Hardr. 321; 1 Chitty on Pl. p. 5; 22 Am. Jurist, p. 19; Hammond on Parties, pp. 8, 9; Skinner *v.* Stocks, 4 B. & Ald. 437. See also Story on Agency, §§ 393, 394.

§ 110. **Joint Contracts.** Where there are *several plaintiffs*, it must be shown that the contract was made with them all; for, if all

within narrower limits than formerly; and the general rule is now more strictly enforced. That general rule is, and always has been, that a plaintiff in an action on a simple contract must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed: There must be a privity of contract between the plaintiff and the defendant, in order to render the defendant liable to an action by the plaintiff on the contract: Crow *v.* Rogers, 1 Stra. 592; Ross *v.* Milne, 12 Leigh, 204; Morrison *v.* Beckey, 6 Watts 349, Pa.; 1 Selw. N. P. (11th ed.) 49. The exceptions to this rule are included in the above maxim, and some of them may be included in three distinct classes.

"1. *Indebitatus assumpsit* for money had and received can be maintained in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind, a recovery has been had, where the promise was to a third person for the benefit of the plaintiff; such action being an equitable one, that can be supported by showing that the defendant has in his hands money, which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant.

"Most of the cases in this first class are those in which A has put money or property in B's hands as a fund from which A's creditors are to be paid, and B has promised, either expressly or by implication, from his acceptance of the money or property, without objection to the terms on which it was delivered to him, to pay such creditors. In such cases, the creditors have maintained actions against the holder of the fund: Disborn *v.* Denaby, 1 D'Anv. Abr. 64; Starkey *v.* Mill, Style, 296; Ellwood *v.* Monk, 5 Wend. (N. Y.) 235; Delaware & Hudson Canal Co. *v.* Westchester County Bank, 4 Denio, 97; Fleming *v.* Alter, 7 S. & R. (Pa.) 295; Beers *v.* Robinson, 9 Pa. St. 229. The cases in Massachusetts which clearly fall into this class are Arnold *v.* Lyman, 17 Mass. 400, recognized in Fitch *v.* Chandler, 4 Cush. (Mass.) 255; Hall *v.* Marston, 17 Mass. 575; and Felch *v.* Taylor, 13 Pick. (Mass.) 133. On close examination, the case of Carnegie and another *v.* Morrison and another, 2 Met. (Mass.) 381, will be found to belong to the same class. The Chief Justice there said: 'Bradford was indebted to the plaintiffs, and was desirous of paying them. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forebore to adopt other measures to pay the plaintiffs' debt.'

"By the recent English decisions, however, one to whom money is transmitted, to be paid a third person, is not liable to an action by that person, unless he has expressly agreed to pay him. And such was the opinion of Spencer, J., in Weston *v.* Barker, 12 Johns. (N. Y.) 282. See the English cases collected in 1 Archb. N. P. (Am. ed. 1848) 121–125.

"2. Cases where promises have been made to a father or uncle, for the benefit of a child or nephew, form a second class, in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made has been sometimes assigned as a reason for these decisions. And though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed by English judges, yet the decisions themselves have never been overruled, but are still regarded as settled law. Dutton *v.* Poole, 1 Vent. 318, is a familiarly known case of this kind, in which the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to fell it, the defendant would pay the daughter £1,000. The daughter maintained an action on this promise. Several like decisions had been previously made: Rookwood's Case, Cro. Eliz. 164; Oldham *v.* Bateman, 1 Roll. Abr. 31; Provender *v.* Wood, Hetl. 30; Thomas's Case, Style 461; Bell *v.* Chaplain, Hardr. 321. These cases support the decision of this court in Felton *v.* Dickinson, 10 Mass. 287. [A similar exception is recognized in New York, where a promise is made to the husband for the benefit of the wife. Buchanan *v.* Tilden, 52 N. E. 724, N. Y. But nearness of relationship is no longer recognized in England, or generally, in this country, as ground for an exception to the general rule. See Harriman on Contracts, 217.]

"3. The last case in this Commonwealth which was cited in support of the present action is Brewer *v.* Dyer, 7 Cush. (Mass.) 337. In that case the defendant gave to the lessee of a shop a written promise to take the lease, and pay to the lessor the rent, with the taxes, according to the terms of the lease. The defendant entered into possession

the promisees do not join, it is a ground of nonsuit. So, if too many should join.[1] And where the plaintiff sues in a *particular capacity*, as assignee of a bankrupt,[2] or surviving partner,[3] he must, under the general issue, prove his title to sue in that capacity. But the plaintiff need not, under the general issue, be prepared to prove that the contract was made with all the defendants; as the non-joinder of defendants can ordinarily be taken advantage of only by a plea in abatement.[4]

§ 111. **Unlawful Contracts.** It must also appear on the part of the plaintiff that the contract was not *unlawful*. For if it appears to have for its object anything forbidden by the laws of God, or contrary to good morals; or, if it appears to be a contract to do or omit, or to be in consideration of the doing or omission of any act, where such doing or omission is punishable by criminal process; or, if it appears to be contrary to sound public policy; or, if it appears to be in contravention of the provisions of any statute; in any of these cases the plaintiff cannot recover, but upon his own showing may be nonsuited. For the law never lends its aid to carry such agreements into effect, but leaves the parties as it finds them *in pari delicto*.[1] But though the principal contract were illegal, yet if

of the shop, with the knowledge of the lessor, and paid the rent to him for a year, and then left the shop. And it was decided that he was liable to the lessor for the subsequently accruing rent, and for the taxes, on his promise to the lessee."} [At common law no person not a party to a contract, nor in privity with such a party, can sue upon the contract: Price *v.* Easton, 4 B. & Ad. 433; Tweddle *v.* Atkinson, 1 B. & S. 393; Borden *v.* Boardman, 157 Mass. 410; Wheeler *v.* Stewart, 94 Mich. 445; Adams *v.* Kuehn, 119 Pa. 76; Woodcock *v.* Bostic, 118 N. C. 822; Willard *v.* Wood, 135 U. S. 309. The common-law rule has been more or less relaxed in many jurisdictions. In New York a stranger to the contract can sue upon it whenever the promise is to discharge some obligation of the promisor to him: Townsend *v.* Rackham, 143 N. Y. 516. For the great variety of decisions and theories in other States, see Harriman on Contracts, ch. viii.]

[1] Chitty on Pl. 6–8, 15; Brand *v.* Boulcott, 2 B. & P. 235.

[2] 1 Saund. on Plead. and Evid. 250–289.

[3] Wilson *v.* Hodges, 2 East 312.

[4] Chitty on Plead. 31–33, 52.

[1] See Chitty on Contracts, pp. 513–561; 22 Amer. Jurist, pp. 249–277; 23 Am. Jurist, pp. 1–23; Story on Contracts, cc. 5, 6; Greenwood *v.* Curtis, 6 Mass. 381; Pearson *v.* Lord, ib. 84; Worcester *v.* Eaton, 11 id. 368; Merwin *v.* Huntington, 2 Conn. 209; Babcock *v.* Thompson, 3 Pick. 446; Burt *v.* Place, 6 Cow. 431; Best *v.* Strong, 2 Wend. 319; Gregg *v.* Wyman, 4 Law Rep. N. S. 361, where the cases are collected. {Gregg *v.* Wyman, *supra*, decided that a person who lets a horse on the Lord's day, to be driven for pleasure, cannot recover of the bailee in tort for injury to the horse, by overdriving beyond the agreed limit; and this case was followed in Whelden *v.* Chappel, 8 R. I. 230. But it was denied in Woodman *v.* Hubbard, 25 N. H. 67; Morton *v.* Gloster, 46 Me. 520; and, upon reconsideration, expressly overruled in Hall *v.* Corcoran, 107 Mass. 251. See also Carroll *v.* St. Island R. R. Co., 58 N. Y. 126. Whether such an action could have been maintained had the horse been injured within the agreed limit, *quære*: Frost *v.* Plumb, 40 Conn. 111; Parker *v.* Latner, 60 Me. 528; Way *v.* Foster, 1 Allen (Mass.) 408. One cannot recover back money paid to an officer in the army as a bribe: Clark *v.* United States, 102 U. S. 322. Nor money paid for compounding a crime: Collins *v.* Lane, 80 N. Y. 627; Hayes *v.* Rudd, 83 id. 251; Comstock *v.* Tupper, 50 Vt. 596. Nor can he enforce as a *loan*, a transaction which was in fact a loss of money in gambling: Sampson *v.* Whitney, 27 La. Ann. 294. Mutual promises to marry between parties, each knowing that the other is married, are invalid, as *contra bonos mores*: Paddock *v.* Robinson, 63 Ill. 99. But if either party is unmarried, and is ignorant that the other is married, by him or her the action may be maintained: Cover *v.* Davenport, 1 Heisk. (Tenn.) 368; Kelley *v.* Riley, 106 Mass. 339; Niver *v.* Best, 4 Law Rep. N. S. 183.}

money has been advanced under it by one of the parties, and the contract still remains wholly *executory*, and not carried into effect, he may recover the money back upon the common money counts; for the policy of the law in both cases is to prevent the execution of illegal contracts; in the one case by refusing to enforce them, and in the other by encouraging the parties to repent, and recede from the iniquitous enterprise.[2] And the same rule is applied to cases where, though the contract is executed, the parties are not *in pari delicto;* the money having been obtained from the plaintiff by some undue advantage taken of him, or other wrong practised by the defendant.[3]

§ 112. **Money lent.** In proof of the count for *money lent*, it is not sufficient merely to show that the plaintiff delivered money or a bank-check to the defendant; for this, *prima facie*, is only evidence of the payment by the plaintiff of his own debt, antecedently due to the defendant.[1] He must prove that the transaction was essentially a loan of money.[2] If it was a loan of stock, this evidence, it seems, would not support the count.[3] But money deposited with a banker

[2] Chitty on Contracts, pp. 498, 499; Tappenden *v.* Randall, 2 B. & P. 467; Aubert *v.* Walsh, 3 Taunt. 277; Perkins *v.* Savage, 15 Wend. 412; White *v.* Franklin Bank, 22 Pick. 181, 189. {In Knowlton *v.* Congress, etc. Co., 57 N. Y. 518, Folger, C. J., comments on this rule as follows: "We have not been referred to any authority, nor have I found any, where money paid in part performance, and in *furtherance* of an illegal contract, has been recovered back where both parties were *particeps criminis*, and *in pari delicto*, and when its execution was in the control of the contracting parties themselves. There are, I concede, dicta and declarations in some of the elementary works, where the contrary rule or principle is apparently laid down without limitation or restriction;" and he concedes the rule only when both parties are not *in pari delicto*. This case was afterwards removed to the Circuit Court of the United States, and thence by appeal to the Supreme Court. The decision in that court is given in 103 U. S. 4–9. Mr. Justice Wood, delivering the opinion of the court, said: "The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated. We think the authorities sustain the affirmative of this position." He then cites 2 Comyns, Contracts, 361; Parsons, Contracts, vol. ii. p. 746; 2 Addison, Contracts, § 1412; Chitty, Contracts, 944; 2 Story, Contracts, § 617; 2 Greenl. Evid. § 111. See also Trover, § 638, note, and cases there cited.} [See Keener on Quasi-Contracts, 259 *et seq.*, where a doubtful distinction is drawn between contracts involving *malum prohibitum*, and those involving *malum in se*.]

[3] Ibid.; Worcester *v.* Eaton, 11 Mass. 376; Walker *v.* Ham, 2 N. H. 241; Amesbury Man. Co. *v.* Amesbury, 17 Mass. 461; Preston *v.* Boston, 12 Pick. 7; Atwater *v.* Woodbridge, 6 Conn. 223; Chase *v.* Dwinel, 7 Greenl. 134; Richardson *v.* Duncan, 3 N. H. 508; Clinton *v.* Strong, 9 Johns. 370; Mathers *v.* Pearson, 13 S. & R. 258.

[1] Welsh *v.* Seaborn, 1 Stark. 474; Cary *v.* Gerish, 4 Esp. 9; Cushing *v.* Gore, 15 Mass. 74. If the money was delivered by a parent to a child, it will be presumed an advancement or gift. Per Bayley, J., in Hick *v.* Keats, 4 B. & C. 71. {In Union Trust Co. *v.* Whiton, 9 Hun (N. Y.) 657, the action was for money loaned. The plaintiff produced a check purporting to be a check of the Union Trust Co., signed by its president and secretary, by which the Manhattan Co. was requested to pay to the order of the defendant a sum of money. This check was shown to have been *indorsed* by the defendant, and his handwriting was proved. The plaintiff's teller testified that it was a *loan* check. An envelope was produced from the plaintiff's papers, on which was indorsed, "Four months loan," and the defendant's name and the same date as the check. It was held that this was sufficient evidence of a loan to be submitted to the jury. The indorsement of the check by the defendant indicated that it had passed through his hands, and this raised a presumption that he had obtained the money on it.}

[2] Painter *v.* Abel, 9 Jur. N. S. 549.

[3] Nightingal *v.* Devisme, 5 Burr. 2589; Jones *v.* Brinley, 1 East 1.

by a customer in the usual way has been held to be money lent.[4] A promissory note is sufficient evidence of a loan between the original parties; even though it be payable on condition, if the condition has been performed; or be payable in specific articles, if the special promise is broken.[5] Indeed, a bill of exchange or promissory note seems now to be considered as *prima facie* proof of the money counts, in any action between the immediate parties, whether they were original parties or subsequent, as indorsees or bearers, claiming against the original drawers, or makers.[6] So, if the plaintiff has become the assignee of a debt with the assent of the debtor, this is equivalent to a loan of the money.[7] So, if A owes a sum definite and certain to B, and B owes the same amount to C, and the parties agree that A shall be debtor to C in B's stead, this is equivalent to a loan by C to A.[8] This is an exception to the general rule of law, that a debt cannot be assigned; and is permitted only where the sum is ascertained and defined beyond dispute.[9]

§ 113. **Money paid.** To sustain the count for *money paid*, the plaintiff must prove the actual payment,[1] and the defendant's prior request so to do, or his subsequent assent and approval of the act, to be shown in the manner and by the methods already stated.[2] And if the money has been paid by the defendant's request, with an undertaking express or implied on his part to repay the amount, it is immaterial whether the defendant has been relieved from liability or otherwise profited by the payment or not.[3] Whether the plaintiff

[4] Pott *v.* Clegg, 11 Jur. 289; Pollock, C. B., *dubitante*. But see 11 Jur. 157, 158.

[5] Payson *v.* Whitcomb, 15 Pick. 212; Smith *v.* Smith, 2 Johns. 235; Crandall *v.* Bradley, 7 Wend. 311.

[6] Bayley on Bills, pp. 390–393, and notes by Phillips and Sewall; Young *v.* Adams, 6 Mass. 189; Pierce *v.* Crafts, 12 Johns. 90; Denn *v.* Flack, 3 G. & J. 369; Wilde *v.* Fisher, 4 Pick. 421; Ramsdell *v.* Soule, 12 Pick. 126; Olcott *v.* Rathbone, 5 Wend. 490; Ellsworth *v.* Brewer, 11 Pick. 316; Edgerton *v.* Brackett, 11 N. H. 218; Fairbanks *v.* Stanley, 6 Shepl. 296; Goodwin *v.* Morse, 9 Metc. 278; Moore *v.* Moore, id. 417. But not if the note is not negotiable, and expresses no value received: Saxton *v.* Johnson, 10 Johns. 418. The defendant may make any defence to the note, when offered under the money counts, which would be open to him under any other count: Austin *v.* Rodman, 1 Hawks 195. But he can have no other defence than would be open to him under a special count upon the note: Hart *v.* Ayers, 9 Ohio 5. It has been held that an I O U, though evidence of account stated, is not evidence of money lent: Fessenmayer *v.* Adcock, 16 M. & W. 449. {An action upon the common count for money lent will lie against an acceptor of a draft in favor of a person who discounted it: Butler *v.* American Toy Co., 46 Conn. 136.}

[7] 1 Steph. N. P. 316; 2 Stark. Ev. 61. See Mowry *v.* Todd, 12 Mass. 281. If the contract assigned is a specialty, the rule is the same: Compton *v.* Jones, 4 Cow. 13. But it has been questioned whether *assumpsit* lies, in such case, without an express promise to the assignee: Dubois *v.* Doubleday, 9 Wend. 317. In this case, there was not sufficient evidence to raise even an implied promise.

[8] Wade *v.* Wilson, 1 East 795; Wilson *v.* Coupland, 5 B. & Ald. 228; Hamilton *v.* Starkweather, 28 Conn. 130.

[9] Fairlee *v.* Denton, 8 B. & C. 395.

[1] {Power *v.* Butcher, 10 B. & C. 329, 346; Whiting *v.* Aldrich, 117 Mass. 582.}

[2] *Supra*, §§ 107, 108. [Crumlish *v.* Central Imp. Co., 38 W. Va. 390.]

[3] Britain *v.* Lloyd, 14 M. & W. 762. {In Emery *v.* Hobson, 62 Me. 578, the same point was adjudged in the same way, after a very full citation of the authorities by counsel (which are set out in the report). Appleton, C. J., giving the opinion of the

can recover under this count, without proof of the actual payment of money, and by only showing that he had become liable at all events to pay money, for the defendant, is a point upon which there has been some apparent conflict of decisions. It has been held in England, that where the plaintiff had given his own negotiable promissory note, which the creditor accepted as a substitute for the debt due by the defendant, he was entitled to recover the amount under this count, though the note still remained unpaid.[4] And it has also been held that, where he had become liable for the debt by giving his bond, though he thereby procured the defendant's discharge, he could not recover the amount from the defendant until he had actually paid the money due by the bond.[5] The latter rule has been adopted and followed by the American courts, on the ground that the bond is not negotiable, nor treated as money in the ordinary transactions of business,[6] but they also hold that the giving of a bill of exchange or negotiable note by the plaintiff, which has been accepted by the creditor in satisfaction of the defendant's debt, is sufficient to support the count for money paid.[7] If, however, the plaintiff has obtained a discharge of his own liability by the payment of less than the full amount, it has been held that he can recover only the sum actually paid.[8] And in regard to the mode of payment, proof of anything given and received as cash, whether it be land or personal chattels, is sufficient to support this count.[9] If incidental damages, such as costs and the like, have been incurred by a surety, they can be proved only under a special count;[10] unless the suit was defended at the request of the principal debtor, and for his sole benefit, the defendant being but a nominal party, such, for example, as an accommodation acceptor.[11]

court, relied on Britain *v.* Lloyd, 14 M. & W. 762, — the case cited by the author, — to support the rule, and also cited Lewis *v.* Campbell, 14 Jur. 396, where a similar decision was given on the same point.]

[4] Barclay *v.* Gouch, 2 Esp. 571.

[5] Taylor *v.* Higgins, 3 East 169; Maxwell *v.* Jameson, 2 B. & Ald. 51; Power *v.* Butcher, 10 B. & C. 329, 346, per Parke, J.

[6] Cumming *v.* Hackley, 8 Johns. 202; 4 Pick. 447, per Wilde, J. And see Gardner *v.* Cleveland, 9 Pick. 334. The entry of judgment on the bond, and issuing of execution, does not vary the case: Morrison *v.* Berkey, 7 S. & R. 238. Whether being taken in execution would, *quære;* and see Parker *v.* United States, 1 Peters C. C. 266.

[7] Douglass *v.* Moody, 9 Mass. 553; Cornwall *v.* Gould, 4 Pick. 444; Pearson *v.* Parker, 3 N. H. 366; 8 Johns. 206; Craig *v.* Craig, 5 Rawle 91, 98, per Gibson, C. J.; Lapham *v.* Barnes, 2 Vt. 213; McLellan *v.* Crofton, 6 Greenl. 331–333. And see Dole *v.* Hayden, 1 id. 152; Ingalls *v.* Dennett, 6 id. 80; Clark *v.* Foxcroft, 7 id. 355; Van Ostrand *v.* Reed, 1 Wend. 424; Morrison *v.* Berkey, 7 S. & R. 238, 246; Beardsley *v.* Root, 11 Johns. 464.

[8] Bonney *v.* Seeley, 2 Wend. 481.

[9] Ainslee *v.* Wilson, 7 Cowen 662, 669; Bonney *v.* Seeley, 2 Wend. 481; Randall *v.* Rich, 11 Mass. 498, per Parker, C. J.; [Floyd *v.* Day, 3 Mass. 403; Blaisdell *v.* Gladwin, 4 Cush. (Mass.) 373. It is quite indifferent how the surety extinguishes the debt. If he do it in any mode, it is, so far as the principal is concerned, equivalent to the payment of money for his benefit, and at his request: Hulett *v.* Soullard, 26 Vt. 298.]

[10] Seaver *v.* Seaver, 6 C. & P. 673; Gillett *v.* Rippon, 1 M. & Malk. 406; Knight *v.* Hughes, ib. 247; s. c. 3 C. & P. 466; Smith *v.* Compton, 3 B. & Ad. 407.

[11] Howes *v.* Martin, 1 Esp. 162.

§ 114. **Money paid per Order.** If the money has been paid to a third person, in compliance with a *written order* of the defendant in that person's favor, the possession of the order by the plaintiff will generally be *prima facie* evidence that he has paid the money.[1] Where *no express order* or request has been given, it will ordinarily be sufficient for the plaintiff to show that he has paid money for the defendant for a *reasonable cause*, and *not officiously*.[2] Thus this count has been sustained, for money paid to relieve a neighbor's goods from legal distraint in his absence;[3] to defray the expenses of his wife's funeral;[4] to apprehend the defendant, for whom the plaintiff had become bail, and bring him to court, so that he might be surrendered;[5] to discharge a debt of the defendant, for which the plaintiff had become surety;[6] or for which the plaintiff's goods, being on the premises of the defendant, had been justly distrained

[1] Blunt *v.* Starkie, 1 Taylor 110; s. c. 2 Hayw. 75.

[2] Brown *v.* Hodgson, 4 Taunt. 190, per Mansfield, C. J.; Skillen *v.* Merrill, 16 Mass. 40. "Whenever the consideration of a promise is *executory*, there must, *ex necessitate rei*, have been a request on the part of the person promising. For if A promise to remunerate B, in consideration that B will perform something specified, that amounts to a request to B to perform the act for which he is to be remunerated. See King *v.* Sears, 2 C. M. & R. 53. Where the consideration is *executed*, unless there have been an antecedent request, no action is maintainable upon the promise; for a request must be laid in the declaration, and proved, if put in issue, at the trial: Child *v.* Morley, 8 T. R. 610; Stokes *v.* Lewis, 1 id. 20; Naish *v.* Tatlock, 2 H. Bl. 319; Hayes *v.* Warren, 2 Str. 933; Richardson *v.* Hall, 1 B. & B. 50; Durnford *v.* Messiter, 5 M. & S. 446. See Reg. Gen. Hil. 1832, pl. 8. For a mere voluntary courtesy is not sufficient to support a subsequent promise; but where there was previous request, the courtesy was not merely voluntary, nor is the promise *nudum pactum*, but couples itself with and relates back to the previous request, and the merits of the party, which were procured by that request, and is therefore on a good consideration. Such request may be either *express* or *implied*. If it had not been made in express terms, it will be implied under the following circumstances: First, where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable: Jeffreys *v.* Gurr, 2 B. & Ad. 833; Pownall *v.* Ferrand, 6 B. & C. 439; Exall *v.* Partridge, 8 T. R. 308; Toussaint *v.* Martinnant, 2 id. 100. Secondly, when the defendant has adopted and enjoyed the benefit of the consideration; for in that case the maxim applies, "omnis ratihabitio retrotrahitur et mandato æquiparatur." Thirdly, where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant, afterwards, in consideration thereof, *expressly* promises: Wennall *v.* Adney, 3 B. & P. 250, *in notis*; Wing *v.* Mill, 1 B. & A. 104; Steph. N. P. (8th ed.) p. 57, n. 11; Paynter *v.* Williams, 1 C. & M. 818. But it must be observed that there is this distinction between this and the two former cases; namely, that in each of the two former cases the law will imply the *promise* as well as the *request*, whereas in this and the following case the *promise* is not implied, and the *request* is only then implied when there has been an express promise: Atkins *v.* Banwell, 2 East 505. Fourthly, in certain cases where the plaintiff *voluntarily* does that to which the defendant is *morally*, though not *legally*, compellable, and the defendant, afterwards, in consideration thereof, *expressly* promises. See Lee *v.* Muggeridge, 5 Taunt. 36; Watson *v.* Turner, Bull. N. P. 129, 147, 281; Trueman *v.* Fenton, Cowp. 544; Atkins *v.* Banwell, 2 East 505. But every *moral* obligation is not, perhaps, sufficient for this purpose. See, per Lord Tenterden, C. J., in Littlefield *v.* Shee, 2 B. & Adol. 811." See 1 Smith's Lead. Cas. p. 70, n. [But see Harriman on Contracts, 82–85.]

[3] Per Ld. Loughborough, 1 H. Bl. 93.

[4] Jenkins *v.* Tucker, 1 H. Bl. 90.

[5] Fisher *v.* Fellows, 5 Esp. 171.

[6] Exall *v.* Partridge, 8 T. R. 310, per Ld. Kenyon; Kemp *v.* Finden, 8 Jur. 65; Blaisdell *v.* Gladwin, 4 Cush. 378

by the landlord;[7] or for money paid to indemnify the owner for the loss of his goods, which the plaintiff, a carrier, had by mistake delivered to the defendant, who had consumed them for his own use.[8] So, where a debt has been paid by one of several debtors, or by one of several sureties, the payment is sufficient evidence in support of this count against the others, for contribution.[9] So, among merchants, when one has accepted a protested bill for the honor of one of the parties, which he has afterwards paid.[10] And, in general, where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which the defendant ought to have paid, this count will be supported.[11]

§ 115. **Money paid by Wrong-doer.** If the money appears to have been paid in consequence of the plaintiff's own voluntary breach of legal duty, or for a tort committed jointly with the defendant, it cannot be recovered.[1] The general *rule* is, that *wrong-doers* shall

[7] Exall *v.* Partridge, 8 T. R. 308.

[8] Brown *v.* Hodgson, 4 Taunt. 189, per Mansfield, C. J., and Heath, J. But in Sills *v.* Laing, 4 Campb. 81, Ld. Ellenborough ruled that, in such case, the plaintiff ought to declare specially.

[9] 1 Steph. N. P. 324–326.

[10] Smith *v.* Nissen, 1 T. R. 259; Vandewell *v.* Tyrell, 1 Mood. & Malk. 87; Story on Bills of Exchange, §§ 255, 256.

[11] 1 Steph. N. P. 324–326; Lubbock *v.* Tribe, 3 M. & W. 607; Colwell *v.* Edwards, 2 B. & P. 268; Alexander *v.* Vane, 1 M. & W. 511; Grissell *v.* Robinson, 3 Bing. N. C. 10. "One of the cases in which an *express request* is unnecessary, and in which a promise will be *implied*, is that in which the plaintiff has been compelled to do that to which the defendant was *legally* compellable. On this principle depends the right of a surety who had been damnified, to recover an indemnity from his principal: Toussaint *v.* Martinnant, 2 T. R. 100; Fisher *v.* Fellows, 5 Esp. 171. Thus the indorser of a bill, who has been sued by the holder, and has paid part of the amount, being a surety for the acceptor, may recover it back as money paid to his use, and at his request: Pownall *v.* Ferrand, 6 B. & C. 439. But then the surety must have been *compelled*, *i. e.* he must have been under a reasonable obligation and necessity to pay what he seeks to recover from his principal; for if he *improperly* defend an action, and incur costs, there will be no implied duty on the part of his principal to reimburse him those, unless the action was defended at the principal's request: Gillett *v.* Rippon, 1 M. & M. 406; Knight *v.* Hughes, ib. 247. See Smith *v.* Compton, 3 B. & Ad. 407. But if he make a reasonable and prudent compromise, he will be justified in doing so." 1 Smith's Lead. Cas. p. 70. If there were several principals, and one surety has paid the debt, each is severally liable for the whole sum: Duncan *v.* Keiffer, 3 Binn. 126. And where there are several sureties, if one, by paying the debt too soon, has deprived the other of an opportunity to relieve himself, he cannot have contribution: Skillin *v.* Merrill, 16 Mass. 40. {So where the plaintiff, in order to save his property from being sold on legal process, has paid a debt which was really due from the defendant, the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid at the defendant's express request: Nicholas *v.* Bucknam, 117 id. 488. But if the plaintiff has mistakenly paid money for the defendant when he was not obliged to, he cannot recover the money so paid: Whiting *v.* Aldrich, ib. 582.}

[1] Capp *v.* Topham, 6 East 392; Burdon *v.* Webb, 2 Esp. 527. {See also *ante*, § 111. Where the parties to a wager upon the result of an election deposited the amount bet with a stakeholder, and after the election was determined against the plaintiff, he demanded of the stakeholder repayment of his money, and forbade the winner to take it, but the stakeholder paid to the winner the identical money which the plaintiff had deposited with him, the plaintiff was allowed to recover the same of the winner, in an action of money had and received: McKee *v.* Manice, 11 Cush. (Mass.) 357. No one

not have contribution one from another. The *exception* is, that a party may, with respect to innocent acts, give an indemnity to another which shall be effectual; though the act, when it came to be questioned afterwards, would not be sustained in a court of law against third persons who complained of it. If one person induce another to do an act which cannot be supported, but which he may do without any breach of good faith or desire to break the law, an action on the indemnity, either express or implied, may be supported.[2] Thus, where the title to property is disputed, an agreement by persons interested to indemnify the sheriff for serving or neglecting to serve an execution upon the property, if made in good faith, and with intent to bring the title more conveniently to a legal decision, is clearly valid.[3] So, where a sheriff, having arrested the debtor on mesne process, discharged him on payment of the sum sworn to, but was afterwards obliged to pay the original plaintiff his interest, he was permitted to recover the latter sum from the debtor, under a count for money paid.[4] So, where the sheriff has been obliged to pay the debt, by reason of the negligent escape of the debtor, namely, an escape by the pure act of the prisoner, without the knowledge and against the consent of the officer, it seems he may recover the amount as money paid for the debtor.[5] But if the escape were voluntary on the part of the officer, the money paid could not be recovered of the debtor.[6]

§ 116. **Money paid upon a Judgment.** Where the money, which is sought to be recovered under the count for money paid has been *paid under a judgment* against the plaintiff, the record of the judgment, as we have heretofore shown,[1] is always admissible to prove the fact of the judgment, and the amount so paid. But it is not

knowingly participating in a transaction intended to accomplish a purpose forbidden by law can bring an action for any cause directly connected with that illegality: Foster *v.* Thurston, ib. 322; White *v.* Buss, 3 id. 448; Duffy *v.* Gorman, 10 id. 45; Mills *v.* Western Bank, ib. 22.}

[2] Betts *v.* Gibbins, 4 Nev. & M. 77, per Ld. Denman, C. J.; s. c. 2 Ad. & El. 57; Merryweather *v.* Nixan, 8 T. R. 186. {The rule of law, that wrong-doers cannot have redress or contribution against each other, is confined to those cases where the person claiming redress or contribution knew, or must be presumed to have known, that the act for which he has been mulcted in damages was unlawful: Jacobs *v.* Pollard, 10 Cush. (Mass.) 287. Thus, where A in good faith took up B's cattle damage-feasant, and C, a field-driver, at A's request, sold them at auction, and received the money; but the *proceedings* being irregular, A and C were in fact joint trespassers, it was held that A may maintain an action of money had and received against C for the proceeds of the sale of the cattle: ib.} [See Keener on Quasi-Contracts, 408; 12 Harvard Law Rev. 176.]

[3] Wright *v.* Lord Verney, 2 Doug. 240; Watson on Sheriffs, p. 380.

[4] Cordon *v.* Lord Massarene, Peake's Cas. 143.

[5] Eyles *v.* Faikney, Peake's Cas. 143, n. (*a*), *semble*. Better reported in 8 East 172, n.; 4 Mass. 373, per Parsons, C. J.; Appleby *v.* Clark, 10 id. 59.

[6] Pitcher *v.* Bailey, 8 East 171; Eyles *v* Faikney, ib. 172, n.; s. c. Peake's Cas. 143, n.; Martyn *v.* Blithman, Yelv. 197; Chitty on Contracts, pp. 526, 527; Ayer *v.* Hutchins, 4 Mass. 370; Denny *v.* Lincoln, 5 id. 385; Churchill *v.* Perkins, ib. 541; Hodgson *v.* Wilkins, 7 Greenl. 113.

[1] *Ante*, Vol. I. § 527.

admissible in proof of the facts on which the judgment was founded, unless the debtor, or person for whose default the action was brought, had due notice of its pendency, and might have defended it; in which case the record is conclusive against the delinquent party, as to all the material facts recited in it.[2]

§ 117. **Money had and received.** The count for *money had and received*, which in its spirits and objects has been likened to a bill in equity, may in general be proved by any legal evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. The subject of the action must either originally have been money; or that which the parties have agreed to treat as money; or, if originally goods, sufficient time must have elapsed, with the concurrence of circumstances, to justify the inference that they have been converted into money.[1] It is a liberal action, in which the plaintiff waives all tort, trespass, and damages, and claims only the money which the defendant has actually received.[2] But if the defendant has any legal or equitable lien on the money, or any right of cross-action upon the same transaction, the plaintiff can recover only the balance, after satisfying such counter demand.[3]

§ 118. **What is Money had and received.** In regard to *things treated as money*, it has been held that this count may be supported by evidence of the defendant's receipt of bank-notes;[1] or promissory

[2] *Ante*, Vol. I. §§ 527, 538, 539; Smith *v.* Compton, 3 B. & Ad. 407. "It is always advisable," observes Mr. Smith, "for the surety to let his principal know when he is threatened, and request directions from him; for the rule laid down by the King's Bench, in Smith *v.* Compton, is that the effect of want of notice (to the principal) is to let in the party who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms, if an opportunity had been given him. . . . The effect of notice to an indemnifying party is stated by Bullard, J., in Duffield *v.* Scott, 3 T. R. 374. The purpose of giving notice is not in order to give a ground for action; but if a demand be made which the party indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant, in the first action, was not bound to pay the money." See 1 Smith's Lead. Cas. 70, 71, n.

[1] [See Keener on Quasi-Contracts, 139.]

[2] Anon., Lofft, 320; Feltham *v.* Terry, cit. Cowp. 419; Moses *v.* MacFerlan, 2 Burr. 1005; Eastwick *v.* Hugg, 1 Dall. 222; Lee *v.* Shore, 1 B. & C. 94; Cowp. 749, per Ld. Mansfield; 4 M. & S. 748, per Ld. Ellenborough. But see Miller *v.* Atlee, 13 Jur. 431. {Thus, where one of several heirs orally agreed with his co-heirs that he should purchase certain stock of a corporation, for their joint benefit, taking the conveyance to himself, and that the other heirs should contribute their respective proportions of the purchase-money, and after purchase he refused to make any adjustment and distribution of the stock, and kept the stock and received dividends thereon, it was held that the other heirs might sue for the dividends in the action for money had and received: Colt *v.* Clapp, 127 Mass. 476.}

[3] Simpson *v.* Swan, 3 Campb. 291; Eddy *v.* Smith, 13 Wend. 488; Clift *v.* Stockdon, 4 Litt. 217; Bartlett *v.* Bramhall, 3 Gray 260.

[1] Pickard *v.* Bankes, 13 East 20; Lowndes *v.* Anderson, ib. 130; Mason *v.* Waite, 17 Mass. 560; Anslie *v.* Wilson, 7 Cow. 662.

notes;[2] or credit in account, in the books of a third person;[3] or a mortgage, assigned to the defendant as collateral security, and afterwards foreclosed and bought in by him;[4] or a note payable in specific articles;[5] or any chattel.[6] But not where the thing received was stocks,[7] goods,[8] or any other article; unless, in the understanding of the parties, it was considered and to be treated as money; or unless it was intended to be sold by the receiver, and sufficient time has elapsed for that purpose.[9] If the defendant was the agent of the plaintiff, and the evidence of his receipt of the money is in his own account, rendered to his principal, this will generally be conclusive against him, unless he can clearly show that it was unintentionally erroneous.[10] And if the agent or consignee of property to be sold refuses to render any account, it will, after a reasonable time, be presumed, if the contrary do not appear, that he has sold the goods, and holds the proceeds in his hands.[11]

§ 119. **Money to be specially applied.** Where the money was *delivered* to the defendant *for a particular purpose*, to which he refused to apply it, he cannot apply it to any other, but it may be recovered

[2] Floyd *v.* Day, 3 Mass. 405; Hinkley *v.* Fowle, 4 Shepl. 285; Tuttle *v.* Mayo, 7 Johns. 132; Fairbanks *v.* Blackinton, 9 Pick. 93. If the plaintiff under this count files a bill of particulars, stating his claim to be for the amount of a promissory note, which he describes, he will not be permitted to give evidence of the pre-existing debt for which the note was given: Bank U. S. *v.* Lyman, 5 Washb. 666.

[3] Andrew *v.* Robinson, 3 Campb. 199.

[4] Gilchrist *v.* Cunningham, 8 Wend. 641.

[5] Crandall *v.* Bradley, 7 Wend. 311; Taplin *v.* Packard, 8 Barb. 200.

[6] Arms *v.* Ashley, 4 Pick. 71; Mason *v.* Waite, 17 Mass. 560. {A stockholder of a corporation cannot sue in *assumpsit* for an *undeclared dividend:* for until a dividend is declared the money is not due to him, and the aim of such an action would be to regulate the receipts, disbursements, and liabilities of the company, which cannot be done by an action of *assumpsit:* Williston *v.* Michigan R. R. Co., 13 Allen (Mass.) 400. But where one bought shares of preferred stock in a railroad, and the act authorizing the issue of such stock provided that its holders should receive eight per cent dividends before any dividends should be paid to unpreferred stockholders, and the company afterwards declared a dividend of four per cent on *all the* stock, it was held that he could recover in *assumpsit* the difference between the four per cent dividend and the eight per cent guaranteed him: West Chester, etc. R. R. Co. *v.* Jackson, 77 Pa. St. 321.}

[7] Nightingal *v.* Devisme, 2 Burr. 2589; Jones *v.* Brinley, 1 East 1; Morrison *v.* Berkey, 7 S. & R. 246.

[8] Leery *v.* Goodson, 8 T. R. 687; Whitwill *v.* Bennett, 3 B. & P. 559.

[9] McLachan *v.* Evans, 1 Y. & Jer. 380; Longchamp *v.* Kenney, 1 Doug. 117; [Potts *v.* First N. B., 102 Ala. 286.]

[10] Shaw *v.* Picton, 4 B. & C. 717, 729; Shaw *v.* Dartnall, 6 id. 56. Where a factor sold goods on credit, to a person notoriously insolvent, taking the note of the purchaser, payable to himself, and passing the amount to his principal's credit in account, as money, which he afterwards paid over; it was held that he was not entitled, upon the failure of the purchaser, to recover this money back from the principal: Simpson *v.* Swan, 3 Campb. 291. But where, after the goods were consigned, but before the sale, the principal drew bills on the factor for the value, which he accepted; after which he sold the goods to a person in good credit, taking notes payable to himself, and rendered to the principal on account of the sale as for cash, not naming the purchaser, and the latter afterwards, and before the maturity of the notes, became insolvent; the principal was held liable to refund the money to the factor in this action: Greely *v.* Bartlett, 3 Greenl. 172.

[11] 2 Stark. Ev. 63; Selden *v.* Beale, 3 Greenl. 178.

back by the depositor, under the count for money had and received.[1] If it was placed in his hands to be paid over to a third person, which he agreed to do, such person, assenting thereto, may sue for it as money had and received to his own use.[2] But if the defendant did not consent so to appropriate it, it is otherwise, there being no privity between them; and the action will lie only by him who placed the money in his hands.[3] If the money was delivered with directions to appropriate it in a particular manner for the use of a third person, it has been held that the party depositing the money might countermand the order, and recover back in this action, at any time before the receiver had paid it over, or entered into any arrangement with the other party, by which he would be injured, if the original order was not carried into effect.[4] But if the money has been deposited in the hands of a trustee, for a specific purpose, such as for the conducting of a suit by him, as the party's attorney, or by two litigating parties, in trust for the prevailing party, it cannot be recovered back in this action till the trust is satisfied.[5] So, if money has been paid upon a condition which has not been complied with, it cannot be recovered as money had and received to the payer's use.[6]

§ 120. **Money obtained by Fraud.** The count for *money had and received* may also be supported by evidence that the defendant obtained the plaintiff's money *by fraud*, or false color or pretence.[1]

[1] De Bernales *v.* Fuller, 14 East 590, n.

[2] Com. Dig. 205, 206, Assumpsit, E. {But the sum so deposited must be for the sole benefit of the plaintiff, or his share must be a definite sum or portion of the whole; for if it is given to the defendant to pay several with, and the amount of the various claims is uncertain and variable, so that it cannot be ascertained what part of the money so deposited ought justly to be paid to the plaintiff, he cannot recover on the count for money had and received: Douglass *v.* Skinner, 44 Conn. 338.}

[3] Williams *v.* Everett, 14 East 582; Hall *v.* Marston, 17 Mass. 575, 579; Grant *v.* Austin, 3 Price 58.

[4] Gibson *v.* Minet, Ry. & M. 68; s. c. 1 C. & P. 247; s. c. 9 Moore 31; s. c. 2 Bing. 7; Lyte *v.* Peny, Dy. 49 *a*; Taylor *v.* Lendey, 9 East 49.

[5] Case *v.* Roberts, Holt's Cas. 500; Ker *v.* Osborn, 9 East 378. See 2 Story on Eq. Juris. §§ 793 *a*, 793 *b*. {A *cestui que trust* cannot bring an action at law against a trustee to recover for money had and received while the trust is still open; but when the trust has been closed and settled, the amount due the *cestui* established and certain, and nothing remains but to pay over the money, such an action may be maintained: Johnson *v.* Johnson, 120 Mass. 465.

It was held in Varnum *v.* Meserve, 8 Allen (Mass.) 158, that where a mortgage deed was executed, the wife joining, with a power of sale, and the land was sold under the power, *after the death* of the mortgagor, the administrator might sue the mortgagee for the surplus. In this case the surplus was specially reserved in the mortgage to the mortgagor and his *assigns*, omitting heirs, which seems to show a disposition to treat the surplus as *personalty*. On this ground the decision must be supported, for the better general rule is that laid down in Chaffee *v.* Franklin, 11 R. I. 578, where under similar circumstances it was held that the surplus was to be treated as realty, and that the administrator therefore could not sue for it. Cf. Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119, p. 130.}

[6] Hardingham *v.* Allen, 5 M. G. & S. 793; 17 Law Jour. C. P. 198.

[1] Steph. N. P. 335; Bliss *v.* Thompson, 4 Mass. 488; *supra*, § 108; Lyon *v.* Annable, 4 Conn. 350; [Robinson *v.* Welty, 40 W. Va. 385.] {So where one exhibiting a sealed instrument, which recites that the person exhibiting it has a claim for a sum of money on a third party (he having in fact no claim), fraudulently induces another

Thus, where one having a wife living, fraudulently married another, and received the rents of her estate, he was held liable to the latter, in this form of action.[2] And where the defendant has tortiously taken the plaintiff's property, and sold it, or, being lawfully possessed of it, has wrongfully sold it, the owner may, ordinarily, *waive the tort*, and recover the proceeds of the sale under this count.[3] So, if the money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort, and bring *assumpsit* upon the common counts. But this rule must be taken with this qualification: that the defendant is not thereby to be deprived of any benefit, which he could have derived under the appropriate form of action in tort.[4] Thus, this count cannot be supported, for money paid for the release of cattle distrained, *damage feasant*, though the distress was wrongful, where the right of common is the subject of dispute,[5] nor even where, though the distress was lawful, the sum demanded in damages was excessive if there had been no tender of amends,[6] nor for money received for rent, where the title to the premises is in question between the parties;[7] nor in any other case, where the title to real estate is the sub-

to buy it, and the other does so, and pays for it, and takes an assignment under seal on the back of the instrument, the person so defrauded may recover back the money so paid in assumpsit: Burton *v.* Driggs, 20 Wall. (U. S.) 125}

[2] Hasser *v.* Wallace, 1 Salk. 28.

[3] *Supra*, § 117; {National Oil Refining Co. *v.* Bush, 88 Pa. St. 835;} [Pritchard *v.* Budd, 42 U. S. App. 186; Nelson *v.* Kilbride, 71 N. W. 1089, Mich.; Downs *v.* Finnegan, 58 Minn. 112.] But the goods must have been sold, or this count cannot be maintained: Jones *v.* Hoar, 5 Pick. 285; [Reynolds *v.* Padgett, 94 Ga. 347.] And there must be a tort, to be waived, for which trespass or case would lie: Bigelow *v.* Jones, 10 Pick. 161; Bartlett *v.* Bramhall, 3 Gray 260.

[4] Lindon *v.* Hooper, Cowp. 414, 419; Anscomb *v.* Shore, 1 Campb. 285; Young *v.* Marshall, 8 Bing. 43.

[5] Lindon *v.* Hooper, Cowp. 414.

[6] Gulliver *v.* Cosens, 9 Jur. 666. The reason for this was stated by Coltman, J., in the following terms: "The plaintiff, if he had desired to recover his cattle, should have replevied. It is true, that, if he had done so, there would have been an avowry by the defendant, which the plaintiff could not have successfully resisted; but he might have allowed judgment in the replevin suit to have passed against him for default of prosecution, upon which an award of a return to the other party would have been made, after which the parties would have been remitted to their former situation. It would then have been for the plaintiff to have tendered sufficient amends; and, if the defendant afterwards refused to deliver up the cattle, an action of detinue to recover them back would have been maintainable. That is the mode pointed out by the law; but, instead of following that, the plaintiff pays the sum demanded, under protest, and brings this form of action of money had and received, in order to recover it back. The objection to that is, that the law has cast on him the duty of tendering the proper amount of compensation, whereas the effect of allowing the present action to lie would be to cast the burden of ascertaining the right amount on the other party. This case is different from that of a carrier, where the action of money had and received has been held to lie; for there the carrier, by claiming more than he is entitled to, is the wrong-doer. Neither does this properly come within the case of money paid under duress of goods, for duress implies an illegal detention; but here the defendant comes into and keeps possession of the cattle in a way which the law does not consider wrongful." See s. c. 1 Man. Gr. & Sc. 788, but not so fully reported.

[7] Cunningham *v.* Lawrents, 1 Bac. Abr. 260, n.; Newsome *v.* Graham, 10 B. & C. 234.

ject of controversy; that being a question which, ordinarily, cannot be tried in this form of action.[8]

§ 121. **Money obtained by duress, etc.** Under this count, the plaintiff may also recover back money proved to have been obtained from him by *duress, extortion, imposition,* or taking any *undue advantage* of his situation, or otherwise involuntarily and wrongfully paid; as by demand of illegal fees or claims,[1] tolls,[2] duties, taxes, usury, and the like, where goods or the person were detained until the money has been paid.[3] So, where goods were illegally detained as forfeited;[4]

[8] 1 Chitty on Pl. 95, 96, 121; Binney *v.* Chapman, 5 Pick. 130; Miller *v.* Miller, 7 id. 133; Codman *v.* Jenkins, 14 Mass. 96; Baker *v.* Howell, 6 S. & R. 481. But the right to an office may be tried in this form of action, if the plaintiff has once been in possession: Allen *v.* McKeen, 1 Sumn. 317; Green *v.* Hewitt, Peake's Cas. 182; R. *v.* Bishop of Chester, 1 T. R. 396, 403. {But where a deed purported to convey a certain number of feet of land, and in fact the piece of land sold contained a less number of feet, and the number mentioned in the deed could only be made up by including a strip of land claimed by the grantor and also by a third party, it was held that an action for money had and received would lie by the grantee, who had paid for the full number of feet; and that to support his action he might prove that the number of feet he obtained by the deed was in reality less than he bargained for, and that he did not get the extra strip because it belonged to the third party, and thus incidentally disprove the title of his grantor to the strip of land in question: Pickman *v.* Trinity Church, 123 Mass. 1.}

[1] Morgan *v.* Palmer, 2 B. & C. 729; Dew *v.* Parsons, 1 Chitty 295; s. c. 2 B. & Ad. 562; Walker *v.* Ham, 2 N. H. 238; Clinton *v.* Strong, 9 Johns. 370; Wakefield *v.* Newbon, 6 Ad. & El. N. S. 276. Even though the money were received and illegally claimed by a corporation: Hall *v.* Swansea. 5 id. 526. See further as to the principal point, Close *v.* Phillips, 7 M. & G. 586.

[2] Fearnley *v.* Morley, 5 B. & C. 25; Chase *v.* Dwinel, 7 Greenl. 135.

[3] Shaw *v.* Woodcock, 9 D. & R. 889; s. c. 7 B. & C. 73; Amesbury *v.* Amesbury, 17 Mass. 461; Perry *v.* Dover, 12 Pick. 206; Atwater *v.* Woodbridge, 6 Conn. 223; Elliott *v.* Swartwout, 10 Pet. 137; Parker *v.* Great Western Railw. Co., 8 Jur. 194; 7 Scott N. R. 835; s. c. 7 M. & G. 253; Valpy *v.* Manley, 9 Jur. 452; 1 M. G. & Sc. 594; [Keener on Quasi-Contracts, 426.] {In Radich *v.* Hutchins, 95 U. S. 210, the rule as to duress is stated thus: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making payment." Compare with this case American Steamship Co. *v.* Young, 89 Pa. St. 186. And in Baltimore *v.* Leffernan, 4 Gill (Md.) 425, it is said that "a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress, imposed upon it by the party to whom the money is paid."

In Briggs *v.* Boyd, 56 N. Y. 289, it was held that where one having possession of another's property refuses to deliver it up until money is paid to satisfy a lien which he claims upon it, but which is in fact unfounded, such a payment is made under duress. Cf. Van Santen *v.* Standard Oil Co., 81 N. Y. 171. So, in Chandler *v.* Sanger, 114 Mass. 364, it was held that when one paid money to free his goods from an attachment put on for the purpose of extorting money by one who knew he had no cause of action, this was a payment under duress. Payment to a collector of taxes, who has a tax-bill and warrant for levying the same, in the form prescribed by law, is not a voluntary payment, but is compulsory, and if the whole tax be illegally assessed, *assumpsit* will lie to recover it back: Joyner *v.* Egremont, 3 Cush. (Mass.) 567; *aliter,* as it seems, where the tax is not entirely void, the remedy then being by appeal: Wright *v.* Boston, 9 id. 233. Such a payment, if made without protest, is a voluntary payment, and the sum paid cannot be recovered back: New York & H. R. R. Co. *v.* Marsh, 2 Kernan (N. Y.) 308. See also Allentown *v.* Saeger, 20 Penn. St. (8 Harris) 421. Illegal taxes, assessed under color of law and voluntarily paid, cannot be recovered back: Christy *v.* St. Louis, 20 Mo. 143.}

[4] Irving *v.* Wilson, 4 T. R. 485.

or, where money was unlawfully demanded and paid to a creditor, to induce him to sign a bankrupt's certificate;[5] or, where a pawnbroker refused to deliver up the pledge, until a greater sum than was due was paid to him.[6] So, if the money had been paid under an usurious or other *illegal contract*, where the plaintiff is not *in pari delicto* with the defendant;[7] or, for a *consideration* which has *failed*;[8] or, where the goods of the plaintiff have been seized and sold by the defendant, under an execution to which he was a stranger;[9] or, under a *conviction* which has since been *quashed*, or a *judgment*, which has since been *reversed*, the defendant having received the money;[10] or, under *terror of legal process*, which, though regularly issued, did not authorize the collection of the sum demanded and paid.[11] So, where the *person is arrested* for improper purposes without just cause; or, for a just cause, but without lawful authority; or, for a just cause and by lawful authority, but for an improper purpose, and pays money to obtain his discharge, it may be recovered under this count.[12]

§ 122. **Money fraudulently obtained.** This count, ordinarily, may also be proved by evidence that the plaintiff paid the money to the defendant upon a security, afterwards discovered to be a *forgery*; provided the plaintiff was not bound to know the handwriting, or the defendant did not receive the money in good faith. Thus, where the defendant, becoming possessed of a lost bill of exchange, forged the payee's indorsement, and thereupon obtained its acceptance and payment for the drawees, he was held liable to refund the money in this action, though the bill was drawn by a commercial house in one country, upon a branch of the same house in another.[1] An acceptor,

[5] Smith *v.* Bromley, 2 Doug. 696 n.; Cockshott *v.* Bennett, 2 T. R. 763; Stock *v.* Mawson, 1 B. & P. 286. See Wilson *v.* Ray, 10 Ad. & El. 82.

[6] Astley *v.* Reynolds, 2 Str. 915; 1 Selw. N. P. 83 n.

[7] 1 Steph. N. P. 335–341; *supra*, § 111; 1 Selw. N. P. 84–94; Worcester *v.* Eaton, 11 Mass. 376; Boardman *v.* Roe, 13 Mass. 105; Wheaton *v.* Hibbard, 20 Johns. 290; Merwin *v.* Huntington, 2 Conn. 209. And see Perkins *v.* Savage, 15 Wend. 412; White *v.* Franklin Bank, 22 Pick. 181, 186–189.

[8] 1 Steph. N. P. 330–345.

[9] Oughton *v.* Seppings, 1 B. & Ad. 241.

[10] Feltham *v.* Terry, cit. Cowp. 419; 1 T. & R. 387; Bull. N. P. 131; 1 Steph. N. P. 357–359. See the cases cited in 9 U. S. Digest, 1st S. 123, 124. {Cf. Wilbur *v.* Sproat, 2 Gray (Mass.) 431. It is not necessary that the payment of money under the judgment should have been coerced by an execution. It is sufficient if it is made after judgment or adjudication made: Scholey *v.* Halsey, 72 N. Y. 578; Hiler *v.* Hiler, 35 Ohio St. 645; [Keener on Quasi-Contracts, 422.] The same principle applies where payments have been made under an assessment for city improvements, and the assessment is afterwards set aside on *certiorari*: Elizabeth *v.* Hill, 39 N. J. L. 555.}

[11] Snowdon *v.* Davis, 1 Taunt. 359. But see Marriott *v.* Hampton, 7 T. R. 269; 2 Esp. 546.

[12] Bull. N. P. 172, 173; 5 Com. Dig. Pleader, 2 W. 19; Richardson *v.* Duncan, 3 N. H. 508; Watkins *v.* Baird, 6 Mass. 596; [Keener on Quasi-Contracts, 438.]

[1] Cheap *v.* Harley, cit. 3 T. R. 127. {Thus, where A through fraud procured from B a promissory note, signed by B, payable to the order of C, and forged the indorsement of C, and got the note discounted at a bank, and on maturity B paid the note to the bank, it was held that B could maintain an action for money had and received against the bank, although the bank acted in good faith in taking the note. Carpenter *v.* Northborough National Bank, 123 Mass. 66.}

however, is bound to know the handwriting of the drawer of the bill; and a banker is in like manner bound to know the handwriting of his own customers; so that, in general, where they pay money upon the forgery of such signatures, to an innocent holder of the paper, the loss is their own.[2] Yet where a banker paid a bill to a remote indorsee, for the honor of his customer, who appeared as a prior indorser, but whose signature was forged, and on discovery of the forgery, he gave notice thereof and returned the bill to the holder, in season for him to obtain his remedy against the prior actual indorsers, it was held that he might, for this reason, recover back the money of the holder.[3] But where one wrote his check so carelessly as to be easily altered to a larger sum, so that the banker, when he paid it, could not discover the alteration, it was held to be the loss of the drawer.[4] So, if lost or stolen money, or securities, have come to the defendant's hands, *mala fide*, the owner may recover the value in this form of action.[5]

§ 123. **Money paid by Mistake.** In this manner, also, money is recovered back which has been *paid under a mistake of facts.* But here the plaintiff must show that the mistake was not chargeable to himself alone;[1] unless it was made through forgetfulness, in the hurry of business, in which case it may be recovered.[2] But if it was paid into court under a rule for that purpose, it is conclusive on the party paying, even though it should appear that he paid it erroneously.[3] Nor can money paid under a mistake of facts be reclaimed, where the plaintiff has derived a substantial benefit from the pay-

[2] Price *v.* Neale, 3 Burr. 1354; Smith *v.* Mercer, 6 Taunt. 76. {In National Bank *v.* Bangs, 106 Mass. 441, it was held that a bank may recover from the payee money paid on the forged check of one of its depositors, if it has been indorsed by the payee; and in Welch *v.* Goodwin, 123 Mass. 71, that if a person, through mistake, pays a promissory note purporting to be signed by himself, supposing the signature to be his own, he may, on discovering it to be forged, maintain an action to recover back the money paid, if he has not been guilty of laches, whereby the situation of the other party is injuriously affected.}

[3] Wilkinson *v.* Johnson, 3 B. & C. 428.

[4] Young *v.* Grote, 4 Bing. 253.

[5] 1 Steph. N. P. 353–355. But a party receiving a stolen bank-note *bona fide* and for value, may retain it against the former owner, from whom it has been stolen: Miller *v.* Race, 1 Burr. 452. So in the case of any other negotiable instrument actually negotiated: 1 Smith's Leading Cases, pp. 258–263 (Am. ed.); 43 Law Lib. 362–368; *post*, § 171.

[1] Milnes *v.* Duncan, 6 B. & C. 671, per Bayley, J.; Hamlet *v.* Richardson, 9 Bing. 647; Story on Contr. §§ 407–411. If one by mistake pay the debt of another, he may recover it back of him who received it, unless the latter was injured by the mistake. Tybout *v.* Thompson, 2 Browne 27. {So where one pays, after investigation, a claim made in good faith, but afterwards found to be baseless: McArthur *v.* Luce, 43 Mich. 435. What is a question of fact is often difficult to decide. In Talbot *v.* Bank of Commonwealth, 129 Mass. 67, it was held that the payment by an indorser of a note, from liability on which he had been released by a failure on the part of the holder to make proper demand on the maker, the indorser relying on the statements of the notary in the notice of protest, as to the demand, was money paid under a mistake of fact.} [It is now generally held that the fact that the plaintiff's mistake has been caused by his own negligence will not prevent recovery where the defendant can be placed *in statu quo:* Keener on Quasi-Contracts, 70.]

[2] Lucas *v.* Worswick, 1 M. & Rob. 293; {Meyer *v.* New York, 63 N. Y. 455.}

[3] 2 T. R. 648, per Buller, J.

ment;[4] nor where the defendant received it in good faith, in satisfaction of an equitable claim;[5] nor where it was due in honor and conscience.[6] The *laws of a foreign country* are regarded, in this connection, as matters of fact; and therefore money paid under a mistake of the law of another State may be recovered back. "Juris ignorantia est, cum jus nostrum ignoramus."[7] But it is well settled, that money paid under a mistake or *ignorance of the law* of our own country, but with a knowledge of the facts or the means of such knowledge, cannot be recovered back.[8]

§ 124. **Failure of Consideration.** This count may also be supported by proof that the defendant has received money of the plaintiff upon a *consideration which has failed;*[1] as, for goods sold to the plaintiff, but never delivered;[2] or, for an annuity granted, but afterwards set

[4] Norton *v.* Marden, 15 Me. 45.

[5] Moore *v.* Eddowes, 2 Ad. & El. 133; [Keener on Quasi-Contracts, 43.]

[6] Farmer *v.* Arundel, 2 W. Bl. 824, per De Grey, C. J.; [Keener on Quasi-Contracts, 43.]

[7] Haven *v.* Foster, 9 Pick. 112, 118; Story on Contr. § 408; [Keener on Quasi-Contracts, 92.]

[8] Chitty on Contr. 490, 491; 1 Story on Contr. § 407; Elliott *v.* Swartwout, 10 Pet. 147. [Keener on Quasi-Contracts, 85.] {But see, for some qualifications of this rule, the very valuable note appended to Black *v.* Ward, 15 Am. Rep. 171. Ignorance of the law of a foreign government is ignorance of fact, and in this respect the statute laws of other States of the Union are foreign laws. Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233. If the consideration of a note by an agent is money advanced to him for the use of his principal, under a mutual mistake of the legal capacity of the principal to authorize the giving of such note by his agent, and the lender, finding that neither the principal nor the agent is legally bound upon the note, demands the money of the agent before it is paid over to his principal, he may recover it of the agent in an action of money had and received: Jefts *v.* York, 10 Cush. (Mass.) 393. Where one with the full knowledge of the facts voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust; and the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back: Benson *v.* Monroe, 7 Cush. (Mass.) 125. In this case the money had been paid by the plaintiff under the requirements of a State statute, which the State courts had decided to be constitutional; and this decision, though it was afterwards reversed by the Federal courts, was, at the time of the payment, in full force. See also Forbes *v.* Appleton, 5 Cush. (Mass.) 115; Gooding *v.* Morgan, 37 Me. 419; Bontelle *v.* Melendy, 19 N. H. 196. Where, in a sale of an article subject to duty, the duty to be assessed was reckoned at five cents a pound more than the true duty, and this excess was deducted from the price to be paid, the vendor was permitted to maintain an action therefor: Renard *v.* Fiedler, 3 Duer (N. Y.) 318. Where one of several debtors pays a debt after it is barred by the statute, he cannot maintain a suit against the others: Wheatfield *v.* Brush Valley, 25 Penn. St. 112. Money voluntarily paid with full knowledge of the facts cannot be recovered back; but having the means of ascertaining the real facts is not the same as actual knowledge of them: Rutherford *v.* McIvor, 21 Ala. 750. See Townsend *v.* Crowdy, 8 C. B. N. S. 477; 7 Jur. N. S. 71, supporting this last proposition. Where money has been paid to an agent under a mistake of fact, and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money: Holland *v.* Russell, 9 W. R. 737.}

[1] Chitty on Contr. 487–490; 1 Steph. N. P. 330–332; Spring *v.* Coffin, 10 Mass. 34; [Tatoo *v.* Bailey, 67 Vt. 73.] As to the meaning of the term "failure of consideration" see Harriman on Contracts, 289–292. But in this form of action no damages are recovered beyond the money actually paid, and the interest: Neel *v.* Deans, 1 Nott & M'C. 210.

[2] Anon., 1 Stra. 407.

aside;[3] or, as a deposit on the purchase of an estate by the plaintiff, to which the defendant cannot make the title agreed for;[4] or, where payment has been innocently made in counterfeit bank-notes, or coins, if the plaintiff has offered to return them, within a reasonable time.[5] So, where the money was paid upon an *agreement which has been rescinded*,[6] whether by mutual consent, or by reason of fault in the defendant; the plaintiff showing that the defendant has been restored to his former rights of property, without unreasonable delay.[7] But if the agreement has been partially executed, and the parties cannot be reinstated *in statu quo*, the remedy is to be had only under a special count upon the contract.[8] Thus, where A was let into possession of a house belonging to B, under a parol agreement with the latter, that if A would make certain repairs, he should receive a lease for twelve years; and he made the repairs, but B refused to grant the lease; it was held that A could not recover in *assumpsit* for the value expended in repairs, because it did not appear that the agreement was mutually rescinded.[9]

§ 125. **Money received by an Agent.** In regard to *money received by an agent*, the general rule is, that the action to recall it must be brought against the principal only, since, in legal contemplation, the receipt was by the principal, with whom the agent was identified.[1] But the count for money had and received, against the agent alone, may be supported by proof that the principal was a foreigner, resident abroad; or, that the agent acted in his own name without disclosing his principal; or, that the money was obtained by the agent through his own bad faith, or wrong, whether alone, or jointly with the principal; or, that, at the time of paying the money into his

[3] Shove *v.* Webb, 1 T. R. 732.

[4] Alpass *v.* Watkins, 8 T. R. 516; Elliott *v.* Edwards, 3 B. & P. 181; Eames *v.* Savage, 14 Mass. 425. The plaintiff in such case must show that he has tendered the purchase-money and demanded a title: Hudson *v.* Swift, 20 Johns. 24. See also Gillett *v.* Maynard, 5 Johns. 85. {It seems to be established law in Massachusetts, that the action may be maintained without offering to return a counterfeit bank-note, for it is entirely worthless, and an offer to return it would be an idle ceremony: Kent *v.* Bornstein, 12 Allen 342. And so of counterfeit United States bonds: Brewster *v.* Burnett, 125 Mass. 68. But if the thing has *any value*, *e. g.* if on a promissory note there are forged indorsements, but the signature of the maker is genuine, it must be returned prior to bringing an action: Coolidge *v.* Brigham, 1 Metc. 547.}

[5] Young *v.* Adams, 6 Mass. 182; Markle *v.* Hatfield, 2 Johns. 455; Keene *v.* Thompson, 4 Gill & Johns. 463; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; ib. 33; Raymond *v.* Baar, 13 S. & R. 318.

[6] Gillett *v.* Maynard, 5 Johns. 85; Bradford *v.* Manley, 13 Mass. 139; Connor *v.* Henderson, 15 id. 319; [Thresher *v.* Stonington S. Bk., 68 Conn. 201.]

[7] Percival *v.* Blake, 2 C. & P. 514; Cash *v.* Giles, 3 id. 407; Reed *v.* McGrew, 5 Ham. (Ohio) 386; Warner *v.* Wheeler, 1 Chipm. 159. {Where a party, under contract to sell land to one, conveys the same, without his consent, to another, the original vendee is clearly entitled to regard his contract as rescinded, and to have restored what he paid on the contract: Atkinson *v.* Scott, 36 Mich. 18.}

[8] Hunt *v.* Silk, 5 East 449; Beed *v.* Blandford, 2 Y. & J. 278.

[9] Hopkins *v.* Richardson, 14 Law J. N. S. 80, Q. B.

[1] [Owen *v.* Cronk, 1895, 1 Q. B. 265; United States *v.* American Ex. N. B., 70 F 232.]

hands, or, at all events before he had paid it over, or had otherwise materially changed his situation or relations to the principal, in consequence of the receipt of the money, as by giving a new credit to him, or the like, he had notice not to pay it over to the principal.[2] But though he has not paid over the money, yet, if he is a mere collector or receiver, the right of the principal cannot be tried in this form of action.[3]

§ 126. **Account stated.**[1] In support of the count upon an *account stated*, the plaintiff must show that there was a demand on his side, which was acceded to by the defendant.[2] There must be a fixed and certain sum, admitted to be due;[3] but the sum need not be precisely proved as laid in the declaration.[4] The admission must have reference to past transactions, that is, to a subsisting debt, or to a moral obligation, founded on an extinguished legal obligation, to pay a certain sum;[5] but if the amount is not expressed, but only alluded to by the defendant, it may be shown, by other evidence, that the sum referred to was of a certain and agreed amount.[6] The admission may be shown to have been made to the plaintiff's wife, or other agent;[7] but an admission in conversation with a third person, not the plaintiff's agent, is not sufficient.[8] The admission itself must be voluntary, and not made upon compulsion;[9] and it must be absolute, and not qualified.[10] But it need not be express and in terms; for if the account be sent to the debtor, in a letter, which is received but not replied to in a reasonable time, the acquiescence of the party is taken as an admission that the account is truly stated.[11] So, if one

[2] Story on Agency, §§ 266–268, 300, 301; Paley on Agency, by Lloyd, pp. 388–394; 3 Chitty on Com. & Manuf. 213.

[3] Ibid.; Sadler *v.* Evans, 4 Burr. 1984; Allen *v.* McKeen, 1 Sumn. 277, 278, 317; [Ellis *v.* Goulton, 1893, 1 Q. B. 350.]

[1] [No express promise to pay is necessary to support this action. The admission of the correctness of the account establishes the obligation to pay the balance: Hendrix *v.* Kirkpatrick, 48 Neb. 670.]

[2] {There must be an assent by the party, to be charged, either express or fairly implied: Volkening *v.* DeGraaf, 81 N. Y. 268; Stenton *v.* Jerome, 54 N. Y. 480;} [Equitable Accident Ins. Co. *v.* Stout, 135 Ind. 444; Lowenthal *v.* Morris, 103 Ala. 332.]

[3] Porter *v.* Cooper, 4 Tyrwh. 456, 464, 465; s. c. 1 C. M. & R. 387; Knowles *v.* Michel, 13 East 249; Arthur *v.* Dartch, 9 Jur. 118; Perry *v.* Slade, 10 Jur. 31; Moseley *v.* Reade, ib. 18. An I O U is evidence of an account stated between the holder and the party signing it: Fessenmayer *v.* Adcock, 16 M. & W. 449. If the defendant has admitted a general balance, the plaintiff may recover, without going into the particulars of the account: Gregory *v.* Bailey, 4 Harringt. 256.

[4] Bull. N. P. 129. Proof of one item only will support the count: Highmore *v.* Primrose, 5 M. & S. 65, 67; Knowles *v.* Michel, 13 East 249; Pinchon *v.* Chilcott, 3 C. & P. 236.

[5] Clarke *v.* Webb, 4 Tyrwh. 673; s. c. 1 C. M. & R. 29; Tucker *v.* Barrows, 7 B. & C. 623; s. c. 3 C. & P. 85; Whitehead *v.* Howard, 2 B. & B. 372; Seagoe *v.* Dean, 3 C. & P. 170. An I O U is admissible: Payne *v.* Jenkins, 4 id. 324.

[6] Dixon *v.* Deverage, 2 C. & P. 109.

[7] Styart *v.* Rowland, 1 Show. 215; Bull. N. P. 129; Baynham *v.* Holt, 8 Jur. 963.

[8] Breckon *v.* Smith, 1 Ad. & El. 488.

[9] Tucker *v.* Barrows, 7 B. & C. 623; s. c. 3 C. & P. 85.

[10] Evans *v.* Verity, Ry. & M. 239.

[11] *Ante*, Vol. I. § 197.

item only is objected to, it is an admission of the rest.[12] So, if a third person is employed by both parties to examine the accounts in their presence, and he strikes a balance against one, which, though done without authority, is not objected to, it is sufficient proof of an account stated.[13] So, if accounts are submitted to arbitration, *by parol*, the award is sufficient proof of this count.[14]

§ 127. **Same Subject.** The *original form, or evidence of the debt,* is of no importance, under the count upon an *account stated;* for the stating of the account alters the nature of the debt, and is in the nature of a new promise or undertaking.[1] Therefore, if the original contract were void, by the Statute of Frauds, or the Stamp Act,[2] or if the items of the account were rents secured by specialty,[3] yet if, after the agreement is executed, there be an actual accounting and a promise express or implied to pay, it is sufficient. It is not necessary to prove the *items* of the account; for the action is founded, not upon these, but upon the defendant's consent to the balance ascertained.[4] And it is sufficient if the account be stated of what is due to the *plaintiff alone,* without deduction of any counter claim of the defendant.[5] But a *banker's pass-book* delivered to his customer, in which there are entries on one side only, is not evidence of an account stated between them, though the customer keeps the book in his custody, without making any objection to the entries contained in it.[6]

§ 128. **Same Subject.** It is not material *when the admission was made,* whether before or after action brought, if it be proved that a debt existed before suit, to which the conversation related.[1] But

[12] Chisman *v.* Count, 2 M. & Gr. 307.

[13] 1 Steph. N. P. 361.

[14] Keen *v.* Batshore, 1 Esp. 194. This case of Keen *v.* Batshore is said by Pollock, C. B., to have been decided chiefly on the ground that, as there were no arbitration bonds, and the parties must be presumed to have intended to do something, the arbitrator might well be regarded as their agent, examining and stating the accounts in their presence. Beyond this, its authority was denied in the recent case of Bates *v.* Townley, 12 Jur. 606, in which it was held that an award, made under a regular submission in writing, was no evidence of an account stated by either of the parties.

[1] Anon., 1 Ventr. 268; Foster *v.* Allanson, 2 T. R. 479, 482, per Ashhurst, J.; ib. 483, per Buller, J.; Holmes *v.* D'Camp, 1 Johns. 36, per Spencer, J. Therefore an account stated with a new firm may sometimes include debts due to a former firm, or to one of the partners: David *v.* Ellice, 5 B. & C. 196. And see Gough *v.* Davies, 4 Price 200; Moor *v.* Hill, Peake's Add. Cas. 10.

[2] Seagoe *v.* Dean, 3 C. & P. 170; s. c. 4 Bing. 459; Pinchon *v.* Chilcott, 3 C. & P. 236; Teal *v.* Auty, 2 B. & B. 99; Knowles *v.* Michel, 13 East 249; Cocking *v.* Ward, 1 M. G. & Sc. 858

[3] Davidson *v.* Hanslop, T. Raym. 211; Moravia *v.* Levy, 2 T. R. 483, n.; Danforth *v.* Schoharie, 12 Johns. 227; Foster *v.* Allanson, 2 T. R. 479; Arthur *v.* Dartch, 9 Jur. 118. But this doctrine was questioned in Gilson *v.* Stewart, 7 Watts 100, and its application restricted to cases where the account included other matters also, not arising by the specialty.

[4] Bartlett *v.* Emery, 1 T. R. 42, n.; Bull. N. P. 129; [Armitage *v.* Saunders, 94 Mich. 482.]

[5] Styart *v.* Rowland, 1 Show. 215.

[6] *Ex parte* Randelson, 3 Deac. & Chitty 534. And see Tarbuck *v.* Bipsham, 2 M. & W. 2.

[1] Allen *v.* Cook, 2 Dowl. P. C. 546.

whensoever such admission was made, it is *not* now held to be *conclusive;* but any errors may be shown and corrected under the general issue.[2] If the defendants were formerly *partners*, and the admission was by one of them alone, in regard to things which were done before the dissolution of the firm, it seems to be considered sufficient.[3] And where A admitted to an agent of B, that a balance was due from himself in respect to a bill of exchange, of which B was then, but unknown to A, the holder; and afterwards A, having been informed that B held the bill, told the agent that he could not pay it; these two admissions, taken together, were held evidence of an account stated.[4] But the admission, however made, in order to constitute an account stated, must have been made to the opposite party or his agent.[5]

§ 129. **Same Subject.** If the plaintiff claims the money in a *particular character* or capacity, it will not be necessary for him to prove that character, under the count upon an account stated; for the defendant, by accounting with him in that character, without objection, has admitted it.[1]

§ 129 *a*. **Presumptions of Value.** Under either of the money counts, where the plaintiff proves the payment or receipt of money, in coins or bank-notes, without showing of what denomination, the jury will be directed to presume the coins or notes to have been of the smallest denomination in circulation. Thus, where the delivery of a bank-note was proved, the amount of which did not appear, it was held that the jury were rightly directed to presume it a £5 note, that being the lowest denomination issued.[1]

§ 130. **Pleas in Abatement.** The *defendant's answer*, in an action of *assumpsit*, is either by a plea in *abatement*, or by the general issue, or by a special plea in bar. In abatement of the suit, the more usual pleas are those of misnomer,[1] coverture, and the omission to sue a joint contractor. Under the liberality with which amendments are permitted, the plea of *misnomer* is now rarely tried. The plea of *coverture* is sustained by evidence of general reputation and acknowledgment of the parties and reception of their friends, as man and wife, and of cohabitation as such.[2] If coverture of the plaintiff

[2] Thomas *v.* Hawkes, 8 M. & W. 140; Perkins *v.* Hart, 11 Wheat. 237, 256; Holmes *v.* D'Camp, 1 Johns. 36; [Porter *v.* Price, 49 U. S. App. 295; Conville *v.* Shook, 144 N. Y. 686.] Formerly it was otherwise: Trueman *v.* Hurst, 1 T. R. 40. See further, Harden *v.* Gordon, 2 Mason 541, 561. [The account is conclusive, however, as to items of interest and compound interest clearly stated in the account: Porter *v.* Price, 49 U. S. App. 295.]

[3] *Ante*, Vol. I. § 112 and n.

[4] Baynham *v.* Holt, 8 Jur. 963.

[5] Bates *v.* Townley, 2 Exch. 152; 12 Jur. 606.

[1] Peacock *v.* Harris, 10 East 104; *ante*, Vol. I. § 195.

[1] Lawton *v.* Sweeney, 8 Jur. 964. And see also Dry Dock Co. *v.* McIntosh, 2 Hill (N. Y.) 290.

[1] See *supra*, tit. Abatement, § 21.

[2] Leader *v.* Barry, 1 Esp. 153; Kay *v.* Duchesse de Pienne, 3 Campb. 123; Birt *v.* Barlow, 1 Doug. 171. See *infra*, tit. Marriage.

is pleaded, it seems that proof of a solemn and unqualified admission by her, that she was married, will be sufficient to support the plea; but that if the admission is coupled with the expression of doubts as to the validity of the marriage, it will not be sufficient.[3]

§ 131. **Non-joinder.** If the defendant pleads in abatement that he made the contract *jointly with other persons*, named in the plea, but *not joined in the suit*, the naming of these persons is taken as exclusive of any others; and therefore if it is shown that there were more joint contractors, this will disprove the plea.[1] If to a declaration for work and labor, or upon several contracts, the defendant pleads in abatement the non-joinder of other contracts, it must be proved that all the contracts were made by, or that all the work was done for, the persons named in the plea, and none others; for, if it should appear that one contract was made by, or one portion of the work was done for, the defendant alone, the plaintiff will have judgment for the whole, though as to the residue of the declaration the plea is supported; for not being supported as to the whole declaration to which it is pleaded, it is no answer at all. Therefore, where, to account for work done, the defendants pleaded that it was done for them and certain others, and the plaintiff proved that it was done partly for them, and the residue for them and the others, he had judgment for the whole, the plea not being supported to the extent pleaded.[2] But where the suit was against A, B, and C, for work done for them, and the defendants pleaded the non-joinder of D, and it appeared that one portion of the work was done for A alone, another portion for A, B, C, and D, a third portion for A, B, and D, and a fourth for A and B, but none for A, B, and C, only; the plea was held supported as an answer to the action, the plaintiff failing to prove any claim against the particular parties sued.[3] If the persons not joined are described in the plea as assignees of a bankrupt contractor, the assignment itself must be proved, unless the fact has been admitted by the other party; proof of their having acted as such not being deemed sufficient.[4] And in the trial of this issue of the want of proper parties defendant, the contracting party not sued, though ordinarily incompetent as a witness for the defendant, by reason of his interests, may be rendered competent by a release.[5]

[3] Mace *v.* Cadell, Cowp. 233; Wilson *v.* Mitchell, 3 Campb. 393.

[1] Godson *v.* Good, 6 Taunt. 587; s. c. 2 Marsh. 299; Ela *v.* Rand, 4 N. H. 307.

[2] Hill *v.* White & Williams, 6 Bing. N. C. 26; s. c. 8 Scott 249; s. c. 8 Dowl. P. C. 13; 3 Jur. 1078. In this case the case of Colson *v.* Selby, 1 Esp. 452, was overruled.

[3] Hill *v.* White, Williams, & Boulton, 6 Bing. N. C. 23; s. c. 8 Scott 245; s. c. 8 Dowl. P. C. 63; 3 Jur. 1077. If some confess the action by default, yet the plaintiff cannot have judgment unless he proves a contract by all: Robeson *v.* Ganderton, 9 C. & P. 476; Elliott *v.* Morgan, 7 id. 334.

[4] Pasmore *v.* Bousfield, 1 Stark. 296. See further as to this plea, *supra*, tit. Abatement, §§ 24, 25.

[5] *Ante*, Vol. I. §§ 395, 426, 427.

§ 132. **Same Subject; Proof.** This plea, to a count for goods sold, may be supported by proof that they were ordered by the defendant jointly with the other person named; or, that such had been the previous and usual course of dealing between the parties; or, that partial payments had been made on their joint account.

§ 133. **Same Subject; Death.** If one of two joint contractors is *dead*, and the survivor is sued, as the sole and several contractor, it will not be sufficient for the plaintiff, in answer to a plea of non-joinder, to *reply* the fact of his death, for this would contradict his declaration upon a separate contract, by admitting a joint one.[1] In all actions upon contract, the defendant has a right to require that his co-debtor should be joined with him; and the plaintiff cannot so shape his case as to strip him of that right, or of the benefit, whatever it may be, of having his discharge stated on the record. The plaintiff is not at liberty, in the first instance, to anticipate what may ultimately perhaps be a discharge. The practice has ever been to join all the contracting parties on the record; thus giving to the party who is joined notice at the time, and enabling him at any future time to plead the judgment recovered on the joint debt, without the help of averments; and likewise advancing him one step in the proof necessary in an action for contribution. Such was the judgment of Lord Ellenborough, in a case in which it was held that, though one of the joint contractors had become *bankrupt* and obtained his discharge, a replication of this fact was no answer to a plea of non-joinder in abatement; for though he was discharged by law, he was not bound to take the benefit of it.[2] If he pleads the discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other.[3] It has been held in England that this course was proper only in cases of bankruptcy; and that a replication of infancy or coverture of the person not sued was a good answer to a plea of non-joinder; for that the plaintiff could not, in such case, enter a *nolle prosequi* as to one joint contractor, without discharging all, and, therefore, that he had no remedy but in this mode.[4] But in the American courts the entry of a *nolle prosequi*, and its effect, have been regarded as matters of practice, resting in the discretion of the court; and accordingly, wherever one defendant pleads a plea which goes merely to his personal discharge, the contract, as to him, being only voidable, and not utterly void, the plaintiff has been permitted to enter a *nolle prosequi* as to him and proceed against the others.[5] It would seem, therefore, that in American courts the

[1] Bovill *v.* Wood, 2 M. & S. 25, per Le Blanc, J.
[2] Bovill *v.* Wood, 2 M. & S. 23; 2 Rose 155; Hawkins *v.* Ramsbottom, 6 Taunt. 179.
[3] Noke *v.* Ingham, 1 Wils. 89.
[4] Chandler *v.* Parks, 3 Esp. 76; Jaffray *v.* Frebain, 5 id. 47. See also Burgess *v.* Merrill, 4 Taunt. 468; 1 Chitty on Plead. 49, 52.
[5] Woodward *v.* Newhall, 1 Pick. 500; Hartness *v.* Thompson, 5 Johns. 160; Minor *v.* Mechanics' Bank, 1 Peters 46; Salmon *v.* Smith, 1 Saund. 207 (2), by Williams.

replication of *infancy*, or other personal immunity of the party not joined, would not be a good answer to a plea of non-joinder in abatement, unless such party had already made his election and avoided the contract.[6]

§ 134. **Same Subject; Partnership.** Where the joint liability pleaded arises from *partnership* with the defendant, it must be proved to have openly existed, not only at the time of making the contract, but in the same business to which the contract related. The partnership may be proved by evidence of any of the outward acts and circumstances, which usually belong to that relation, brought home to the knowledge of the plaintiff. But if the partnership is dormant, and unknown to the plaintiff, or if it is known, but the omitted party is a secret partner, this, as we have heretofore seen, is no objection to the suit.[1]

§ 135. **General Issue.** Almost all the *defences to the action of assumpsit*, in the United States, and, until a late period, in England, have been made under the *general issue*. This plea, on strict principle, operates only as a denial in fact of the express contract or promise, where one is alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. But by an early relaxation of the principle, the defendant, in actions on express contracts, was admitted, under the general issue, to the same latitude of defence, which was open to him in actions upon the common counts, and was permitted to adduce evidence showing that, on any ground common to both kinds of assumpsit, he was under no legal liability to the plaintiff for that cause, at the time of pleading.[1] The practice in the English courts, by the recent rules, has been brought back to its original strictness and consistency with principle. In the United States, it remains, for the most part, in its former relaxed state; and accordingly where it has not been otherwise regulated by statutes, the defendant, under this issue, may give in evidence any matters, showing that the plaintiff *never had* any cause of action; such as, the non-joinder of another promisee; the defendant's infancy; lunacy; drunkenness, or other mental incapacity; or coverture at the time of contracting; duress; want of consideration; illegality; release or parol discharge or payment before breach; material alteration of the written contract; that the plaintiff was an alien enemy at the time of contracting; or that the contract was void by statute, or by the policy of the law; non-performance of condition precedent, by the plaintiff; or that performance on his own part was prevented by the plaintiff, or by law, or, in certain cases, by the act of God; or any the like matters of defence.[2] He may also *give in*

[6] Gibbs *v.* Merrill, 3 Taunt. 313, 314, per Mansfield, C. J.

[1] *Supra*, tit. Abatement, § 25; Story on Partnership, § 241; Collyer on Partnership, pp. 424, 425.

[1] Stephen on Pleading, pp. 170–182.

[2] 1 Chitty on Plead. 417–420; Gould on Plead. c. 6, §§ 46–50; Yonng *v.* Black, 7 Cranch 565; Craig *v.* Missouri, 4 Pet. 426; Wilt *v.* Ogden, 13 Johns. 56; Wailing

evidence many *matters in discharge* of his liability to the plaintiff, such as, bankruptcy of the plaintiff, where this would defeat the action; coverture of the plaintiff, where she sues alone, and has no interest in the contract; payment; accord and satisfaction; former recovery; higher security given; discharge by a new contract; release; and the like.[3] So, in assumpsit for use and occupation, the defendant under this issue may show that he has been evicted by one who had recovered judgment against his lessor, by virtue of a paramount title, to whom he has attorned and paid the rent subsequently accruing.[4] Yet there are *some matters in discharge*, which admit the debt, but go in denial of the remedy only, that *must be pleaded;* namely, bankruptcy or insolvency of the defendant; tender; set-off; and the statute of limitations.[5] It is only where the special plea amounts to the general issue, that is, where it alleges matter which is in effect a denial of the truth of the declaration, that such plea is improper and inadmissible.[6] These defences, being for the most part applicable to other actions on contracts, will be treated under their appropriate titles.

§ 136. **Want of Consideration.** In regard to the admissibility of evidence of failure, or *want of consideration*, as defence to an action of assumpsit, there is an embarrassing conflict in the decisions. A distinction, however, has been taken between those cases where

v. Toll, 9 id. 141; Hilton *v.* Burley, 2 N. H. 193; Sill *v.* Rood, 15 Johns. 230; Mitchell *v.* Kingman, 5 Pick. 431; Osgood *v.* Spencer, 2 H. & G. 133. Where the plaintiff sues upon a *quantum meruit*, and the defendant has lost the opportunity of making a set-off, by not complying with the rule requiring him to file a bill of particulars, he may still show that the plaintiff's demand was compensated at the time, by services rendered, and that therefore no liability of the defendant ever arose: Green *v.* Brown, 3 Barb. S. C. 119. {In Hawks *v.* Hawks, 124 Mass. 457, Soule, J., says that, under a general denial, all facts material to the establishment of the plaintiff's case are in issue, and the plaintiff is called on to prove, not only the receipt of the money by the defendant, but that he received it under such circumstances that he was under an obligation to pay it to the plaintiff. Proof, therefore, that he received it as payment of a debt due him from the plaintiff is admissible under this answer.

So the defendant may prove that the amount claimed by the plaintiff was, by agreement of the parties, received and applied by the defendant to the advances made by him to plaintiff, and interest: Marvin *v.* Mandell, 125 Mass. 562.}

[3] 1 Chitty on Plead. 417–420; Gould on Plead. c. 6, §§ 46–50; Edson *v.* Weston, 7 Cow. 278; Drake *v.* Drake, 11 Johns. 531; Dawson *v.* Tibbs, 4 Yeates 349; Young *v.* Black, 7 Cranch 565; Offut *v.* Offut, 2 H. & G. 178; Wright *v.* Butler, 6 Wend. 284.

[4] Newport *v.* Hardy, 10 Jur. 333. {To sustain assumpsit for use and occupation, the relation of landlord and tenant must have existed between the parties, evidenced either by an express or implied contract. Where one enters upon the land of another under an agreement of purchase which he subsequently fails to carry out, the relation is not sustained: Stacy *v.* Vt. Cen. R. R., 32 Vt. 551; Hough *v.* Birge, 11 id. 190. But where the holding possession of the premises is by permission of the owner, an undertaking on the part of the tenant to pay rent may be implied from slight circumstances: Watson *v.* Brainard, 33 id. 88. And the plaintiff being the owner of the premises, the mere fact of occupancy by the defendant would be, *prima facie*, sufficient to create a presumption of such relation: Keyes *v.* Hill, 30 id. 759. If the tenant has been evicted of part of the premises and retains the rest, he is liable for a proportion of the rent. He should set up this by a special plea: Seabrook *v.* Moyer, 88 Pa. St. 417.}

[5] 1 Chitty on Plead. 420; Gould on Plead. c. 6, § 51.

[6] Gould on Plead. c. 6, § 78; Steph. on Plead. 412.

the consideration was the conveyance of real property, and those where it was wholly of a personal nature, such as goods or services; and also between a total and a partial failure of the consideration. Where the consideration is personal in its nature, and the *failure is total*, or the defendant has derived *no benefit* at all from the services performed, or none beyond the amount of money which he has already advanced, it seems agreed, that this may be shown in bar of the action.[1] If, in an express contract for a stipulated price, the failure of a similar consideration is *partial only*, the defendant having derived some benefit from the consideration, whether goods or services, and the count is special, upon the express contract, the English rule seems to be, not to admit it to be shown in bar *pro tanto*, but to leave the defendant to his remedy by action;[2] unless the *quantum* to be deducted is matter susceptible of definite computation.[3] But where the plaintiff proceeds upon general counts, the value of the goods or services may be appreciated by evidence for the defendant.[4]

[1] Jackson *v.* Warwick, 7 T. R. 121; Templer *v.* McLachlan, 2 N. R. 136, 139; Farnsworth *v.* Garrard, 1 Campb. 38; Dax *v.* Ward, 1 Stark. 409; Morgan *v.* Richardson, 1 Campb. 40, n.; 9 Moore 159; Tye *v.* Gwinne, 2 Campb. 346.

[2] Templer *v.* McLachlan, 2 N. R. 136; Franklin *v.* Miller, 4 Ad. & El. 599; Grimaldi *v.* White, 4 Esp. 95; Denew *v.* Daverell, 3 Campb. 451; Basten *v.* Butter, 7 East 483, per Lord Ellenborough; Sheels *v.* Davies, 4 Campb. 119; Crowninshield *v.* Robinson, 1 Mason 93, acc. But see *contra*, Okell *v.* Smith, 1 Stark. 107; Chapel *v.* Hicks, 2 Cr. & M. 214; 4 Tyrwh. 43; Cutler *v.* Close, 5 C. & P. 337.

[3] Day *v.* Nix, 9 Moore 159. See also Parish *v.* Stone, 14 Pick. 198, 210.

[4] Denew *v.* Daverell, 3 Campb. 451; Basten *v.* Butter, 9 East 479; Farnsworth *v.* Garrard, 1 Campb. 38; Fisher *v.* Samuda, ib. 190; Kist *v.* Atkinson, 2 id. 63; Bilbie *v.* Lumley, 2 East 469; 1 Mason 95, per Story, J., acc.; Miller *v.* Smith, ib. 437; 2 Smith's Leading Cases, pp. 14, 15. In the second American edition of the last-cited work, the doctrine recognized in this country, which seems to accord in its main principles with that of Westminster Hall, is well stated in the notes of Mr. Wallace, as follows: "Where there has been a special contract, and the plaintiff's duty has been executed and closed, he may either declare specially on the contract, or maintain general assumpsit. It is important to observe the different ground on which these two actions rest, and the difference in the proceedings to which they give rise. The special assumpsit is brought upon the express contract. Unless the plaintiff can show that he has fulfilled with legal exactness all the terms of the contract, he can recover nothing. See Morford *v.* Mastin & Ambrose, 6 Monroe 609; and compare with it s. c. in 3 J. J. Marsh. 89; Taft *v.* Inhabitants of Montague, 14 Mass. 282; Gregory *v.* Mack, 3 Hill (N. Y.) 380. But if his performance has been according to the terms of the contract, and has resulted in an available and practical work of the kind required, so that the plaintiff is capable of maintaining his special action at all, he is entitled at common law to recover the whole compensation fixed by the contract, and the defendant must resort to a cross-action, to recover damages for faults in the manner of performance, or for breaches of a warranty. See Everett *v.* Gray *et al.*, 1 Mass. 101, where there was a special count. It is true that, in such case, a recovery may be defeated by proof of fraud, for fraud vitiates every sale; but upon a contract of sale, where performance has been accepted, the defendant cannot set up this defence, unless he has returned the article or given notice as soon as the variance is discovered, for thereby he rescinds his acceptance of the performance; if he does not, he cannot set up this defence, for the plaintiff should have been allowed an opportunity to make other use of the article, and the defendant's delay and silence would be a counter fraud in him; unless he can show that the plaintiff could not possibly have been injured by the non-return, which is only where the article is wholly useless; therefore, on a sale, a special count can only be defeated for fraud, where the article has been returned, or is proved to be wholly worthless: Burton *v.* Stewart, 3 Wend. 236; Van

The American courts, to avoid circuity of action, have of late permitted a partial failure of consideration to be shown in defence *pro tanto* in all suits on contracts respecting personal property or services;[5] only taking care that the defence shall not take the plaintiff

Epps *v.* Harrison, 5 Hill 64. See Thornton *v.* Wynn, 12 Wheat. 183; Case *v.* John, 10 Watts 107.

"But if the plaintiff, having executed his part of the contract, brings general assumpsit, the ground of his recovery is *not* the defendant's special contract or promise, but he rests wholly on the implied legal liability of the defendant to recompense him for a service which has been done at the defendant's request; the defendant not being allowed to defeat the plaintiff by setting up a special contract which he himself has broken, by not paying at the appointed time. The nature of the action, and the legal ground of the recovery, therefore, are precisely the same as they are where there has been in fact no special contract at all; the rule that the plaintiff cannot recover beyond the rates of recompense fixed by the contract being merely a rule of evidence, founded not only upon those rates being necessarily the most reasonable measure of values in the particular case, but upon the consideration that the defendant's previous request, or subsequent acceptance, which is relied upon, was conditioned upon the charges being at those specified rates. Accordingly it results necessarily from the ground and nature of the action, that, when the plaintiff declares generally, the defendant may show, in reduction of damages, everything that goes directly to the consideration, and immediately affects the value of the work; for the assumpsit which the law implies, whether in *quantum meruit*, or *indebitatus*, is always commensurate with the actual final value of the article or work. This principle, in respect to *indebitatus assumpsit*, is decided in Heck *v.* Shener, 4 Serg. & Rawle, 249, the distinction being between those torts or breaches of contract which go entirely to the consideration, and those which are *dehors*, and collateral to it; the latter not being admissible: Gogel *v.* Jacoby, 5 S. & R. 117. The defendant, therefore, may show defects in the work or service, and if the plaintiff refers to the contract as evidence of the fair price of the work, or article, the defendant may show that this price was predicated upon a *warranty* of quality which has proved false; in short, from the very nature of the claim which the plaintiff has chosen to make, the defendant may prevent his recovering more than the real, inherent value of the consideration. This is not an anomaly or innovation of the law; at least, the law has necessarily been thus ever since it has been settled that general assumpsit is maintainable after the performance of a special contract; it is evident from the cases cited in Basten *v.* Butter, 7 East 479, and notes, that Lord Kenyon had previously more than once ruled the point differently from Buller, even if Broom *v.* Davis, ruled by the latter, was not, what it probably was, a special count; and Lord Kenyon was not very greatly given to innovation. The cases of Mills and others *v.* Bainbridge, and Templer *v.* McLachlan, in 2 New Reports, 136, 137, accord entirely with the distinction above noted. (But Templer *v.* McLachlan is not now regarded as law. See note to the case in Day's edition.) The neglects there complained of did not go to the consideration of the assumpsit there declared upon, the service for which the assumpsit was brought having been, in both cases, completely performed; but were collateral torts. In this country it may be considered as perfectly settled, that when the plaintiff brings general assumpsit, when there has been a special contract, the defendant may give in evidence, in reduction of damages, a breach of warranty, or a fraudulent misrepresentation, without a return of the article: McAllister *v.* Reab, 4 Wend. 483, affirmed on error in 8 id. 109; Still *v.* Hall, 20 id. 51; Batterman *v.* Pierce, 3 Hill (N. Y.) 172; Steigleman *v.* Jeffries, 1 Serg. & Rawle, 477, etc. In like manner, defects in the work or article must be given in evidence if this form of action be brought: Grant *v.* Button, 14 Johns. 377; King & Mead *v.* Paddock, 18 id. 141." See 2 Smith's Leading Cases, pp. 27, 28 (2d Am. ed.).

[5] 22 Am. Jur. 26; 2 Kent Comm. 473, 474; Barker *v.* Prentiss, 6 Mass. 430; Parish *v.* Stone, 14 Pick. 198; Folsom *v.* Mussey, 8 Greenl. 400; Reed *v.* Prentiss, 1 N. H. 174, Shepherd *v.* Temple, 3 id. 455; Hills *v.* Banister, 8 Cowen 31; McAllister *v.* Reab, 4 Wend. 483; Reab *v.* McAllister, 8 id. 109; Todd *v.* Gallagher, 16 S. & R. 261; Christy *v.* Reynolds, ib. 258; Evans *v.* Gray, 12 Martin 475, 647; Spalding *v.* Vandercook, 2 Wend. 431; Hayward *v.* Leonard, 7 Pick. 181; Cone *v.* Baldwin, 12 id. 545; Pegg *v.* Stead, 9 C. & P. 636. In the case of Parish *v.* Stone, above cited, the jury found that a part of the consideration of the note declared upon was for services rendered by the plaintiff to the defendant's testator, and that the residue was

by surprise.[6] But where the consideration consists of real estate, conveyed by deed, with covenants of title, promissory notes being

intended as a mortuary gift, and the question was, whether the plaintiff was entitled to recover for that part only which was good and valid in law. In delivering the judgment of the court upon this question, the law was thus stated by Shaw, C. J.: "Had the note been taken for two distinct liquidated sums, consolidated, and the consideration had been wholly wanting, or wholly failed as to one, it seems quite clear that, according to well-established principles, supported by authorities, the note as between the original parties, and all those who stand in such relation as to allow the defence of want of consideration, it would be competent to the court to apportion and consider it good in part, and void in part, and to permit the holder to recover accordingly.

"In Bayley on Bills (Phillips and Sewall's ed.), 340, and in most other text-books, it is laid down that want or failure of consideration is a good defence as between immediate parties, or holders without value, either total or *pro tanto*, as the failure goes to the whole or part of the consideration: Barber *v.* Backhouse, Peake 61. Where there was originally no consideration, for part of the sum expressed in the bill, the jury may apportion the damages. Per Lord Kenyon, Darnell *v.* Williams, 2 Stark. 166.

"That the holder in such case recovers on the note, and not on the original consideration, is rendered manifest by another series of decisions, thereby showing that the note is good *pro tanto*, as a negotiable instrument, upon which a holder by indorsement may sue and recover; whereas the right to recover upon the original consideration would not be negotiable, and would not vest in the holder of the note by indorsement.

"It being held that when a bill or note is made without value, or as an accommodation note, this may be shown as a good defence against the payee; it is also held as a principle absolutely essential to the currency of bills and notes, that where an indorsee takes a bill for valuable consideration, or derives title through any one who has paid value for it, he shall recover to the amount, notwithstanding it was originally made without value, and as an accommodation bill. It follows, as a necessary consequence, from these two principles, that where an indorsee of an accommodation bill has taken it for value, but for less than the amount expressed by the bill, there the holder shall recover only to the amount for which he has given value. Jones *v.* Hibbert, 2 Stark. 304. In that case the defendant accepted a bill for £415, to accommodate Phillips & Co., who indorsed it to their bankers for value, and became bankrupt; the bankers knew it to be an accommodation acceptance, and their demand against Phillips & Co. was £265 only; it was held that they could only recover the £265, and they had a verdict accordingly.

"So where a bill accepted as a gift to the payee is indorsed for a small consideration, the indorser can recover only to that extent: Nash *v.* Brown, Chitty on Bills (5th ed.), 93.

"From these cases it is manifest that the plaintiff recovers on the bill, and not on the original consideration; otherwise the right to sue and recover *pro tanto* would not pass to the indorsee by the negotiation of the bill. They therefore establish the proposition that where the parts of a bill are divisible, making an aggregate sum, and as to one liquidated and definite part there was a valuable consideration, and as to the other part there was no consideration; the bill, as such, may be apportioned, and a holder may recover for such part as was founded on a good consideration.

[6] Runyan *v.* Nichols, 11 Johns. 547; People *v.* Niagara C. P., 12 Wend. 246; Reed *v.* Prentiss, 1 N. H. 174, 176.

"But it is contended that where the parts of the bill are not liquidated, and distinguishable by computation, a different rule prevails, and several English cases are relied on to show that, though the consideration fails in part, the whole bill is recoverable: Moggridge *v.* Jones, 14 East 486; Morgan *v.* Richardson, 1 Campb. 40, n.; Tye *v.* Gwynne, 2 id. 346; Grant *v.* Welchman, 16 East 206. In these cases it was held that where the note was given for an entire thing, and the consideration afterwards failed in part, the whole bill was recoverable, and the defendant was left to his cross-action. As where the note was given for a lease, and the lease was not completed according to contract; or for a parcel of hams, and they proved bad and unmarketable; or for goods, and they were of a bad quality and improperly packed; or for an apprentice-fee, and the apprentice was not kept by his master.

"In this respect there seems to be some distinction between the English decisions

given for the purchase-money, the better opinion seems to be, that, on common-law principles, the covenants in the deed constitute a sufficient consideration for the notes, and that the failure of title constitutes no ground of defence to an action upon them.[7] In some of the United States, however, this defence has been allowed.[8]

§ 136 *a.* **Entire Contract.** Where the *contract is entire*, the general rule is, that if the plaintiff has failed to perform the whole on his part, he can recover nothing; for being entire, it cannot be ap-

and those of New York. In the latter it was held that upon a suit between original parties, upon a note given upon a contract to manufacture casks, the defendant might go into evidence to show that the casks were unskilfully manufactured, to reduce the amount of damages.

"But without relying upon this difference, we think the English decisions may be well reconciled, by a reference to the known distinction between failure of consideration and want of consideration.

"All the cases put are those of failure of consideration, where the consideration was single and entire, and went to the whole note, and was good and sufficient at the time the note was given, but by some breach of contract, mistake, or accident, had afterwards failed. There the rule is, if the consideration has wholly failed, or the contract been wholly rescinded, it shall be a good defence to the note. But if it have partially failed only, it would tend to an inconvenient mode of trial and to a confusion of rights, to try such question in a suit on the note, as a partial defence, and therefore the party complaining shall be left to his cross-action. This distinction, and the consequence to be drawn from it, is alluded to by Lord Ellenborough in Tye *v.* Gwynne, 2 Camph. 346. He says, 'There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action.' It seems, therefore, very clear that want of consideration, either total or partial, may always be shown by way of defence; and that it will bar the action, or reduce the damages, from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such case depend upon the state of the evidence, whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended to be in a great degree gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt, and what a gratuity. The rule to be deduced from the cases seems to be this, that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle there seems to be no reason why it shall depend upon the state of the evidence, showing that these different parts can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by a jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor, as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration." See 14 Pick. 208–211.

In New York, the right of recoupment of damages is allowed, though the damages result from a mere breach of contract, and are unliquidated; and though the action be upon a specialty; under the provision of Rev. Stat. vol. ii. p. 504, § 96 [77]. See Van Epps *v.* Harrison, 5 Hill 63; Batterman *v.* Pierce, 3 id. 171; Ives *v.* Van Epps, 22 Wend. 155.

[7] Lloyd *v.* Jewell, 1 Greenl. 352, and n. to 2d ed.; Howard *v.* Witham, 2 id. 390; Knapp *v.* Lee, 3 Pick. 452; Vibbard *v.* Johnson, 19 Johns. 77; Whitney *v.* Lewis, 21 Wend. 131, 134; Greenleaf *v.* Cook, 2 Wheat. 13; Fulton *v* Griswold, 7 Martin 223; 22 Am. Jur. 26; 2 Kent Comm. 471–473.

[8] 2 Kent Comm. 472, 473; 22 Am. Jur. 26

portioned. And this rule has been often applied to contracts for labor and service for a certain term of time, where the party had served only a part of the time. But it is also conceded, that if the part performance of a contract is beneficial to the promisee and has been accepted by him, though the other party can maintain no action upon the original contract, his part of which he has failed to perform, yet he may maintain a general assumpsit for the actual value of his labor and materials which the promisee has accepted and enjoyed. Whether the defence of failure of performance of the entire contract can be sustained in an action for the value of labor and services, upon the common counts, is a question upon which judges are not perfectly agreed. On the one hand, it has been maintained with great force of reason, and so adjudged, that the party contracting for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if performance is commenced; and with knowledge, also, that the other may eventually fail of completing the entire term; and that, therefore, he ought to pay the reasonable value of the benefit, which, upon the whole, he has thus derived, over and above the damage which may have accrued to him from the non-performance of the original contract.[1] But the general current of decisions is to the contrary; the courts holding that this case is not to be distinguished in principle from other cases of failure to perform an entire contract.[2]

[1] Britton *v.* Turner, 6 N. H. 481.

[2] See Stark *v.* Parker, 2 Pick. 267 (2d ed.), notes; Olmstead *v.* Beale, 19 id. 528; Pordage *v.* Cole, 1 Saund. 320, n. (4); Peeters *v.* Opie, 2 id. 352, n. (3), by Williams; Badgely *v.* Heald, 5 West. Law Jour. 392; [Keener on Quasi-Contracts, 215 *et seq.*]

ATTORNEYS.

§ 137. **Attorneys at Law.** Under this title, it is proposed to treat only of Attorneys at Law, and of the remedies in general, and at common law, between them and their clients, the subject of attorneys in fact having been already treated under the head of Agency. The peculiar remedies, given by statutes and rules of court, in England, and in some few of the United States, being not common to all the American States, and applicable to but few, will not here be mentioned.

§ 138. **Suits for Fees and Injuries to Professional Character.** Actions by attorneys, as such, are ordinarily brought either to recover payment for *fees*, disbursements, and professional services, or to recover damages for *slander* of their professional character. In the latter case, it seems generally necessary for the plaintiff to prove, by the book of admissions, or by other equivalent record or documentary evidence, that he has been regularly admitted and sworn; with proof that he has practised in his profession.[1] But where the slanderous words contained a threat by the defendant that he would move the court to have the plaintiff struck off the roll of attorneys, this was held an admission that the plaintiff was an attorney, sufficient to dispense with further proof.[2]

[1] Jones *v.* Stevens, 11 Price 235. And see Green *v.* Jackson, Peake's Cas. 236. {It has been held that a statutory provision limiting the right to practise as an attorney at law to free *white* male citizens was not obnoxious to the fourteenth amendment of the Constitution of the United States: *Re* Taylor, 48 Md. 28. The fourteenth amendment provides, *inter alia*, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The United States Supreme Court, in the Slaughter House Cases, 16 Wall. 36, held that the amendment had reference only to the rights and immunities belonging to citizens of the United States as such, as contradistinguished from those belonging to them as citizens of a State. And in Bradwell *v.* State, 16 Wall. 130, the same court held that the right to be admitted to practise as an attorney at law in the courts of a State was not a privilege or immunity belonging to citizens of the United States as such, and consequently was not under the protection of the fourteenth amendment. The court of Maryland accordingly refused admission to the bar to a negro applicant: *Re* Taylor, 48 Md. 28.

In regard to the admission of women to the bar, it may be said, in general, that in absence of express statutory provisions the courts have considered themselves obliged to refuse them admission: *Re* Goodell, 39 Wis. 232; *Re* Bradwell, 55 Ill. 535; Robinson's Case, 131 Mass. 376; Lockwood's Case, 9 Ct. of Cl. 346, p. 356. But in some States statutes have been passed authorizing the admission of women to practise as attorneys at law: Wis. R. S. (1878), § 2586; Mass. Stats. 1882, c. 139.} [Women are now admitted to the bar in most of the States: *Re* Ricker, 66 N. H. 207; *Re* Thomas, 16 Col. 441.]

[2] Berryman *v.* Wise, 4 T. R. 336; *ante*, Vol. I. § 195, n.

§ 139. **Retainer.** When the suit is by an attorney, *for fees*, etc., he must prove his retainer, and the fees and the services charged. The *retainer* may be proved by evidence, that the defendant attended upon the plaintiff, at his office, in regard to the business in question; or, that he personally left notices or executed other directions of the plaintiff; or, that he was present and assisting at the trial, while the plaintiff was managing the cause in his behalf; or, that he has spoken of the plaintiff, or otherwise recognized him, as his attorney.[1] If the retainer was to commence a suit, which was afterwards abated by a plea of non-joinder, this is sufficient evidence of authority to commence another suit against the parties named in the plea.[2] So, after an award made against a party, a retainer "to do the needful," is an authority to do all that is necessary on the part of the client, to carry the award into complete effect.[3] So, where money was placed in the attorney's hands to invest for his client, with discretionary power "to do for her as he thought best," and he lent the money on mortgage, but, discovering that the security was bad, sued out a bailable writ against the borrower, in his client's name, it was held a sufficient retainer for this purpose.[4] It has, however, been laid down as a general rule, that a special authority must be shown to institute a suit,[5] though a general authority is sufficient to defend one; and accordingly, where one, acting under a general retainer, as solicitor, undertook to defend a suit at law brought against his client, upon certain promissory notes, and filed a bill in chancery to restrain proceedings in that suit, the bill was ordered to be dismissed, with costs, to be paid by the solicitor, as having been filed without authority.[6] If two attorneys occupy the same office, one being ostensibly the principal, and the other his clerk, under an agreement that the latter shall receive all the benefit of

[1] Hotchkiss *v.* Le Roy, 9 Johns. 142; Burghart *v.* Gardner, 3 Barb. S. C. 64. Sworn to an answer signed by the attorney: Harper *v.* Williamson, 1 McCord, 156. But where one attorney does business for another, it is presumed to be done on the credit of the attorney who employed him, and not of the client: Scrace *v.* Whittington, 2 B. & C. 11. {The authority of an attorney who has been employed by a director, or other analogous officer, of a corporation, to appear for it, without any specific vote therefor, and who has been paid for his services by the corporation, is sufficiently proved: Field *v.* Proprietors, etc., 1 Cush. (Mass.) 11. See also Manchester Bank *v.* Fellows, 28 N. H. 302. A party to a suit, in which the employment of senior counsel is necessary, is liable for the reasonable value of the services of a counsellor at law who acts as senior counsel at the trial, in his presence, in consultation with him, and without objection from him, under a retainer for that purpose by the attorney of record, although there was a secret agreement between him and the attorney of record that such services should be paid for by the latter: Brigham *v.* Foster, 7 Allen (Mass.) 419.} [As to what constitutes a retainer, see Hicks *v.* Drew, 117 Cal. 305; Orr *v.* Brown, 41 U. S. App. 486; 30 id. 405.]

[2] Crook *v.* Wright, Ry. & M. 278.

[3] Dawson *v.* Lawley, 4 Esp. 65.

[4] Anderson *v.* Watson, 3 C. & P. 214. But see Tabran *v.* Horn, 1 M. & R. 228.

[5] [The authority of the attorney to bring suit is presumed (Ferris *v.* Commercial Bank, 158 Ill. 237; Bonnifield *v.* Thorp, 71 F. 924), and cannot be contested before the jury in the action brought: Lange *v.* Schoettler, 115 Cal. 388.]

[6] Wright *v.* Castle, 3 Meriv. 12.

the common-law business, those who employ the persons in the office will be presumed to employ them upon the terms on which business is there done; and, therefore, in a suit by the clerk for the fees of common-law business, those terms are competent evidence of a retainer of him alone.[7] So, where two attorneys dissolved an existing partnership between them, but a client, with means of knowledge of that fact, continued to instruct one of them in a matter originally undertaken by the firm, this was held sufficient evidence that the joint retainer had ceased.[8]

§ 140. **In Case of Partnership.** But where solicitors are in *partnership*, they cannot dissolve their partnership, as against the client, without his consent, so as to discharge the retiring partner from liability; much less can the retiring partner, in such case, accept a retainer from the opposite party.[1]

§ 141. **Effect of Retainer.** The *effect of a retainer*, to prosecute or defend a suit, is to confer on the attorney all the powers exercised by the forms and usages of the court in which the suit is pending.[1] He may receive payment;[2] may bring a second suit after being nonsuited in the first for want of formal proof;[3] may sue a writ of error on the judgment;[4] may discontinue the suit;[5] may restore an action after a *nol. pros.*;[6] may claim an appeal, and bind his client by a recognizance in his name for the prosecution of it;[7] may submit the

[7] Pinley *v.* Bagnall, 3 Doug. 155. So if both, being partners, were in fact employed, but only one was an attorney of the court, and did the business there, yet both may jointly recover: Arden *v.* Tucker, 4 B. & Ad. 815; 5 C. & P. 248. Unless the other was but a nominal partner: Kell *v.* Nainby, 10 B. & C. 20. And see Ward *v.* Lee, 13 Wend. 41; Simon *v.* Bradshear, 9 Rob. (La.) 59.

[8] Perrins *v.* Hill, 2 Jurist 858.

[1] Cholmondeley (Earl of) *v.* Lord Clinton, Coop. Ch. Cas. 80; s. c. 19 Ves. 261, 273; Cook *v.* Rhodes, 19 Ves. 273, n.; Walker *v.* Goodrich, 16 Ill. 341.

[1] Smith *v.* Bosard, 2 McCord Ch. 409. {Where a sworn attorney of the court enters his appearance for a party, the party is bound by any admissions made by him in writing, though out of court, concerning the facts in the cause, until the appearance is withdrawn, or the party revokes the attorney's authority, and gives notice of the revocation; and until the appearance is withdrawn, or the authority revoked and the revocation notified, the party cannot give evidence, on the trial of the cause, that the attorney had no authority in fact: Lewis *v.* Sumner, 13 Met. (Mass.) 269. If it appear by the record that the defendant appeared by attorney, he may disprove the authority of such attorney: Hess *v.* Cole, 3 Zab. (N. J.) 116; [Bruschke *v.* Nord Chicago Verein, 145 Ill. 433; Bryn Mawr N. B. *v.* James, 152 Pa. 364.] *Contra*, Kent *v.* Ricards, 3 Md. Ch. Decis. 392. See also Fowler *v.* Morrill, 8 Texas 153, where it is held that the authority of an attorney at law undertaking to represent a party to a suit, is *prima facie* presumed, and cannot be questioned for the first time on appeal or error; but where an act purports to have been done by agent or attorney, as the waiver of service of process, and it does not appear that the agent or attorney is an attorney at law, there is no presumption of authority, and the want of authority may be assigned for error by the party thus represented.}

[2] Langdon *v.* Potter, 13 Mass. 320; Brackett *v.* Norton, 4 Conn. 517; Gray *v.* Wass, 1 Greenl. 257; Erwin *v.* Blake, 8 Pet. 18; Commissioners *v.* Rose, 1 Desaus. 469; Hudson *v.* Johnson, 1 Wash. 10; Ducett *v.* Cunningham, 39 Me. 386; [Williams *v.* State, 65 Ark. 159.]

[3] Scott *v.* Elmendorf, 12 Johns. 315.

[4] Grosvenor *v.* Danforth, 16 Mass. 74.

[5] Gaillard *v.* Smart, 6 Cow. 385. [*Contra*, Rhutasel *v.* Rule, 97 Ia. 20.]

[6] Reinhold *v.* Alberti, 1 Binn. 469.

[7] Adams *v.* Robinson, 1 Pick. 462.

suit to arbitration;[8] may sue out an *alias* execution;[9] may receive livery of seisin of land taken by extent;[10] may waive objections to evidence, and enter into stipulations for the admission of facts, or conduct of the trial;[11] and for release of bail;[12] may waive the right of appeal, review, notice, or the like, and confess judgment.[13] But he has no authority to execute any discharge of a debtor, but upon the actual payment of the full amount of the debt,[14] and that in

[8] Somers *v.* Balabrega, 1 Dall. 164; Holker *v.* Parker, 7 Cranch 436; Buckland *v.* Conway, 16 Mass. 396.

[9] Cheever *v.* Merrick, 2 N. H. 376.

[10] Pratt *v.* Putnam, 13 Mass. 363.

[11] Alton *v.* Gilmanton, 2 N. H. 520; [Garrett *v.* Hanshue, 53 Ohio 482; Wibur *v.* Wilbur, R. I., 30 A. 555. The attorney has discretion to bring suit in the State or the Federal court: McGeorge *v.* Bigstone Co., 88 F. 599. The client cannot control the conduct of the case by stipulations as to time for pleading: Wyllie *v.* Sierra Gold Co., 120 Cal. 485.]

[12] Hughes *v.* Hollingsworth, 1 Murph. 146.

[13] Pike *v.* Emerson, 5 N. H. 393; Talbott *v.* McGee, 4 Monr. 377; Union Bank of Georgetown *v.* Geary, 5 Pet. 99.

[14] Savory *v.* Chapman, 8 Dowl. 656; Jackson *v.* Bartlett, 8 Johns. 361; Kellogg *v.* Gilbert, 10 id. 220; 5 Pet. 113; Gullet *v.* Lewis, 3 Stew. 23; Carter *v.* Talcott, 10 Vt. 471; Kirk *v.* Glover, 5 Stew. & Port. 34; Tankersly *v.* Anderson, 4 Desaus. 45; Simonton *v.* Barrell, 21 Wend. 362; [Cram *v.* Sickel, 51 Neb. 828; Smith *v.* Jones, 47 id. 108; Faughnan *v.* Elizabeth, 58 N. J. L. 309; Watt *v.* Brookover, 35 W. Va. 323.] {The attorney for a plaintiff has no authority to direct a sheriff to make a return of an execution as satisfied, when no payment has in fact been made (Mandeville *v.* Reynolds, 68 N. Y. 528); nor to satisfy a judgment without payment (Beers *v.* Hendrickson, 45 id. 665); nor to compromise or settle a suit (Barrett *v.* 3d Avenue R. R. Co., ib. 628); [Macaulay *v.* Polkes, 1897, 2 Q. B. 122; Senn *v.* Joseph, 106 Ala. 454; Martin *v.* Capital Ins. Co., 85 Ia. 643; Brown *v.* Bunger, 43 S. W. 714, Ky. But see Belireau *v.* Amoskeag Co., 40 A. 734, N. H.] But he has authority to do everything which is properly incidental to carrying on the suit to judgment and execution. Thus where, as in New York, provision is made for the appointment of a receiver, as a supplemental process in collecting a debt, the attorney has authority to take measures for the appointment of a receiver: Ward *v.* Roy, 69 N. Y. 96. So the attorney may release an attachment before judgment, and generally do all acts, in or out of court, necessary or incidental to the management of the suit, which affect the remedy only: Moulton *v.* Bowker, 115 Mass. 36. But he cannot waive other rights or bind his client by the exercise of powers affecting such rights: Bloomington *v.* Heiland, 67 Ill. 278. The power of an attorney extends to opening a default which he has taken (whether properly or improperly), and vacating the judgment entirely, even though his client has instructed him to the contrary. "A client has no right to interfere with the attorney in the due and orderly conduct of the suit, and certainly cannot claim to retain a judgment obtained and an execution issued by his attorney fraudulently:" Read *v.* French, 28 N. Y. 293, and cases cited by the court; Nightingale *v.* Oregon C. R. R. Co., 2 Sawyer (C. Ct.) 338. The attorney has no authority, by virtue merely of his retainer to prosecute or defend a suit, to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client (Shores *v.* Caswell, 13 Met. (Mass.) 413); nor to execute a bond to the Probate Court upon an appeal (Clark *v.* Courser, 29 N. H. 170). An attorney's bond, in the name of the principal, to indemnify a sheriff, though made by parol authority, will bind the principal as a simple contract: Ford *v.* Williams, 13 N. Y. 577. An attorney cannot execute a replevin bond for his client; but such bond is voidable, and the client may adopt it (Narraguagus Land Proprietors *v.* Wentworth, 36 Me. 339); nor assign the judgment or execution (Wilson *v.* Wadleigh, ib. 496); [Gardner *v.* Mobile, etc. R., 102 Ala. 635; Lewis *v.* Blue, 110 N. C. 420;] nor can he release or postpone the judgment lien on lands, created in a suit begun by himself on a claim given him to collect (Wilson *v.* Jennings, 3 Ohio St. 528; Doub *v.* Barnes, 1 Md. Ch. Decis. 127;) [or any other lien (Ludden *v.* Sumter, 45 S. C. 186).] On the general subject of the limitations of an attorney's powers, see Moulton *v.* Bowker, 115 Mass. 136;} [Willis *v.* Channing, 90 Tex. 617; McElrath *v.* Middletown, Ga., 14 S. E. 906.]

money only;[15] nor to release sureties;[16] nor to enter a *retraxit;*[17] nor to act for the legal representatives of his deceased client;[18] nor to release a witness.[19]

§ 142. **Nature of the Service.** In regard to the *conduct of business* by the attorney for his client, he must show, that he has done all that he ought to have done.[1] Though he is generally bound to follow the instructions of his client, yet he is not bound to do what is intended merely for delay, or is otherwise in violation of his duty to the court.[2] Generally speaking, the contract of an attorney or solicitor, retained to conduct or defend a suit, is an entire and continuing contract to carry it on until its termination; and if without just cause, he quits his client before the termination of the suit, he can recover nothing for his bill.[3] But he may refuse to go on without any advance of money, or without payment of his costs in arrear, upon giving reasonable notice to his client; or, for just cause and upon reasonable notice he may abandon the suit; and in either case he may recover his costs up to that time.[4] But he cannot insist upon the payment of moneys due on any other account.[5]

§ 143. **Defences for Fees.** In the *defence* of an action for professional fees and services, besides denying and disproving the retainer, the defendant may show, that the plaintiff has not exercised the reasonable diligence and skill which he was bound to employ; and may depreciate the value of the services, upon a *quantum meruit,* by any competent evidence. Whether *negligence* can be set up as a defence to an action for an attorney's bill of fees, is a point which has been much questioned. If the services have proved

[15] Commissioners *v.* Rose, 1 Desaus. 469; Treasurers *v.* McDowell, 1 Hill (S. C.) 184; [Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358; McClintock *v.* Helberg, 168 Ill. 384; Barr *v.* Rader, 31 Or. 225.]

[16] Givens *v.* Briscoe, 3 J. J. Marsh. 532.

[17] Lambert *v.* Sanford, 3 Blackf. 137; [Nichells *v.* Nichells, 5 N. D. 125.]

[18] Wood *v.* Hopkins, 2 Penningt. 689; Campbell *v.* Kincaid, 3 Monr. 566.

[19] Marshall *v.* Nagel, 1 Bailey 308.

[1] Allison *v.* Rayner, 7 B. & C. 441; s. c. 1 M. & R. 241; Gill *v.* Lougher, 1 Cr. & J. 170; s. c. 1 Tyrw. 121; Godefroy *v.* Jay, 7 Bing. 413.

[2] Johnson *v.* Alston, 1 Campb. 176; Pierce *v.* Blake, 2 Salk. 515; Vincent *v.* Groome, 1 Chitty 182; Anon., 1 Wend. 108; Gilbert *v.* Williams, 8 Mass. 51.

[3] Harris *v.* Osbourn, 4 Tyrw. 445; s. c. 2 Cr. & M. 629; Cresswell *v.* Byron, 14 Ves. 271; Anon., 1 Sid. 31, pl. 8; 1 Tidd's Pr. 86 (9th ed.); Love *v.* Hall, 3 Yerg. 408; {Whitehead *v.* Lord, 11 Eng. Law & Eq. 587;} [Underwood *v.* Lewis, 1894, 2 Q. B. 306; cf. *Re* Romer, 1893, 2 Q. B. 286. If the withdrawal is justified by the client's misconduct, the attorney may recover for services rendered: Powers *v.* Manning, 154 Mass. 370 French *v.* Cunningham, 149 Ind. 632.] {The authority of an attorney to commence and prosecute a suit is revoked by the death of the constituent, and he has no authority, without a new retainer, to appear in the suit for the constituent's executor or administrator: Gleason *v.* Dodd, 4 Met. (Mass.) 333; Palmer *v.* Reiffenstein, 1 Man. & G. 94; Shoman *v.* Allen, ib. 96, n.}

[4] Lawrence *v.* Potts, 6 C. & P. 428; Wadsworth *v.* Marshall, 2 C. & J. 665; Vansandau *v.* Browne, 9 Bing. 402; Rowson *v.* Earle, Mood. & M. 538; Hoby *v* Built, 3 B. & Ad 350; Gleason *v.* Clark, 9 Cowen 57; Castro *v.* Bennet, 2 Johns 296.

[5] Heslop *v.* Metcalf, 8 Sim. 622. [He cannot recover for risk incurred in signing a bond of indemnity for his client without proof of actual risk or custom to pay compensation therefor: McMannomy *v.* Chicago, etc. R., 167 Ill. 497.]

entirely useless, it has long been agreed, that this may be shown in bar of the whole action; and, after some conflict of opinions, the weight of authority seems in favor of admitting any competent evidence of negligence, ignorance, or want of skill, as a defence to an action for professional services, as well as for any other work and labor.[1]

§ 144. **Gross Ignorance.** An attorney undertakes for the employment of a degree of skill, ordinarily adequate and proportionate to the business he assumes. "Spondet peritiam artis. Imperitia culpæ adnumeratur."[1] *Reasonable skill* constitutes the measure of his engagement.[2] "Attorneys," said Lord Mansfield, "ought to be protected when they act to the best of their skill and knowledge; and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt, which he was employed to recover for his client, from the person who stands indebted to him. A *counsel* may mistake, as well as an attorney. Yet no one will say that a counsel, who has been mistaken, shall be charged with the debt. The counsel, indeed, is honorary in his advice, and does *not demand* a fee;[3] the attorney *may demand* a compensation. But neither of them ought to be charged with the debt for a mistake."[4] In a more recent case, the law on this subject was thus stated by Lord Brougham: "It is of the very essence of this kind of action that it depends, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceeding may induce the party to think he was not advised properly, and may, in fact, prove the advice to have been erroneous; — not upon

[1] See *supra*, Assumpsit, § 136, and cases there cited; Kannen *v.* McMullen, Peake's Cas. 59; Chapel *v.* Hicks, 2 C. & M. 214; 4 Tyrw. 43; Cutler *v.* Close, 5 C. & P. 337; Cousens *v.* Paddon, 5 Tyrw. 535; Hill *v.* Featherstonhaugh, 7 Bing. 569; Montriou *v.* Jefferys, 2 C. & P. 113; Huntley *v.* Bulwer, 6 Bing. N. C. 111; Grant *v.* Button, 14 Johns. 377; Brackett *v.* Norton, 4 Conn. 517. But see Templer *v.* McLachlan, 2 New Rep. 136; Runyan *v.* Nichols, 11 Johns. 547. {In Caverly *v.* McOwen, 123 Mass. 574, it was held that in such a case the burden is on the plaintiff to make out a *prima facie* case by proving that the work was done, at the request of the defendant, and also what the work is reasonably worth. On this latter part of the case it is competent for the defendant to introduce evidence that by reason of the negligence or unskilfulness of the plaintiff such services were of little or no value. This evidence is admissible under a general denial.}

[1] Story on Bailm. § 431.

[2] Story on Bailm. §§ 432, 433; Reece *v.* Rigby, 4 B. & A. 202; Ireson *v.* Pearman, 3 B. & C. 799; Hart *v.* Frame, 3 Jur. 547; 6 Cl. & Fin. 193; Lanphier *v.* Phipos, 8 C. & P. 475; Davies *v.* Jenkins, 11 M. & W. 745; {Wilson *v.* Coffin, 2 Cush. (Mass.) 316; Holmes *v.* Peck, 1 R. I. 242; Parker *v.* Rolls, 28 Eng. Law & Eq. 424; Cox *v.* Sullivan, 7 Ga. 144;} [Gaar *v.* Hughes, Tenn., 35 S. W. 1092; Ahlhauser *v.* Butler, 57 F. 121; Isham *v.* Parker, 3 Wash. 755; Maloue *v.* Gerth, 75 N. W. 972, Wis.]

[3] In the United States, the offices of attorney and counsellor are so frequently exercised by the same person that they have become nearly blended into one; and actions for compensation for services performed in either capacity are freely sustained in most if not all the States of the Union.

[4] Pitt *v.* Yalden, 4 Burr. 2061. And see Compton *v.* Chandless, cited 3 Campb. 19; Kemp *v.* Burt, 4 B. & Ad. 424; Shilcock *v.* Passman, 7 C. & P. 289; Nixon *v.* Phelps, 29 Vt. 198.

his having received, if I may so express it in common parlance, bad law, from the solicitor; nor upon the solicitor or attorney having taken upon himself to advise him, and having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action, that there should be a negligence of a crass description, which we shall call *crassa negligentia*, that there should be gross ignorance, that the man who has undertaken to perform the duty of attorney, or of a surgeon, or an apothecary (as the case may be), should have undertaken to discharge a duty professionally, for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from the service. That is the very ground Lord Mansfield has laid down in that case,[5] to which my noble and learned friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord Ellenborough in the case of Baikie *v.* Chandless,[6] because there Lord Ellenborough uses the expression, 'an attorney is only liable for *crassa negligentia*,' therefore, the record must bring before the court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be *crassa negligentia*, — something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*."[7]

[5] Pitt *v.* Yalden, 4 Burr. 2060.

[6] 3 Camph. 17.

[7] Purves *v.* Landell, 12 Clark & Fin. 91, 98, 99. This was an action in Scotland, against a writer to the signet, for advising and conducting an improper and irregular mode of procedure against a debtor, which proved fruitless and expensive to the plaintiff, and resulted in large damages recovered against him in an action for false imprisonment. The action ultimately failed, for want of any allegation and proof of gross ignorance or gross negligence on the part of the attorney or law agent. Lord Campbell, in delivering his opinion, in which the other lords concurred, expressed himself as follows: "In an action such as this, by the client against the professional adviser, to recover damages arising from this misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been sorry, when I had the honor of practising at the bar of England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath who said that it was a very difficult thing for a gentleman at the bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined. Well, then, this may happen in all grades of the profession of the law. Against the barrister in England and the advocate in Scotland luckily no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You

§ 145. **Inattention.** More particularly, an attorney is held liable for the consequence of ignorance or non-observance of the rules of practice of the court; for the want of proper care in the preparation of a cause for trial, or of attendance thereon, and the use of due means for procuring the attendance of the witnesses; and for the mismanagement of so much of the cause as is usually and ordinarily allotted to his department of the profession.[1] But he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of a kind usually intrusted to men in another or higher branch in the profession.[2] If he undertakes the collection of a debt, he is bound to sue out all process necessary to that object. Thus, he is bound to sue out the proper process against bail;[3] and against the officer, for taking insufficient bail, or for not delivering over the bail-bond;[4] and to deliver an execution to the officer, in proper season after judgment, to perfect and preserve the lien created by the attachment of property on mesne process;[5] but not to attend in person to the levy of the execution.[6] If he doubts the expediency of further proceeding, he should give notice to his client, and request specific instructions;[7] without which, it seems, he would be justified in not prosecuting, in cases where he is influenced by a prudent regard to the interest of his client.[8]

§ 146. **When Action lies; Damages.** For every violation of his duty, an *action lies immediately* against the attorney, even though merely nominal damages are sustained at the time; for it is a breach of his contract; but actual *damages* may be recovered for the direct

can only expect from him that he will be honest and diligent; and, if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guaranty, binding themselves, in giving legal advice aud conducting suits at law, to be always in the right.

"Then, my lords, as *crassa negligentia* is certainly the gist of an action of this sort, the question is whether in this summons that negligence must not either be averred or shown? This is not any technical point in which the law of Scotland differs from the law of England. I should be very sorry to see applied, and I hope this House would be very cautious in applying, technical rules which prevail in England to proceedings in Scotland. But I apprehend that, in this respect, the laws of the two countries do not differ, and that the summons ought to state, and must state, what is necessary to maintain the action; this summons must either allege negligence, or must show facts which inevitably prove that this person has been guilty of gross negligence:" ib. pp. 102, 103; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178.

[1] [He is liable for allowing a claim to become barred by the Statute of Limitations (Drury *v.* Butler, 171 Mass. 171; King *v.* Fourchy, 47 La. Ann. 354); and for failing to preserve an appeal which he has taken (Armin *v.* Loomis, 82 Wis. 86).]

[2] Godefroy *v.* Dalton, 6 Bing. 467, per Tindal, C. J. And see Lynch *v.* Com., 16 S. & R. 368.

[3] Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 1 Vt. 73.

[4] Crooker *v.* Hutchinson, 1 Vt. 73; Simmons *v.* Bradford, 15 Mass. 82.

[5] Phillips *v.* Bridge, 11 Mass. 246. And see Pitt *v.* Yalden, 4 Burr. 2060; Russell *v.* Palmer, 2 Wils. 325.

[6] Williams *v.* Reed, 3 Mason 405.

[7] Dearborn *v.* Dearborn, 15 Mass. 316.

[8] Crooker *v.* Hutchinson, 2 Chipm. 117.

consequences of the injury, even up to the time of the verdict.[1] The damages do not necessarily extend to the nominal amount of the debt lost by the attorney's negligence, but only to the loss actually sustained.[2]

§ 147. **Attorney as an Officer of the Court.** An attorney, being an officer of the court in which he is admitted to practise, is held amenable to its *summary jurisdiction*, for every act of official misconduct.[1] The matter is shown to the court by petition or motion, ordinarily supported by affidavit; and the order of the court, after hearing, is enforced either by attachment,[2] or by striking his name from the roll.[3] If he neglects or refuses to perform any stipulation

[1] Wilcox *v.* Plummer, 4 Peters 172. And see Marzetti *v.* Williams, 1 B. & Ad. 415.

[2] Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 2 Chipm. 117; Huntington *v.* Rumnill, 3 Day, 390. And see *infra*, § 599; [Drury *v.* Butler, 171 Mass. 171. A son cannot recover for loss to himself caused by the gross negligence of an attorney in failing to draw his mother's will in accordance with her desires: Buckley *v.* Gray, 110 Cal. 339.]

[1] [The proceeding is not criminal, and the strict conformity of proof to specifications required in criminal cases is unnecessary: Bar Association *v.* Greenhood, 168 Mass. 169; Philbrook *v.* Newman, 85 F. 139; *Re* Bloor, 52 P. 779, Mont. But the charges must be clearly sustained: State *v.* Wines, 54 id. 562, Mont.; *Re* Clink, 76 N. W. 1, Mich.; *Re* Haymond, 121 Cal. 385. A judge in chambers cannot disbar for contempt: State *v.* Nathans, 49 S. C. 199. The proceeding need not be in the name of the sovereign: People *v.* Moutray, 166 Ill. 630; *Re* Crum, 7 N. D. 316. Trial by jury is unnecessary: *Re* Smith, 179 Pa. 14; *Re* Wharton, 114 Cal. 367.]

In several of the American States, persons of full age, and qualified as the statutes of those States prescribe, are *entitled* to admission to practise as attorneys in any of the courts, and it is made the *duty* of the judges to admit them accordingly. Whether persons of this class are amenable to the summary jurisdiction of the courts has been doubted. If they are not, this fact shows the great impolicy of popular interference with the forms of administering justice, since in this case the legislatures will have unconsciously deprived the people of the benefit of one of the strongest securities for professional good conduct.

[2] [Baker *v.* Brown, 150 N. Y. 567.]

[3] [In the Matter of Eldridge, 82 N. Y. 161, the court held that the motion and affidavits are in the nature of pleadings only, not evidence, and that when they are denied by the accused he is entitled to a hearing governed by the laws of evidence, and to be confronted with the witnesses against him, and to subject them to cross-examination. The evidence, however, offered to induce the court to grant an order commanding the accused to show cause why he should not be disbarred is not governed by the common-law rules of evidence, and affidavits are sufficient: *In re* Percy, 36 N. Y. 651.

It has been said that it would be a great misdemeanor in an attorney, rendering him liable to censure and punishment as well as to an action for damages in a proper case, if he were to enter an appearance without authority: Smith *v.* Bowditch, 7 Pick. (Mass.) 137; Lewis *v.* Sumner, 13 Met. (Mass.) 269. Ignorance of the law is not good cause for removing or suspending an attorney from practice: Bryant's Case, 24 N. H. 149.

An attorney, when delivering up papers intrusted to him, is bound to deliver them up in a reasonable state of arrangement, so that the party to whom they are delivered may not be put to unreasonable trouble in sorting them: Northwestern Railway Co. *v.* Sharp, 28 Eng. Law & Eq. 555. If an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and to give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained, and although, to carry on the imposture, persons may be introduced to him acting in a feigned name: *In re* Barber, 6 Eng. Law & Eq. 338. Where an attorney has fraudulently misapplied money received from his client for a specific purpose, the court will

or agreement entered into by him with the counsel or attorney of the other party, respecting the management or final disposition of the cause, or touching the trial or the proofs; or fails to pay or perform anything, which he has personally undertaken that his client shall pay or perform; or improperly refuses to deliver up documents to his client, who intrusted them to him; or to pay over to his client any moneys which he has collected for him; he is liable to this summary mode of proceeding, as well as to an action at law.[4] But for mere negligence in the conduct of his client's business, the courts will not interfere in this manner, but will leave the party to his remedy by action.[5]

§ 148. **Plaintiff's Case when a Debt is lost.** Where the remedy against an attorney is pursued by *action at law*, and the misconduct has occasioned the loss of a debt, the existence of the debt is a material fact to be shown by the plaintiff. If it were a judgment, this is proved by a copy of the record, duly authenticated.[1] If not, and an arrest of the debtor upon mesne process is a material allegation, the writ must be proved by itself, or by secondary evidence, if lost; unless it has been returned; in which case the proof is by copy. If the injury to the plaintiff was occasioned by departure from the known and usual course of practice, this should be shown by the

exercise its summary jurisdiction by ordering him to pay the money, although he has obtained a certificate of protection from the Bankruptcy Court: *In re* ——, 30 Eng. Law & Eq. 390. Courts will, in exercising their powers over attorneys, inquire into character in those particulars which show them professionally untrustworthy: Baker *v.* Com., 10 Bush (Ky.) 592; *In re* Hirst, 9 Phila. (Pa.) 216.] [The following grounds for disbarment have been recognized in recent cases: Slandering the court, *Re* Brown, 3 Wy. 121; United States *v.* Green, 85 F. 857; deceiving the court, Baker *v.* State, 90 Ga. 153; State *v.* Finn, 52 P. 756, Or.; aiding a client to defraud creditors, People *v.* Keegan, 18 Col. 237; allowing tenants to use houses for brothels, *Re* Weare, 1893, 2 Q. B. 439; publication of malicious libel, State *v.* Mason, 29 Or. 18; felony, *Re* Madigan, 66 Minn. 9; *Ex parte* Thompson, 32 Or. 499; threats or solicitation of judge, *Re* Smith, 179 Pa. 14; falsifying bill of exceptions, People *v.* Moutray, 166 Ill. 630; State *v.* Harber, Mo., 31 S. W. 889; converting client's money, *Re* Westcott, 66 Conn. 585; offence involving moral turpitude, *Re* Kirby, 84 F. 606; altering public records, *Re* Nunn, 76 N. W. 38, Minn.]

[4] 1 Tidd's Practice, 85–98 (9th ed.); Sharp *v.* Hawker, 3 Bing. N. C. 66; De Wolfe *v.* ——, 2 Chitty 68; *In re* Fenton, 3 Ad. & El. 404; *In re* Atkin, 4 B. & A. 47. To support the action for moneys collected, it is essential to prove a demand made on the attorney: Satterlee *v.* Frazer, 2 Sandf. S. C. 141. [There has been of late years a tendency to enforce this summary jurisdiction of the court over its attorneys with somewhat greater stringency than formerly, in order to keep the standard of professional conduct from being lowered by the example of those attorneys whose practices are a disgrace to the profession: In the Matter of Gale, 75 N. Y. 526, where the attorney of a married man had assisted his wife to manufacture evidence, which, if not untrue, was deceptive, in order to allow her to procure a divorce, the Supreme Court held that the order disbarring the attorney should be affirmed. Cf. Proctor's Case, 71 Me. 288. So when there was record evidence that the attorney was convicted of a felony on a plea of guilty, his name was stricken from the rolls of the court: *Re* McCarthy, 42 Mich. 71.

When an attorney has been disbarred, he is no longer competent to represent any one in any court of the State where he was formerly a practising attorney: Cobb *v.* Judge of the Superior Court, 43 Mich. 289.]

[5] Brazier *v.* Bryant, 2 Dowl. P. C. 600; *In re* Jones, 1 Chitty 651.

[1] *Ante*, Vol. I. §§ 501–514.

evidence of persons conversant with that course of practice.[2] The fact of indebtment to the plaintiff, by his debtor, must also be proved by other competent evidence, where it has not yet passed into judgment. In short, the plaintiff has to shew, that he had a valid claim, which has been impaired or lost by the negligence or misconduct of the defendant.[3] And if the attorney, having received money for his client, mixes it with his own, in a general deposit with a banker in his own name, and the banker fails, the attorney is liable for the loss. He should have deposited it in his client's name, or otherwise designated it as money held by him in trust for his client, so earmarked as to be capable of precise identification.[4]

§ 149. **Where there is Injury by Neglect in making Title.** If the injury to the plaintiff resulted from the attorney's neglect in regard to a *conveyance of title*, or in the examination of evidences of title, it is, ordinarily, necessary to produce the deeds or documents in question; whether the neglect were in a case drawn up for the opinion of counsel, in which certain deeds materially affecting the title were omitted;[1] or in the insertion of unusual and injurious covenants of title in a lease, without informing him of the consequences;[2] or in advising him, or acting for him, in the investment of money under a will, upon the perusal of only a partial extract from the will, and not of the entire will itself;[3] or were any other misfeasance or neglect as a professional agent in the conveyance of title.[4] And if the client has thereby been evicted from the land, he should prove the eviction by a copy of the judgment, and by the writ of possession duly executed;[5] or, if he has peaceably submitted to an entry and ouster without suit, he must show that it was in submission to an elder and better title.[6]

[2] Russell *v.* Palmer, 2 Wils. 325, 328.
[3] Steph. N. P. 434. And see *infra*, § 599.
[4] Robinson *v.* Ward, 2 C. & P. 59.
[1] Ireson *v.* Pearman, 3 B. & C. 799.
[2] Stannard *v.* Ullithorne, 10 Bing. 491.
[3] Wilson *v.* Tucker, 3 Stark. 154.
[4] {It has been held that if counsel be retained to defend a particular title to real estate, he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain: Henry *v.* Raiman, 25 Pa. St. 354. And in no case can an attorney, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates: Smith *v.* Brotherline, 62 Pa. St. 461; Davis *v.* Smith, 43 Vt. 269; Case *v.* Carroll, 35 N. Y. 385; Lewis *v.* Hillman, 3 H. of L. Cas. 607.} [A mortgagee may recover the difference in the value of his security caused by his attorney's failure to discover a prior lien, without proof that the mortgagee could not realize the full amount due by foreclosure or collection: Lawall *v.* Groman, 180 Pa. 532.]
[5] 1 Steph. N. P. 434. And see Gore *v.* Brazier, 3 Mass. 543.
[6] Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 Mass. 586, 590.

BASTARDY.

§ 150. **Bastardy defined.** By the common law, children born out of lawful wedlock are bastards. By the Roman law, if the parents afterwards intermarried, this rendered the issue legitimate.[1] The rule of the common law prevails in the United States, except where it has been altered by statutes; which in several of the States have been enacted, introducing, under various modifications not

[1] [On the question of legitimacy, there is an important point regarding the conflict of laws. Is a child born out of wedlock, who is legitimated by his parents having married subsequently to his birth (which is the law of legitimacy in some States and countries), legitimate to all intents and purposes, in a State where such is not the law? It may be premised that legitimacy is a status, and the general rule is that a status acquired by persons in one jurisdiction attaches to and travels with them wherever they afterwards reside. Wheaton, International Law, § 84, Dana's ed.; Law. ed. ch. II. § 6, pp. 171, 177. But it is said that, as to real estate, the status of the claimant must be tested by the law of the State where the land is situated. Wheaton, International Law, Dana's ed. §§ 85–93; Law. ed. ch. II. § 3, p. 164; Wharton, Conflict of Laws, s. 243. Story, however, in his Confiict of Laws, ch. 4, considers the status of the original jurisdiction to govern, even as regards real estate. The leading case on this point is Birtwhistle *v.* Vardill, 7 Cl. & Fin. 895, in which the facts were these. A went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. During this residence in Scotland A cohabited with M, an unmarried woman, for some years, and had by her a son, B, who was born in Scotland. Several years after the birth of B, who was the only son, A and M were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child, with the father of such child, takes place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage for the purpose of taking land and for every other purpose. A died seised of real estate in England. The question was, Is B entitled to such property as the heir of A? It was held that he was not so entitled. Tindal, C. J., giving his opinion in the House of Lords, says: "We hold it to be a rule or maxim of the law in England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother. This is a rule *juris positivi*, as are all the laws which regulate succession to real estate, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate, and that this rule of descent, being a rule of positive law, annexed to the land itself, cannot be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of comity of nations." The court thus decides the question on the ground that in England something more than mere legitimacy is necessary, in order to entitle one to lands. It is legitimacy of the sort that arises from birth after the lawful marriage of the parents. It is believed that the rule as given in the remarks of Tindal, C. J., is the law in the United States. The principle of Birtwhistle *v.* Vardill was discussed and approved in Smith *v.* Derr's Adm'rs, 34 Pa. St. 126. In accord are also Lingen *v.* Lingen, 45 Ala. 410; Miller *v.* Miller, 18 Hun (N. Y.) 507; [Williams *v.* Kimball, 35 Fla. 49; *contra*, De Wolf *v.* Middleton, 18 R. I. 810; Bates *v.* Virolet, 53 N. Y. S. 893; 33 App. Div. 436.] Except as to the inheritance of real estate, legitimacy is decided by the law of the place of birth and domicile. Shaw *v.* Gould, L. R. 3 H. of L. 55. Cf. Don's

necessary here to be mentioned, the rule of the Roman law.[2] The modern doctrine of the common law on this subject is this: that where a child is born during lawful wedlock, the husband not being separated from the wife by a sentence of divorce *a mensa et thoro*, it is presumed that they had sexual intercourse, and that the child is legitimate;[3] but this presumption may be rebutted by any competent evidence tending to satisfy a jury, that such intercourse did not take place at any time, when, by the laws of nature, the husband could have been father of the child.[4] If the husband and wife have

Estate, 4 Drewry 197; *Re* Wright, 2 K. & J. 595.] [The law of the domicile of the father determines the question of legitimation in such cases: Blythe *v.* Ayres, 96 Cal. 532.]

[2] In New Hampshire, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, South Carolina, Tennessee, and Arkansas, the rule of the common law is understood to prevail. A subsequent marriage of the parents renders their prior issue legitimate in Kentucky, Alabama, Illinois, Louisiana, Michigan, and Missouri. Beside the marriage, a subsequent acknowledgment of the child by the father is requisite in Indiana, Ohio, Vermont, Virginia, Maine, and Massachusetts. In Maine, other issue must have been born after the marriage. In Massachusetts, the child can inherit only from its parents. In North Carolina, a decree of legitimacy in favor of ante-nuptial issue is obtained from the courts, on application of the father, after the marriage. See 3 Cruise's Dig. tit. 29, c. 2, § 8, note (Greenleaf's ed.), where the laws of the several States on this subject are more particularly stated. [Marriage and acknowledgment in Connecticut and Pennsylvania legitimatize children for all purposes: Simsbury *v.* East Granby, 69 Conn. 302; Oliver's Estate, 184 Pa. 306. Statutes providing that children of a marriage annulled because of a former husband or wife living, or of a marriage null in law, shall be legitimate, do not legitimatize children born before such marriage: Adams *v.* Adams, 154 Mass. 290.]

[3] [*Re* Matthews, 153 N. Y. 443; Smith *v.* Henline, 174 Ill. 184.] {A child born in wedlock, though within a month or a day after marriage, is presumed to be legitimate; and when the mother was visibly pregnant at the time of the marriage, it is presumed that the child is the offspring of the husband: State *v.* Herman, 13 Ired. (N. C.) 502. See Gaines *v.* Hennen, 24 How. (U. S.) 553, for an examination of the Louisiana cases, the Spanish law, and the Code Napoleon upon this subject.}

[4] See the opinions of the judges in the Banbury Peerage Case, in Nicholas on Adulterine Bastardy, pp. 183, 184; and of Ld. Redesdale and Ld. Ellenborough, ib. pp. 458, 488; Morris *v.* Davies, 3 C. & P. 427; 5 C. & Fin. 163; R. *v.* Luffe, 8 East 193; Goodright *v.* Saul, 4 T. R. 356; Pendrel *v.* Pendrel, 2 Stra. 924; Stegall *v.* Stegall, 2 Brock. 256; Head *v.* Head, 1 Turn. & Russ. 138; 1 Sim. & Stu. 150; Cope *v.* Cope, 5 C. & P. 604; 1 M. & Rob. 269. The presumption mentioned in the text is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by showing that the husband was, — 1st, impotent; 2dly, constantly absent, so as to have no intercourse or communication of any kind with the mother; 3dly, absent during the entire period in which the child must, in the course of nature, have been begotten; 4thly, present, but under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.

It is, however, very difficult to conclude against the legitimacy in cases where there is no impotency, and where some society or communication is continued between the husband and wife, during the time in question, so as to have afforded opportunities for sexual intercourse. If such opportunities have occurred, no evidence can be admitted to show that any man, other than the husband, may have been the father of the wife's child, whatever probabilities may exist that it was the child of another man. Throughout the investigation, the presumption in favor of legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory, and conclusive. Hargrave *v.* Hargrave, 9 Beav. 552. This case is valuable for the observations it contains on the nature and extent of the proof necessary to establish a case of adulterine bastardy, and the kind of evidence which is admissible in such cases.

had opportunity for intercourse, this merely strengthens the presumption of legitimacy; but it may still be rebutted by opposing proof.[5] And if they have cohabited together, yet this does not exclude evidence, that the husband was physically incapable of being the father.[6] But if the child was begotten during a separation of the husband and wife *a mensa et thoro* by a decree, it will be presumed illegitimate; it being presumed, until the contrary is shown, that the sentence of separation was obeyed.[7] But no such presumption is made, upon a voluntary separation.[8]

§ 151. **Husband and Wife incompetent to prove.** The *husband and wife* are alike *incompetent witnesses* to prove the fact of non-access while they lived together. But they *are competent* to testify, in cases between third parties, as to the time of their own marriage, the time of the child's birth, the fact of access, and any other independent facts affecting the question of legitimacy.[1] The husband's declarations, however, that the child is not his, are not sufficient to establish its illegitimacy, though it were born only three months after marriage, and thereupon he and his wife had separated, by mutual consent.[2]

[5] Ibid. See also Commonwealth *v.* Striker, 1 Browne, App. p. xlvii; 3 Hawks 63; 1 Ashmead 269.

[6] Per Ld. Ellenborough in R. *v.* Luffe, 8 East 205, 206; Foxcroft's Case, ib. 200, n., 205. This case, however, is more fully stated and explained in Nicholas on Adulterine Bastardy, pp. 557–564. In case of access of the husband, nothing short of physical impotency on his part will serve to convict a third person of paternity of the offspring: Com. *v.* Shepherd, 6 Binn. 283. {Or to show that the child is illegitimate: Sullivan *v.* Kelly, 3 Allen (Mass.) 148; Phillips *v.* Allen, 2 id. 453; Hemmeuway *v.* Towner, 1 id. 209.} [The fact that the child of white parents is a mulatto is evidence against his legitimacy: Bullock *v.* Knox, 96 Ala. 195.]

[7] [*Contra*, McNeely *v.* McNeely, 47 La. Ann. 1321.]

[8] St. George's *v.* St. Margaret's Parish, 1 Salk. 123; Bull. N. P. 112.

[1] *Ante*, Vol. I. §§ 28, 344; Standen *v.* Standen, Peake's Cas. 32; R. *v.* Bramley, 6 T. R. 330; Goodright *v.* Moss, Cowp. 591; [McDonald's Appeal, 147 Pa. 527;] {Corson *v.* Corson, 44 N. H. 587; Page *v.* Dennison, 1 Grant's Cas. (Pa.) 377; Parker *v.* Way, 15 N. H. 49.}

[2] Bowles *v.* Bingham, 2 Munf. 442; s. c. 3 id. 599. {General reputation in the family is competent evidence in a case involving legitimacy; but common report of the neighborhood is not competent: Wright *v.* Hicks, 15 Ga. 160. That a child was called and treated by a man and his family as his daughter is presumptive proof of her legitimacy, although the town registry of the father's marriage, as compared with the time of the daughter's birth, would contradict this. A declaration by the father that unless he made his will, the daughter could get nothing by law, is admissible as evidence tending to prove her illegitimacy, it being for the jury to determine the sense in which he used the expression: Viall *v.* Smith. 6 R. I. 417. Though the declarations of the parents are inadmissible to bastardize issue born during the wedlock, they are admissible to show that the parents were not married at the time of the birth: Craufurd *v.* Blackburn, 17 Md. 49.} [The recognition of a child by its alleged parents who are living together as husband and wife raises a presumption of legitimacy: Metheny *v.* Bohn, 160 Ill. 263. Repute of legitimacy cannot be shown by declarations of a relative of the mother, whose relation to the father depends upon the existence of the supposed marriage: Jackson *v.* Jackson, 80 Md. 176. If the general recognition of legitimacy by the families of both parents is sufficient, proof of marriage may be dispensed with after great lapse of time and the death of all parties having knowledge of the facts. *Re* Robb, 37 S. C. 19. The complaint and evidence of the husband in a divorce action, showing non-access to his wife, are inadmissible upon the issue of the paternity of a child born after the divorce, but within the period of gestation: *Re* Shuman, 83 Wis. 250.]

§ 152. **Period of Gestation.** In regard to the *period of gestation*, no precise time is referred to, as a rule of law, though the term of two hundred and eighty days, or forty weeks, being nine calendar months and one week, is recognized as the usual period. But the birth of a child being liable to be accelerated or delayed by circumstances, the question is purely a matter of fact, to be decided upon all the evidence, both physical and moral, in the particular case.[1]

§ 153. **Void Marriage.** Bastardy may also be proved by showing, that the party was the issue of a *marriage absolutely void;* as, if the husband or wife were already married to another person, who was alive at the time of the second marriage. So, by showing that the child was begotten after a decree of divorce *a vinculo matrimonii.* But if the marriage were only voidable, and not *ipso facto* void, the issue are deemed legitimate, unless the marriage was avoided by the parties themselves, in the lifetime of both.[1] After the lapse of thirty years, and after the death of all the parties, legitimacy will be presumed on slight proof.[2]

[1] See 1 Beck's Med. Jurisp. c. 9; Hargrave & Butler's note (2) to Co. Lit. 123 *b;* 4 Law Mag. 25–49; Nicholas on Adulterine Bastardy, pp. 212, 213; The Banbury Peerage Case, ib. 291–554; The Gardner Peerage Case, ib. 209; Phillips *v.* Allen, 2 Allen 453.

[1] Co. Lit. 33 *a;* 1 Bl. Comm. 424.

[2] Johnson *v.* Johnson, 1 Desaus. 595.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

§ 153 *a*. **What Laws considered.** In treating this subject, the rules of the common law-merchant, recognized in the courts of England and the United States of America, will alone be stated.[1] But it is to be remembered, that as between the holder of a bill of exchange and the drawer or indorser, the *lex loci contractus* of the drawer and of the indorser, and not of the acceptor, governs the liabilities of the drawer and of the indorser, respectively.[2] Thus, A drew a bill in favor of B (both being residents of Demerara), upon C, resident in Scotland, who accepted it, making it payable in London; and B indorsed it to D, who afterwards became bankrupt. When C's acceptance became due, he held a bill of exchange, accepted by D. An action being brought in Demerara, by D's assignees, against A and B upon the bill, it was held, that the Roman-Dutch law, prevalent in Demerara, and not the law of England, must govern the case; and that, according to that law, the defendants were at liberty to plead D's bill as a compensation, *pro tanto*, of the bill in suit.[3]

[1] [The law of negotiable instruments is now codified in England by the Bills of Exchange Act. In this country steps have been taken in the same direction, and a uniform act has already been adopted in Connecticut, Massachusetts, New York, and other States, which will doubtless soon be adopted in most if not all American jurisdictions. References to this act are therefore given as follows: Uniform Act, § —.]

[2] [Douglas *v.* Bank of Commerce, 97 Tenn. 133; Glidden *v.* Chamberlin, 167 Mass. 486; Brook *v.* Van Nest, 58 N. J. L. 162; Benton *v.* German-American N. B., 45 Neb. 850.]

[3] Allen *v.* Kemble, 13 Jur. 287, Priv. Conn. {So where an accommodation note was dated at and made payable in New Jersey, and was afterwards indorsed in New York, for the accommodation of the maker, and for the purpose of procuring it to be discounted in new York, where it was discounted at a usurious rate of interest, it was held that, as against the indorser, the law of New York was the law of the contract: Weil *v.* Lange, 6 Daly (N. Y.) 549.

And so a note dated and payable at New York and delivered in New York by mailing it to the plaintiff in Germany by his direction, was governed by the laws of New York and not those of Germany, though the original contract for a loan of money in pursuance of which the note was given was made in Germany: Heidenheimer *v.* Mayer, 42 N. Y. Super. Ct. 506.

And to this effect is Merchants' Bank *v.* Griswold, 72 N. Y. 472. The *locus contractus* is not the place where the note or bill is made, drawn, or dated, but the place where it is *delivered* by the drawer or maker: Overton *v.* Bolton, 9 Heisk. (Tenn.) 762;} [Wells *v.* Vansickle, 64 F. 944.]

§ 154. **Classification of Liabilities.** As the acceptor of a bill of exchange and the maker of a promissory note stand in the same relation to the holder, the note being of the nature of a bill drawn by a man on himself, and accepted at the time of drawing, the rules of evidence are, in both cases, the same. The liabilities of the parties to the instruments are of three general classes: — (1) Primary and absolute liability; such as that of the acceptor of a bill or maker of a note, to the payee, indorsee, and bearer; (2) Secondary and conditional liability; such as that of the drawer of a bill, to the payee or indorsee, and of the indorser to the indorsee; (3) Collateral and contingent liability; such as that of the acceptor to the drawer or indorser, and of the drawer to the acceptor. And, accordingly, the action upon a bill or note will be brought, either, (1) by the payee or bearer against the acceptor or maker; or (2) by the indorsee against the acceptor or maker; or (3) by the payee against the drawer of a bill; or (4) by the indorsee against the drawer of a bill, or against the indorser of a bill or note; or (5) by the drawer or indorser of a bill against the acceptor; or (6) by the acceptor against the drawer.

§ 155. **Points to be proved.** In these forms of remedy, the material allegations on the part of the plaintiff involve four principal points, which, if not judicially admitted, he must prove: namely, *first*, the existence of the instrument, as described in the declaration; *secondly*, how the defendant became party to it, and his subsequent contract; *thirdly*, the mode by which the plaintiff derived his interest in and right of action upon the instrument; and, *fourthly*, the breach of the contract by the defendant. The plaintiff will not be holden to prove a *consideration*, unless in special cases, where his own title to the bill is impeached, as will be shown hereafter. In treating this subject, therefore, it is proposed to consider these four principal points, in their order.[1]

[1] In this order, that of Mr. Chitty has been followed, whose treatise on Bills, c. 5 (9th ed.), and the treatise of Mr. Justice Story on Bills, have been freely resorted to throughout this Title.

The usual declarations on bills and notes are in the following forms, according to the present practice in England, and in most of the United States where the common-law remedies are pursued.

(1) *Payee* v. *Acceptor*, of a foreign bill. "For that one E. F., at ——, in the kingdom [or *State*] of ——, on ——, made his bill of exchange in writing directed to the said (*defendant*) at ——, and thereby required the said (*defendant*) in —— days [or, *months*, etc.] after sight [or, *date*] of that his first of exchange, the second and third of the same tenor and date not paid, to pay to the plaintiff —— [*here insert the sum as expressed in the bill; and if the currency mentioned in the bill is one which has not been recognized, and its value not established by statute, the value in the national currency should be averred*]; and the said (*defendant*) on —— accepted the said bill, and promised the plaintiff to pay the same, according to the tenor and effect thereof and of his said acceptance. Yet," etc.

In this case the proposition of fact, to be maintained by the plaintiff, involves, first, the existence of such a bill as he describes, and, secondly, that the defendant accepted it as alleged.

(2) *Payee* v. *Maker*, of a negotiable promissory note. "For that the said (*defendant*), on ——, by his promissory note in writing, for value received, promised the plain-

§ 156. **Existence of the Contract.** And, FIRST, as to *the existence of the instrument, as described in the declaration.* Ordinarily the bill

tiff to pay him or his order —— dollars —— in —— days [or *months*, etc.] after the date thereof. Yet," etc.

Here the plaintiff's case is made out by the production and proof of the note.

(3) *Indorsee* v. *Acceptor*, of a foreign bill. "For that one E. F., at ——, in the kingdom, etc., on ——, made his bill of exchange in writing, and directed the same to the said (*defendant*) at ——, and thereby required the said defendant in —— days [or, *months*, etc.] after sight [or *date*] of that his first of exchange, the second and third of the same tenor and date not paid, to pay to one G. H. or his order —— [*as in No.* 1]; and the said (*defendant*) then accepted the said bill; and the said G. H. then indorsed the same to the plaintiff [*or*, indorsed the same one to J. K., and the said J. K. then indorsed the same to the plaintiff]; of all which the said (*defendant*) then had notice, and in consideration thereof then promised the plaintiff to pay him the amount of said bill, according to the tenor and effect thereof and of his said acceptance. Yet," etc.

In this action the plaintiff's case is made out by proof of the acceptance, and of the indorsement, the acceptance being an admission that the bill was duly drawn.

(4) *Indorsee* v. *Maker*, of a promissory note. "For that the said (*defendant*), on ——, by his promissory note in writing, for value received, promised one E. F. to pay him or his order —— in —— days [*or*, months, etc.] from said date; and the said E. F. then indorsed the said note to the plaintiff; of which the said (*defendant*) then had notice, and in consideration thereof then promised the plaintiff to pay him the amount of said note according to the tenor thereof. Yet," etc.

Here the plaintiff's case is made out by proof of the maker's signature, and of the indorsement.

(5) *Bearer* v. *Maker*, of a promissory note. "For that the said (*defendant*), on ——, by his promissory note in writing, for value received, promised one E. F. to pay him or the bearer of said note —— in —— days [*or*, months, etc.] from said date; and the said E. F. then assigned and delivered the said note to the plaintiff, who then became and is the lawful owner and bearer thereof; of which the said (*defendant*) then had notice, and in consideration thereof then promised the plaintiff to pay him the amount of said note, according to the tenor thereof. Yet," etc.

This declaration is proved by production of note, and proof of its execution by the defendant.

(6) *Payee* v. *Drawer*, of a foreign bill, on non-acceptance. "For that the said (*defendant*), at ——, on ——, made his bill of exchange in writing, and directed the same to one E. F., at ——, in the kingdom of ——, and thereby required the said E. F. in —— days [*or*, months, etc.] after sight [*or*, date] of that his first of exchange, the second and third of the same tenor and date not paid, to pay to the plaintiff —— [*as in No.* 1]; and the said bill, on ——, at said ——, was presented to the said E. F. for acceptance, and he refused to accept the same: of all which the said (*defendant*) on —— had due notice, and thereby became liable to pay to the plaintiff the amount of said bill on demand, and in consideration thereof promised the plaintiff to pay him the same accordingly. Yet," etc.

Here the plaintiff must prove, if traversed, the drawing of the bill, its presentment to the drawer for acceptance, and his refusal to accept it, and notice thereof to the defendant; together with the protest, it being a foreign bill. See Salomons *v.* Staveley, 3 Doug. 298.

(7) *Indorsee* v. *Drawer*, of a foreign bill, on non-acceptance. "For that the said (*defendant*) at ——, on ——, made his bill of exchange in writing, and directed the same to one E. F., at ——, in the kingdom of ——, and thereby required the said E. F. in —— days [*or*, months, etc.] after sight [*or*, date] of that his first of exchange, the second and third of the same tenor and date not paid, to pay to one G. H. or his order —— [*as in No.* 1]; and the said G. H. then indorsed the same to —— [*as in No.* 3]; and the said bill, on ——, at said ——, was presented to the said E. F. for acceptance, and he refused to accept the same; of all which the said (*defendant*), on ——, had due notice, and thereby became liable to pay to the plaintiff the amount of said bill on demand, and in consideration thereof promised the plaintiff to pay him the same accordingly. Yet," etc.

A traverse of this declaration puts the plaintiff to prove the drawing of the bill, — the payee's indorsement, and all the subsequent indorsements declared upon, — pre-

must be produced at the trial, in all the parts or sets in which it was drawn.[1] If the bill or other *negotiable security be lost*, there can be no remedy upon it at law, unless it was in such a state, when lost, that no person but the plaintiff could have acquired a right to sue thereon. Otherwise, the defendant would be in danger of pay-

sentment to the drawee, — his default, — and notice to the defendant of the dishonor of the bill; together with the protest, as before.

(8) *Indorsee* v. *Indorser*, being payee of a foreign bill, on non-acceptance. "For that one E. F. at ——, on ——, made his bill of exchange, and directed the same to one G. H., at ——, in the kingdom of ——, and thereby required the said G. H., in —— days [*or*, months] after sight [*or*, date] of that his first of exchange, the second and third of the same tenor and date not paid, to pay to the said (*defendant*) or his order —— [*here describe the bill as in No.* 1]; and the said (*defendant*) then indorsed the same [*as in No.* 3]; and the said bill, on ——, at said ——, was presented to the said G. H. for acceptance, and he refused to accept the same, of all which the said (*defendant*), on ——, had due notice, and thereby became liable to pay to the plaintiff the amount of said bill on demand, and in consideration thereof promised the plaintiff to pay him the same accordingly. Yet," etc.

The proof of this declaration is the same as in the preceding case.

(9) *Drawer* v. *Acceptor*. "For that the plaintiff, on ——, made his bill of exchange in writing, and directed the same to said (*defendant*), and thereby required him, in —— days [*or*, months, etc.] after sight [*or*, date] of that his first of exchange, the second and third of the said tenor and date not paid, to pay to one E. F. or his order —— [*as in No.* 1], and delivered the same to the said E. F.; and the said (*defendant*) then accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, and of his said acceptance: yet he did not pay the amount thereof, although the said bill was presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff, of which the said (*defendant*) had notice."

In this case, the plaintiff may be required to prove the acceptance of the bill by the defendant, — its presentment for payment, and his refusal, — payment of the bill by the plaintiff, — and that the defendant had effects of the plaintiff in his hands; of which, however, the acceptance of the bill is *prima facie* evidence. It is not necessary for the plaintiff to make out a title to the bill under the payee: Kingman *v.* Hotaling, 25 Wend. 423.

(10) *Indorser* v. *Acceptor*. In this case, the plaintiff may declare specially as in the preceding case, *mutatis mutandis;* but the more usual course is to declare upon his original relation of payee or indorsee [*as in Nos.* 1 *and* 3].

(11) *Acceptor* v. *Drawer*, of an accommodation bill. "For that the said (*defendant*), on ——, in consideration that the plaintiff, at the request of the said (*defendant*) and for his accommodation, had then accepted a certain bill of exchange of that date drawn by the said (*defendant*), upon the plaintiff for the sum of ——, payable to one E. F. or his order in —— days [*or*, months, etc.] after sight [*or*, the date] of said bill, promised the plaintiff to furnish him with money to pay said bill at the time when the same should become payable. Yet the said (*defendant*) never did furnish the plaintiff with said money, by reason whereof the plaintiff has been compelled with his own money to pay the amount of said bill to the holder thereof, of which the said defendant had due notice."

In this case the plaintiff must prove the drawing of the bill and its acceptance; he must rebut the presumption that he had effects of the drawer in his hands, which results from his acceptance, by some evidence to the contrary; and he must prove that he has paid the bill. This last fact is not established by production of the bill without proof that it has been put into circulation since the acceptance; nor will a receipt of payment on the back of the bill suffice, without showing that it was signed by some person entitled to demand payment. Pfiel *v.* Vanbatenburg, 2 Camph. 439.

It is to be observed, that, where, by the course of practice, the precise time of filing the declaration does not judicially appear, it may be necessary, and is certainly expedient, to insert an averment that the time of payment of the bill or note is elapsed. But where the declaration is required to be inserted in the writ, or filed at the time of commencing the action, as is the case in several of the United States, this averment is unnecessary.

[1] 2 Stark. Ev. 203; Chitty & Hulme on Bills, p. 616.

ing it twice, in case it has been negotiated.[2] It is also his voucher, to which he is entitled by the usage of merchants, which requires its actual presentation for payment, and its delivery up when paid.[3] Therefore, wherever the danger of a double liability exists, as in the case of a bill or note, either actually negotiated in blank, or payable to bearer, and lost or stolen, the claim of the indorsee or former holder has been rejected.[4] And whether the loss was before or after the bill fell due is immaterial.[5] On the other hand, if there is no danger, that the defendant will ever again be liable on the bill or note, as if it be proved to have been actually destroyed, while in the plaintiff's own hands,[6] or if the indorsement were specially restricted to the plaintiff only,[7] or if the instrument was not indorsed,[8] or has been given up by mistake,[9] the plaintiff has been permitted to recover, upon the usual secondary evidence. So, if the bill was lost after it had been produced in court, and used as evidence in another action.[10] By cutting a bill, or a bank-note, into

[2] [Bank of the University *v.* Tuck, 96 Ga. 456.]

[3] Pierson *v.* Hutchinson, 2 Campb. 211; Hansard *v.* Robinson, 7 B. & C. 90; 9 D. & R. 860; Ry. & M. 404, n.; Poole *v.* Smith, Holt's Cas. 144; Rowley *v.* Ball, 3 Cowen 303; Story on Bills, §§ 448, 449; Ramuz *v.* Crowe, 11 Jur. 715; 1 Exch. 167; in which the cases are examined, Hansard *v.* Robinson confirmed, and the question put at rest.

[4] Davis *v.* Dodd, 4 Taunt. 602; Poole *v.* Smith, Holt's Cas. 144; Rowley *v.* Ball, 3 Cowen 303; Mayor *v.* Johnson, 3 Campb. 324; Bullet *v.* Bank of Pennsylvania, 4 Wash. C. C. 172; Champion *v.* Terry, 3 B. & B. 295.

[5] Ibid.; Kirby *v.* Sisson, 2 Wend. 550.

[6] Pierson *v.* Hutchinson, 2 Campb. 211; Swift *v.* Stevens, 8 Conn. 431; Anderson *v.* Robson, 2 Bay 495; Rowley *v.* Ball, 3 Cow. 303. The destruction of the bill may be inferred from circumstances: Pintard *v.* Tackington, 10 Johns. 104; Peabody *v.* Denton, 2 Gal. 351; Hinsdale *v.* Bank of Orange, 6 Wend. 378, 379.

[7] Long *v.* Bailie, 2 Campb. 214; *Ex parte* Greenway, 6 Ves. 812.

[8] Rolt *v.* Watson, 4 Bing. 273; s. c. 12 Moore 510; [Hoil *v.* Rathbone, 98 Mich. 323; Palmer *v.* Carpenter, 73 N. W. 690, Neb.]

[9] Eagle Bank *v.* Smith, 5 Conn. 71.

[10] Renner *v.* Bank of Columbia, 9 Wheat. 396. This may have been decided upon the ground that the loss was by the officers of the court, while the document was in the custody of the law. The same rule has been applied, where the bill has been used before commissioners in bankruptcy: Poorley *v.* Millard, 1 C. & J. 411; s. c. 1 Tyrw. 331. In the case of a lost bill, the general and appropriate remedy is in equity, upon the offer of a bond of indemnity: 1 Story on Eq. Jurisp. §§ 81, 82; *Ex parte* Greenway, 6 Ves. 812; Pierson *v.* Hutchinson, 2 Campb. 211; Mossop *v.* Eadon, 16 Ves. 430; Cockell *v.* Bridgman, 4 Beav. 499. In England, however, by Stat. 9 & 10 W. IV. c. 17, § 3, if any inland bill be lost or miscarried within the time limited for payment, the drawee is bound to give another of the same tenor to the holder, who, if required, must give security to indemnify him in case the lost bill should be found. But in some cases the courts of law have sustained an action by the payee, for the original consideration where the note or bill was not received in extinguishment of the original contract (Rolt *v.* Watson, 2 Bing. 273); or, upon the ground that the defendant, being the drawer of the bill, had prevented the indorsee from obtaining the money of the drawee, by refusing to enable him so to do (Murray *v.* Carrett, 3 Call 373). And in other cases, the owner of a bill, lost before its maturity, has been permitted to recover at law, on giving the defendant an indemnity (Miller *v.* Webb, 8 La. 516; Lewis *v.* Peytarin, 4 Martin N. S. 4); [Means *v.* Kendall, 35 Neb. 693;] but if lost after it had become due, and had been protested, no indemnity was held requisite (Brent *v.* Erving, 3 Martin N. S. 303); [Swatts *v.* Bowen, 141 Ind. 322; Means *v.* Kendall, *supra*.] See also 3 Kent Comm. 104, and cases cited by Comstock, editor.

two parts, as is often done for safety of transmission by post, its negotiability, while the parts are separate, is destroyed; in which case the holder of one of the parts, on proof of ownership of the whole, has been held entitled to recover.[11] If the loss of a promissory note is proved, the plaintiff, if he is the payee, may recover, unless it is affirmatively proved to have been negotiable; for, in the absence of such proof, the court will not presume that it was negotiable.[12]

§ 157. **Same Subject.** This amount of proof is incumbent on the plaintiff in order to recover his damages, whatever may be the point in issue. But where the *general issue* is pleaded, the plaintiff must also prove every other material averment in his declaration. If the issue is upon a point specially pleaded, all other averments are admitted, and the evidence is confined to that point alone.

§ 158. **Signature.** After the note or bill is produced, the next step is to *prove the signature* of the defendant, where, by the nature of the action, or by the state of the pleadings, or the course of the court, this proof may be required.[1] If the signature is not attested, the usual method of proof is by evidence of the person's handwriting, or of his admission of the fact.[2] If it is attested by a subscribing witness, that witness must be produced, if he is to be had, and is competent.[3] Some evidence has also been held requisite of the identity of the party with the person whose signature is thus proved;

[11] Hinsdale *v.* Bank of Orange, 6 Wend. 378; Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; Patton *v.* State Bank, 2 N. & McC. 464; Bank of United States *v.* Sill, 5 Conn. 106; Farmers' Bank *v.* Reynolds, 5 Rand. 186.

[12] McNair *v.* Gilbert, 3 Wend. 344; Pintard *v.* Tackington, 10 Johns. 104, 105. See further, Bayley on Bills, 413–418. In a suit by the payee against the maker of a promissory note, if the note be so mutilated that the payee's name is illegible, the plaintiff must prove that the note was made to him, and was in his possession at the commencement of the suit, and that it was mutilated under circumstances not affecting its validity: Hatch *v.* Dickinson, 7 Blackf. 48.

[1] See *supra*, § 16. {By statute in Massachusetts, signatures to written instruments declared on or set forth as a cause of action or as a ground of defence or set-off, shall be taken as *admitted*, unless the party sought to be charged thereby files in court, within the time allowed for an answer, a *special denial* of the genuineness thereof, and a demand that they shall be proved at the trial: Mass. Pub. Stat. c. 167, § 21.

This statute does not apply, however, to the signature of a witness to an attested promissory note: Holden *v.* Jenkins, 125 Mass. 446.

In Maine a similar rule is embodied in Rule X. Reg. Gen. of the Supreme Court; and for the States where such rule exists, see *ante*, § 16.}

[2] Where the plaintiff relies on the defendant's verbal admission that he made the note in question, the identity of the note referred to must be satisfactorily established. Therefore, where the agent of the holder of a note, payable to bearer, called on the defendant with the alleged note in his pocket, which he did not exhibit, but told him he had a note for that amount against him, and requested payment of it for the plaintiff, and the defendant replied that he had given such a note, and would pay it if the plaintiff would make a small deduction, and indulge him as to time; it was held, that the note declared on and produced at the trial was not sufficiently identified with that to which the admission referred, and that the proof was insufficient: Palmer *v.* Manning, 4 Denio 131.

[3] See *ante*, Vol. I. §§ 569–574, where the proof of the execution of instruments is more fully treated.

but slight evidence to this point will suffice.[4] If it is alleged in the declaration, that the bill was drawn, or accepted, or that the note was made by the party, "his own proper hand being thereunto subscribed," it has been thought, that this unnecessary allegation bound the plaintiff to precise proof, and that if the signature appeared to have been made by another, by procuration, it was a fatal variance.[5] But the weight of later authority is otherwise; and accordingly it is now held, that these words may be rejected as surplusage.[6] If the instrument was executed by an agent, his authority must be proved, together with his handwriting; and if he was authorized by deed, the deed must be produced, or its absence legally accounted for, and its existence and contents shown by secondary evidence.[7] If the instrument is in the hands of the adverse party, or his agent, notice must be given to the party to produce it.[8]

§ 159. **Several Signatures.** If there are *several signatures*, they must all be proved; and an admission by one will not, in general, bind the others.[1] But where the acceptors are partners, it will suffice to prove the partnership, and the handwriting of the partner who wrote the signature.[2] If the signature is not attested by a subscribing witness, the *admission* of the party is sufficient proof of it; otherwise the subscribing witness must be called;[3] but the

[4] See *ante* Vol. I. § 575; Nelson *v.* Whittall, 1 B. & Ald. 19; Page *v.* Mann, 1 M. & M. 79; Mead *v.* Young, 4 T. R. 28; Bulkeley *v.* Butler, 2 B. & C. 434; Chitty & Hulme on Bills, 641, 642 (9th ed.). Sometimes identity of name will suffice: Roden *v.* Ryde, 4 Ad. & El. N. S. 630–634.

[5] 2 Stark. Ev. 203; 2 Phil. Ev. 4.

[6] This point was first raised before Lord Ellenborough, in 1804, in Levy *v.* Wilson, 5 Esp. 180, when he held it matter of substance, and nonsuited the plaintiff for the variance. Afterwards, in 1809, in Jones *v.* Mars *et al.*, 2 Campb. 305, which was against partners, as drawers of a bill, "their own *hands* being thereto subscribed," and the proof being, that the name of their firm of "Mars & Co." was subscribed by one of them only, the same learned judge refused to nonsuit the plaintiff for that cause. In the following year, the original point being directly before him in Helmsley *v.* Loader, 2 Campb. 450, he said it would be too narrow a construction of the words "own hands," to require that the name should be written by the party himself. And of this opinion was Lord Tenterden, who accordingly held the words mere surplusage, in Booth *v.* Grove, 1 M. & Malk. 182; s. c. 3 C. & P. 335. See also Chitty & Hulme on Bills, pp. 570, 627 (9th ed.). If the party signed by the initials only of his name, intending thereby to be bound, it is sufficient: Palmer *v.* Stephens, 1 Denio 471.

[7] Johnson *v.* Mason, 1 Esp. 89.

[8] See *ante*, Vol. I. §§ 560–563. Notice to the agent is unnecessary. Burton *v.* Payne, 2 C. & P. 520.

[1] See *ante*, Vol. I. § 174; Gray *v.* Palmer, 1 Esp. 135; Sheriff *v.* Wilkes, 1 East 48; Carvick *v.* Vickery, 2 Doug. 653, n.

[2] See *ante*, Vol. I. § 177. As to admission by partners, see *ante*, Vol. I. § 112 and n. In the modern English practice, under the issue of *non acceperunt*, though it be shown, in defence, that the acceptance was given by one partner in fraud of the firm, yet such proof does not require the plaintiff to show that he gave a consideration for the bill, unless the evidence of the defendants affects him with knowledge of the fraud: Musgrave *v.* Drake, 5 Ad. & El. N. S. 185. In the American courts, where the older rules of practice are still observed, it is otherwise. See *infra*, § 172. A signature by the names and surnames of the several members of the firm is sufficient to charge the partnership: Norton *v.* Seymour, 3 M. G. & S. 792; Blodgett *v.* Jackson, 40 N. H. 21.

[3] See *ante*, Vol. I. §§ 569–572.

admission of the party that the signature is his, if not solemnly made, does not estop him from disproving it.[4] Payment of money into court, partial payments made out of court, promises to pay, a request of forbearance, and for further time of payment, and a promise to give a new security, have severally been deemed sufficient to dispense with proof of the signature.[5] A promise by the maker to pay a note to an indorsee, made after it fell due, has been held an admission not only of his own signature, but of all the indorsements, superseding the necessity of further proof.[6]

§ 160. **Variance.** The bill or note produced must conform in all respects to the instrument described in the declaration; for every part of a written contract is material to its identity, and a *variance* herein will be fatal.[1] But where it is alleged that the party on such a day *made* his promissory note, but it is not alleged that the note *bore date* on that or any other day, this is not considered as giving a date to the note, so as to cause a variance by proof of a note bearing date on a different day.[2] If there be any alteration apparent on the instrument, tending to render it suspected, the plaintiff must be prepared with evidence to explain it.[3] And if the plaintiff sue as payee of a bill or note, which purports to be payable

[4] Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; *ante*, Vol. I. §§ 27, 186, 205, 572.

[5] See *ante*, Vol. I. § 205; Israel *v.* Benjamin, 3 Campb. 40; Bosanquet *v.* Anderson, 6 Esp. 43; Helmsley *v.* Loader, 2 Campb. 450; Jones *v.* Morgan, ib. 474.

[6] Keplinger *v.* Griffith, 2 Gill & Johns. 296.

[1] See Vol. I. §§ 56, 61, 63, 64; and *supra*, §§ 11 *b*, 11 *d*, as to the law of variance. {But a memorandum written at the bottom of a promissory note which is contradictory to the note, as where an addition to a note made it payable before its date, does not form part of the contract, but is immaterial and may be omitted in the copy of the note set out in the declaration without causing a variance: Way *v.* Batchelder, 129 Mass. 361. This is true of a receipt upon the back of a note of part of the amount, and a memorandum that it has been protested for non-payment: Buhl *v.* Trowbridge, 42 Mich. 44.} A note made payable to the maker's own order, and by him indorsed in blank, will support a count on such a note as made payable to the bearer: Hooper *v.* Williams, 12 Jur. 270; Masters *v.* Baretto, 8 M. G. & S. 433. But prior to its indorsement it is not a promissory note, within the Stat. 3 & 4 Anne, c. 9: Brown *v.* DeWinton, 12 Jur. 678. {So held in the Court of Exchequer: Flight *v.* Maclean, 16 Mees. & W. 51; Hooper *v.* Williams, 2 Exch. 13; also in Woods *v.* Ridley, 11 Humph. 194; but in Wood *v.* Mytton, 10 Ad. & El. N. S. 805, it was held that such an instrument was a promissory note before indorsement.}

[2] Smith *v.* Lord, 9 Jur. 450; s. c. 2 Dowl. & L. 579.

[3] See Vol. I. § 564. {This arises from the general burden of proof which is on the plaintiff, to show that the instrument declared on is the genuine and valid promise of the defendants. But the paper itself, unaided by other evidence, may satisfy the jury, or it may not. It may explain itself or it may present indications of fraud or forgery. In each case the burden of proof rests on the plaintiff, and the question of whether the alteration is a forgery or not is a question of fact for the jury: Dodge *v.* Haskell, 69 Me. 429. And when a material alteration is proved, the burden is on the plaintiff to show the defendant's consent to the alteration.

The unauthorized alteration of a note after delivery discharges the promisor: Angle *v.* North Western Ins. Co., 92 U. S. 330; Cape Ann National Bank *v.* Burns, 129 Mass. 596. An alteration on a note will avoid the note as to those parties who have not consented to the alteration, although it may have been made without any fraudulent intent: Draper *v.* Wood, 112 Mass. 315; Booth *v.* Powers, 56 N. Y. 22.} [Uniform Act, § 124; allowing a holder in due course, however, to enforce the note according to its original tenor.]

to a person of a different name, this also may be explained by evidence *aliunde*, if the record contains the proper averments.[4] So, if the drawer and drawee of a bill are of the same name, and the record does not assert that they are two persons, parol evidence is admissible that they are one and the same person, and of course that the bill amounts, in effect, to a mere promissory note.[5] If the action is by the indorsee against the indorser of a bill dishonored on presentment for payment, the allegation of its acceptance is not descriptive of the instrument, but is wholly immaterial, and therefore need not be proved.[6] And in an action against the acceptor, if his acceptance be unnecessarily stated to have been made to pay the bill at a particular place, and there is an averment of presentment there, this averment also is immaterial, and need not be proved.[7] If the currency mentioned in the bill is foreign, and its equivalent value has not been established and declared by law, the value will of course be alleged in the declaration, and must be proved, including the rate of exchange when the bill became due; together with the duration of the usances, if any are stated in the bill.

§ 161. **Defendant's Liability.** Secondly, the plaintiff must show *how the defendant was a party to the bill or note*, and the *nature of his contract*. If the action is *against the acceptor*, the acceptance must be proved. And an acceptance, where it is not otherwise qualified or restrained by the local law, may be either verbal or in writing; or may be either by express words, or by reasonable implication.[1] By the French law, every acceptance must be in writing. By the English law, the acceptance of a foreign bill may be verbal or in writing; but that of an inland bill must be only in writing, on the bill itself. In all other cases an acceptance by letter or other writing is good; though it is usually made on the bill.[2] If the acceptance is by an agent, his authority, as we have

[4] Willis *v.* Barret, 2 Stark. 29; [Uniform Act, § 43.]

[5] Roach *v.* Ostler, 1 Man. & Ry. 120. If the declaration is on a bill of exchange, as drawn by S. S., and made payable "to S. S. or order," and the bill produced in evidence reads, "Pay to my order," it is no variance: Smith *v.* McClure, 5 East 476; Bluett *v.* Middleton, 1 Dowl. & L. 376; Masters *v.* Barrets, 2 C. & K. 715.

[6] Tanner *v.* Bean, 4 B. & C. 312, overruling Jones *v.* Morgan, 2 Campb. 474, as to this point.

[7] Freeman *v.* Kennell, Chitty & Hulme on Bills, p. 616.

[1] Story on Bills, §§ 242, 243. [Under the Uniform Act, the acceptance must be in writing and signed by the drawee: § 132. "Where the acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown, and who, in the faith thereof, receives the bill for value:" § 134. "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value:" § 135. "When a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same:" § 137.]

[2] Story on Bills, § 242; Chitty & Hulme on Bills, pp. 314–333 (9th ed.). A promise to accept an existing bill, specifically described, is a good acceptance: Grant *v.* Hunt,

seen in other cases, must be shown.[3] Where the action is against some of several acceptors *or makers*, the others are competent witnesses for the plaintiff, to prove the handwriting of the defendant.[4] So, if the action is against *partners*, after proof of the partnership, the admissions of one of the firm are good against all.[5] A signature by the names and surnames of the respective partners is sufficient to charge the partnership; and it seems that such signature made by one of the partners will suffice.[6] If the bill is drawn payable *after sight*, it is in general necessary to prove the precise time of acceptance; but if the acceptance is dated, this is sufficient evidence of the time; and though the date is in a hand different from that of the acceptor, it will be presumed to have been written by his authority, by a clerk, according to the usual course of business.[7] If the acceptance was *by parol*, the person who heard it must be called; and if the answer relied on was given by a clerk, his authority to accept bills for his master must also be proved.[8]

1 M. G. & S. 44; 10 Jur. 228; Story on Bills, § 244; but whether a promise to accept a non-existing bill, to be drawn at a future day, is a good acceptance, is a point not universally agreed. As between the drawee and a third person, who has taken the bill upon the faith of the promise to accept it, the doctrine was for a long time maintained in England, that it amounted to an acceptance of the bill. But this doctrine has recently been re-examined and explicitly overruled, in the Bank of Ireland *v.* Archer, 11 M. & W. 383. "But the rule," says Mr. Justice Story, "as formerly held, always included the qualification, that the paper containing the promise should describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others; that the bill should be drawn within a reasonable time after the paper was written; and it should be received, by the person taking it, upon the faith of the promised acceptance; and if either of these circumstances should fail, the promise would not amount to an acceptance. Under these qualifications, the rule seems to be firmly established in America upon the footing of the old authorities. But the rule is applicable only to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for it is obvious, that, to constitute an acceptance in the latter cases, a presentment is indispensable, since the time that the bill is to run cannot otherwise be ascertained:" Story on Bills, § 249. And see Chitty & Hulme on Bills, pp. 284, 285–297; Ulster County Bank *v.* MacFarlan, 3 Hill (N. Y.) 432.

[3] *Supra*, §§ 59–68.

[4] York *v.* Blott, 5 M. & S. 71; Chitty & Hulme on Bills, p. 627 (9th ed.). See *ante*, Vol. I. § 399; Poole *v.* Palmer, 9 M. & W. 71.

[5] See *ante*, Vol. I. §§ 172, 174, 177.

[6] Norton *v.* Seymour, 3 M. G. & Sc. 792.

[7] Glossop *v.* Jacob, 4 Campb. 227; s. c. 1 Stark. 69; Chitty & Hulme on Bills, p. 292 (9th ed.). An acceptance by the wife of the drawee, by writing her own name on the bill, is sufficient to bind him as acceptor, if she had authority to accept the bill: Lindus *v.* Bradwell, 17 Law Jour. 121; 9 Law Mag. N. S. 146; 12 Jur. 230; 5 M. G. & Sc. 583. The mere production of a bill, with formal proof of the acceptor's handwriting, is *prima facie* evidence that the bill was accepted during its currency, and within a reasonable time of its date, such being the regular course of business. The reasonableness of the time depends on the relative places of abode of the parties to the bill: Roberts *v.* Bethell, 14 Eng. Law & Eq. 218.

[8] Sawyer *v.* Kitchen, 1 Esp. 209. As to what conduct or words amount to a verbal acceptance, see Chitty & Hulme on Bills, pp. 288, 289 (9th ed.); Story on Bills, §§ 243–247. {Where a note, payable on time, is indorsed, and the indorsement is not dated, and there is no evidence to show when it was made, the presumption is that the transfer of the note was made at or soon after its date: Balch *v.* Onion, 4 Cush. (Mass.) 559. In an action by the payee of a negotiable note against two or more persons as joint promisors, where one of the defendants' names is on the face of the note,

§ 162. **Same Subject.** In an action *against the drawer, maker, or indorser*, of a bill or note, the same proof of signature, and of agent's authority, is requisite as in the case of an acceptor.[1]

§ 163. **Plaintiff's Right to Sue.** In the THIRD PLACE, *the plaintiff must prove his interest in the bill or note*, or *his title to sue thereon.* Where the action is between the immediate parties to the contract, as payee and maker of a note, or payee and acceptor of a bill, the plaintiff, ordinarily, has only to produce the instrument and prove the signature.[1] But where the plaintiff was not an original party to the contract, but has derived his title by means of some intermediate transfer, the steps of this transfer become, to some extent, material to be proved. The extent to which the proof must be carried will generally depend upon the extent of the allegations in the declaration. Thus, if a note made payable to A. B. or bearer is indorsed in blank by the payee, and the holder, in an action against the maker, declares upon the indorsement, he must prove it; although the allegation of the indorsement was unnecessary; for he might have sued as bearer only, in which case the indorsement need not be proved.[2] If the name of the payee in the bill or note was

and the names of the others are on its back, without date and in blank, the legal presumption is that all the names were signed at the same time: Benthall *v.* Judkins, 13 Met. (Mass.) 265. The legal presumption is that a note has been transferred in the usual course of business, for a valuable consideration, and before it was dishonored: Andrews *v.* Chadbourne, 19 Barb. (N. Y.) 147; Leland *v.* Farnham, 25 Vt. 553.}

[1] As to the proof of handwriting, see *ante*, Vol. I. §§ 576–581. As to proof by the subscribing witness, see *ante*, Vol. I. §§ 569–575. And as to admissions by the party or by one of several parties, see *ante*, Vol. I. §§ 27, 172–205. {A mutual fire insurance company, in an action brought by them against one of their members, to recover assessments on a deposit note, must prove not only the actual assessments, but must produce proper evidence of their act of incorporation and by-laws, and show that the assessments are made in accordance therewith: Atlantic Mut. Fire Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279. And if the mutual insurance company be a foreign one, it must, in such an action, show affirmatively that the contract of insurance, which is the consideration of the note, is a valid contract according to the laws of the State in which it is made: Jones *v.* Smith, 3 Gray (Mass.) 501. But if the action on such note is brought by the indorsee, and he is a *bona fide* holder without notice, a compliance by the company with the requisitions of law may be presumed, in the absence of evidence to the contrary: Ibid.; Williams *v.* Cheney, ib. 215.}

[1] King *v.* Milson, 2 Campb. 5. See also Peacock *v.* Rhodes, 2 Doug. 633.

[2] Waynam *v.* Bend, 1 Campb. 175. And see *ante*, Vol. I. § 60. If he sues as bearer only, the indorsement need not be proved: Wilbour *v.* Turner, 5 Pick. 526; [Uniform Act, § 40.] See also Blakely *v.* Grant, 6 Mass. 386. And possession of a negotiated bill or note is *prima facie* evidence of title in the holder, on proof of the indorsements. See Mohtam *v.* Mills, 1 Sandf. S. C. 37. Every indorsement of a promissory note will be presumed to have been made at the place of making the note, until the contrary appears: Duncan *v.* Sparrow, 3 Rob. (La.) 167. {In an action on a note payable to a person named, or bearer, when the plaintiff brings the note declared upon in his hand and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand as proof of title until other evidence is produced to control it: [Dashiell *v.* Merchants' Sav. Bk., Va., 22 S. E. 169; Robinson *v.* Smith, 62 Minn. 62.] And where the note is payable to a corporation, of which the plaintiff is the general agent, and, as such, has the custody of all their notes, this fact alone is not sufficient to rebut the general presumption that he is the owner: Pettee *v.* Prout, 3 Gray (Mass.) 502. If, when the

left blank, and the plaintiff has filled it by inserting his own name, he must show either that he was intended as the original payee, or that the bill came regularly into his possession.[3] If there are several persons of the same name with the payee, the possession of the bill or note is *prima facie* evidence that the plaintiff was intended; but if there be two, father and son, in the absence of other proof, it will be presumed that the father was intended.[4] And, where the bill or note is made payable to a firm by the name of A. & Co., the payees, in a suit in their own names, must prove that they were the persons who composed the firm.[5]

§ 164. **Same Subject; Admissions of Defendant.** But though the plaintiff must furnish the proof of his own title, yet this proof may consist of *admissions* by the defendant, apparent upon the bill or note. For every person giving currency to commercial paper is understood thereby to assert the genuineness of all such signatures, and the regularity of all such previous transactions as he was bound to know. Thus, the acceptor of a bill, after sight, whether in general, or for honor, or *supra protest*, by the act of *acceptance*, admits that the drawer's signature is genuine, that he had a right to draw, that he was of proper age, and otherwise qualified to contract, and that he bears the character in which he assumes to draw,

plaintiff produces the note at the trial, the indorsements are all special and do not make a title in him, he cannot recover on the note, because he is not a party to it. The producing the note, though *prima facie* evidence of ownership, is overcome by the special indorsements: Royce *v.* Nye, 52 Vt. 372. It is no defence to a note that the plaintiff has no beneficial interest in the note sued on, and must hand over the proceeds to the real owner: Spofford *v.* Norton, 126 Mass. 533; Way *v.* Richardson, 3 Gray (Mass.) 412. But where the plaintiff sued as administrator of the president of a bank, and the defence was that the intestate never had possession of the note as his own property, nor claimed to have, but that he had it only as president of the bank, this was held a good defence. The possession must not be fraudulent: Towne *v.* Wason, 128 Mass. 517.}

[3] Crutchley *v.* Mann, 5 Taunt. 529; s. c. 1 Marsh. 29; [Uniform Act, § 14.] Where the payee indorsed the note, but did not deliver it, and after his death it was delivered by the executor to the plaintiff, it was held that the plaintiff had no title to sue on the note: Bromage *v.* Lloyd, 1 Exch. 32.

[4] Sweeting *v.* Fowler, 1 Stark. 106; Stebbing *v.* Spicer, 8 M. G. & S. 827; *ante*, Vol. I. § 38, n. {In some States, if a person, not an indorsee, places his name in blank on a note, before it is negotiated or passed, and so before it has acquired the character of the contract, the holder may fill up the blank so as to charge such indorsee as a joint and several promisor and surety. The fact of intrusting such blank with another is evidence of an authority to fill up something over it, and the actual authority to fill it up in any particular form may be proved by evidence *aliunde:* Riley *v.* Gerrish, 9 Cush. (Mass.) 104; Union Bank of Weymouth & B. *v.* Willis, 8 Met. (Mass.) 504; Benthall *v.* Judkins, 13 id. 265; Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Bryant *v.* Eastman, 7 id. 111; Howe *v.* Merrill, 5 id. 80; Story, Prom. Notes, §§ 59 472–480; Lowell *v.* Gage, 38 Me. 35; Sargent *v.* Robbins, 19 N. H. 572.} [Under the Uniform Act, § 64, such signer "is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."]

[5] Waters *v.* Paynter, Chitty & Hulme on Bills, 637, n. (1) (9th ed.).

such as executor, partner, and the like.[1] But there is no implied admission, in such case, of the genuineness of the signature of the payee, or of any other indorser.[2] So, also, the *indorsement* of a bill or note is an admission of the genuineness of the signature of the drawer, or maker.[3] And if the bill is drawn by *procuration*, the acceptance admits the procuration.[4]

§ 165. **Same Subject.** These *admissions*, however, by the act of acceptance or indorsement, are strictly *limited* to those things which the party was bound to know. Therefore, though a bill is drawn payable to the drawer's own order, and is indorsed with the same name, whether by procuration or not, yet the acceptance is not in itself an admission of the indorsement, but only of the drawing;[1]

[1] [Acceptance admits "(1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse:" Uniform Act, § 62.]

[2] Wilkinson *v.* Lutwidge, 1 Stra. 648; Smith *v.* Seare, Bull. N. P. 270; Porthouse *v.* Parker, 1 Campb. 82; Taylor *v.* Croker, 4 Esp. 187; Bass *v.* Clive, 4 M. & S. 13; Vere *v.* Lewis, 3 T. R. 182; Parminter *v.* Symons, 2 Bro. P. C. 182; 1 Wils. 185; Aspinal *v.* Wake, 10 Bing. 51; Story on Bills, §§ 113, 262; Schultz *v.* Astley, 2 Bing. N. C. 544; Pitt *v.* Chappelow, 8 M. & W. 616; Braithewaite *v.* Gardiner, 10 Jur. 591; Halifax *v.* Lyle, 18 Law Journ. Exc. 197; Smith *v.* Marsack, 6 D. & L. 363; Bank of Commerce *v.* Union Bank, 3 Comst. 230. {Acceptance admits that the bill is drawn by a competent party: Smith *v.* Marsack, 6 C. B. 486; and, when it is drawn by an agent, that the agent was duly authorized; but it does not admit the genuineness or authority of the indorsement: Garland *v.* Jacomb, L. R. 8 Ex. 216; Beeman *v.* Duck, 11 M. & W. 251. Where a bank, in answer to the inquiry whether a check is good, replies in the affirmative, it admits the genuineness of the signature, and that the drawer has funds to meet it. But it is not thereby estopped to deny that the name of the payee, or the amount, is genuine. If a bank certifies a check for the purpose of giving it credit for negotiation, it is bound for the genuineness of the filling: Espy *v.* First Nat. Bk. of Cin., 18 Wall. (U. S.) 604. A forged a certificate of stock, and borrowed money of a bank. When A paid the loan, the cashier of the bank signed the transfer on the back of the certificate in blank, for the purpose of restoring the certificate to A. A afterwards borrowed money of B on the same certificate. Held, that the bank, by signing the transfer, warranted the genuineness of the certificate, and was liable to the holder for the amount borrowed: Matthews *v.* Mass. Nat. Bk., U. S. C. Ct. Mass. Dist. 1874, 10 Alb. L. J. 199. But a bank is not held to know the genuineness of the filling up of a check drawn upon and paid by it: Nat. Bk. of Com. *v.* Nat. Mech. Bk. Ass., 55 N. Y. 211.}

[3] Free *v.* Hawkins, Holt's Cas. 550; Young *v.* Patterson, 11 Rob. (La.) 7. {A person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures of the makers and indorsers; and such implied contract is not a representation concerning the character, credit, or ability of another, within the Statute of Frauds: Cabot Bank *v.* Morton, 4 Gray (Mass.) 156; Markle *v.* Hatfield, 2 Johns. (N. Y.) 455; Herrick *v.* Whitney, 15 id. 240; Canal Bank *v.* Bank of Albany, 1 Hill 287; Talbot *v.* Bank of Rochester, id. 295; [Uniform Act, § 65.] And if the person procuring the notes to be discounted by a bank says, when offering them for discount, they are good, and in case of non-payment he will see them paid, this is no evidence of a waiver by the bank of the implied warranty of the genuineness of the signatures: Cabot Bank *v.* Morton, *ubi supra*.}

[4] Robinson *v.* Yarrow, 7 Taunt. 455; Story on Bills, §§ 262, 263, 412, 451.

[1] Robinson *v.* Yarrow, 7 Taunt. 455; Story on Bills, §§ 262, 263, 412, 451; Smith *v.* Chester, 1 T. R. 654. But where the bill is made payable to the drawer's own order, and by him is indorsed, the acceptance, though it may not be an admission of the genuineness of his indorsement (a distinction which Mr. Justice Story thought very nice and not very satisfactory, see Story on Bills, § 412), yet is an admission of his authority to transfer the bill to the *bona fide* holder. Thus, where, in an action by the indorsee against the acceptor of such a bill, it appeared upon demurrer, that the drawer, at the time of drawing the bill, was an uncertificated bankrupt, and so had no

though probably the jury would be warranted in inferring the one, from the admitted genuineness of the other.[2] So, though the bill has been shown to the drawer, with the indorsement of the payee upon it, and his objection to paying it was merely because it was drawn without consideration, yet this will not dispense with proof of the indorsement.[3] But where there are successive indorsements, which are all laid in the declaration, and are therefore generally necessary to be proved,[4] yet, if the defendant apply to the holder for further time, and offer terms, this is an admission of the plaintiff's title, and a waiver of proof of all the indorsements except the first.[5] So, if the payee delivered it, with his name indorsed on it, to another, the proof of this fact will dispense with direct proof of the indorsement.[6] So, if the drawee, at the time of acceptance of an indorsed bill, expressly promises to pay it, this has been held an admission of the indorsements.[7]

§ 166. **Same Subject.** The plaintiff is *not bound* to allege, nor of course *to prove, any indorsements but such as are necessary to convey title* to himself. All others, therefore, may be stricken out; even after the bill has been read in evidence, and after an objection has been taken on account of variance.[1] And in an action against a subsequent indorser, it is not necessary to prove any indorsement prior to his own, even though alleged.[2] If the action is against the drawer or acceptor, and the first indorsement was in blank, it will be unnecessary to prove any of the subsequent indorsements, though they were in full; they may therefore be stricken out at the time of trial, unless set out in the declaration; which, however, may in that case be amended.[3] If the bill or note was made payable to the

right to control the funds, yet it was held, that the defendant, by the acceptance, had conclusively admitted his right so to do, and, *as against the indorsee*, was estopped to set up such a defence: Pitt *v.* Chappelow, 8 M. & W. 616; Braithwaite *v.* Gardiner, 10 Jur. 591. And see Story on Bills, § 85, n.

[2] See *ante*, Vol. I. §§ 578, 581; Alport *v.* Meek, 4 C. & P. 267. In this case, as it appeared, by the plaintiff's own showing, that neither of the signatures was in the handwriting of the nominal drawer, for the want of further explanatory evidence, he was nonsuited. See also Jones *v.* Turnour, 4 C. & P. 204.

[3] Duncan *v.* Scott, 1 Campb. 101.

[4] Chitty & Hulme on Bills, p. 642 (9th ed.); *ante*, Vol. I. § 60.

[5] Bosanquet *v.* Anderson, 6 Esp. 43.

[6] Glover *v.* Thompson, Ry. & M. 403. But where the acceptor negotiated the bill with the drawer's name indorsed, he was not allowed, as against the indorsee, to *plead* that it was not indorsed by the drawer to the plaintiff, in addition to a plea denying the acceptance: Gilmore *v.* Hague, 4 Dowl. P. C. 303.

[7] Hankey *v.* Wilson, Sayer 223. And see Sidford *v.* Chambers, 1 Stark. 326.

[1] Mayer *v.* Jadis, 1 M. & Rob. 247. And see Dollfus *v.* Frosch, 1 Denio 367; [Uniform Act, § 48.]

[2] Critchlow *v.* Parry, 2 Campb. 182; Lambert *v.* Pack, 1 Salk. 127; Chaters *v.* Bell, 4 Esp. 210.

[3] Walwyn *v.* St. Quintin, 1 B. & P. 658; s. c. 2 Esp. 515; Chaters *v.* Bell, 4 Esp. 210; Smith *v.* Chester, 1 T. R. 654. If the note or bill, though indorsed and transferred, gets back again into the hands of the payee, he is *prima facie* the legal owner: Dugan & *al* *v.* United States, 3 Wheat. 172; [Kells *v.* Northwestern Livestock Ins. Co., 64 Minn. 390; Middletown *v.* Griffith, 57 N. J. L. 442; Spreckels *v.* Bender, 30

order of a *fictitious person,* and the party sued knew that fact when he became party to the bill or note, or before he transferred it, this will dispense with proof of the handwriting of the fictitious indorser.[4] It may here be added, that, where the indorser of a bill or note is not a party to the suit, he is generally a competent witness to prove his own indorsement;[5] and that the indorsement of an infant;[6] or, of a *feme covert,*[7] she being the agent of her husband; or, of a trader, after an act of bankruptcy,[8] if he received the value, — are alike sufficient to convey title to the indorsee.

§ 167. **Case of Partnership.** In an action against the drawer or acceptor of a bill payable to the order of several *partners,* it is in general necessary to prove the partnership and the handwriting of the partner or agent of the firm by whom it was indorsed.[1] But if the partnership has been dissolved, it is not necessary, in an action upon a bill, drawn and indorsed by one partner in the name of the firm, to prove that the bill was drawn and indorsed before the dissolution; for the bill will be presumed to have been drawn on the day of its date, and the jury will be at liberty to infer that the indorsement, if without date, was made at the same time.[2] If the plaintiffs sue as indorsees of a bill indorsed in blank, they need not prove their partnership, nor that the bill was indorsed or delivered to them jointly; for the indorsement in blank conveys a joint right of action to as many as agree in suing on bill.[3] But if a bill or note is payable or indorsed specially to a firm, by their

Or. 577.] The holder may derive title to himself from any preceding indorser, striking out the intermediate indorsements: Emerson *v.* Cutts, 12 Mass. 78; Tyler *v.* Binney, 7 id. 479; Watervliet Bank *v.* White, 1 Denio 608.

[4] Minet *v.* Gibson, 3 T. R. 481; Bennett *v.* Farnell, 1 Campb. 180 *c;* Chitty & Hulme on Bills, pp. 157, 158 (9th ed.); Story on Bills, § 200; Cooper *v.* Meyer, 10 B. & C. 468. [The instrument in such case is payable to bearer: Uniform Act, § 9.] {Where the payee of the note was the "New England Steam & Gas Pipe Co.," and there was no such company then existing, but A was carrying on business under that name, A may transfer the title to the note by an indorsement in his own name: Bryant *v.* Eastman, 7 Cush. (Mass.) 111.}

[5] Richardson *v.* Allan, 2 Stark. 334; *ante,* Vol. I. §§ 190, 383, 385.

[6] Taylor *v.* Croker, 4 Esp. 187; Nightingale *v.* Withington, 15 Mass. 273; Jones *v.* Darch, 4 Price 300.

[7] Cotes *v.* Davis, 1 Campb. 485; Barlow *v.* Bishop, 1 East 434; Miller *v.* Delamater, 12 Wend. 433; Lord *v.* Hall, 8 M. G. & S. 627; Stevens *v.* Beals, 10 Cush. 291.

[8] Smith *v.* Pickering, 1 Peake's Cas. 50.

[1] Chitty & Hulme on Bills, pp. 37–61, 643 (9th ed.).

[2] Anderson *v.* Weston, 5 Bing. N. C. 296. {Where one of two partners files his individual petition for the benefit of the insolvent law, and afterwards, but before the first publication of notice on said petition, the two partners divide between themselves certain promissory notes, the property of the partnership, and payable to the partnership firm, either partner, before the dissolution of the firm, by the publication of notice on the petition of the individual partner, may indorse the partnership name on the notes which he takes under said division: Mechanics' Bank *v.* Hildreth, 9 Cush. (Mass.) 356.}

[3] Ord *v.* Portal, 3 Campb. 239, per Ld. Ellenborough; Attwood *v.* Rattenbury, 6 Moore 579, per Parke, J.; Rordasuz *v.* Leach, 1 Stark. 446.

partnership name, and they sue thereon, strict proof must be made, that the firm consists of the persons who sue.[4]

§ 168. **In Case of Blank Indorsement.** The like effect is given to a *blank indorsement* in other cases; for in pleading it is sufficient, *prima facie*, to convey a title to the actual holder, and of course nothing more need be proved. Thus, where a promissory note indorsed in blank was delivered to one to get it discounted, and he shortly afterwards returned with the money, which he paid over, this was held sufficient to entitle him as executor to recover judgment upon the note as indorsed to his testator.[1] But in an action by the executor of the payee, against the acceptor, it is necessary to allege and prove, that the acceptance was in the testator's lifetime.[2] If the note, after being indorsed in blank, is delivered in pledge by the payee, as collateral security for a debt, this will not prevent the payee from suing upon it in his own name, or again transferring it, subject only to be defeated by the claim of the pledgee.[3]

§ 169. **In Case of Drawer against Acceptor.** If the action is by the *drawee against the acceptor* of a bill, which, having been dishonored, he has been obliged to pay to the holder, and these facts are alleged in the declaration, the plaintiff must prove the return of the bill, and the payment by him; but it is not necessary to prove that the acceptor held funds of the drawer, this being admitted by the acceptance.[1] And if a prior indorser, who has been obliged to pay a subsequent indorsee, sues the acceptor, it has been held that he must prove such payment.[2] But in all these actions, founded on the return of a bill, if it is shown that the instrument was once in circulation, it will be presumed that it came back into the plaintiff's hands by payment, in the regular course, by which dishonored paper goes back to the original parties.[3]

§ 170. **In Case of Accommodation Acceptor against Drawer.** Where the action is by an *accommodation acceptor* against the drawer, either for money paid, or specially for not indemnifying the plaintiff, in addition to proof of the drawing of the bill, and of the absence of consideration, the plaintiff should prove payment of the bill by himself, or some special damage, or liability to costs, by reason of his acceptance.[1] But here, also, the mere production of

[4] 3 Campb. 240, n.; Chitty & Hulme on Bills, p. 644 (9th ed.). In such case the names of the partners may be suggested to the witness by whom the partnership is proved: *ante*, Vol. I. § 435.

[1] Godson *v.* Richards, 6 C. & P. 188.

[2] Anon., 12 Mod. 477, per Holt, C. J. And see Sarell *v.* Wine, 3 East 409.

[3] Fisher *v.* Bradford, 7 Greenl. 28; Bowman *v.* Wood, 15 Mass. 534.

[1] Chitty & Hulme on Bills, pp. 537, 647 (9th ed.); Vere *v.* Lewis, 3 T. R. 182.

[2] Mendez *v.* Carreroon, 1 Ld. Raym. 742.

[3] Pfiel *v.* Vanbatenburg, 2 Campb. 439; Dugan *v.* United States, 3 Wheat. 172; Baring *v.* Clark, 19 Pick. 220.

[1] Chilton *v.* Whiffin *et al.*, 3 Wils. 13; Bullock *v.* Lloyd, 2 C. & P. 119; Chitty & Hulme on Bills, p. 647 (9th ed.).

the bill by the plaintiff is not sufficient proof that he has paid it, unless he shows that it was once in circulation after it has accepted. And, generally, payment will not be presumed from a receipt indorsed on the bill, unless it is shown to be in the handwriting of one entitled to demand payment.[2]

§ 171. **Consideration.** In regard to the *consideration*, two things are to be noted: *first*, as to *the parties* between whom it may be impeached; and, *secondly*, as to the *burden of proof*. And here it is, *first*, to be observed, that the consideration of a bill or note, as well as of any other unsealed instrument of contract, is impeachable by the immediate or original parties; between whom, the general rule is, that the want of it may always be set up by the defendant, in bar of the action. Thus, it may be insisted on by the drawer against the payee; by the payee against his indorsee; and by the acceptor against the drawer. The same rule is applied to all persons standing precisely in the situation of the original parties, and identified with them, in equity; such as, their agents; purchasers of paper dishonored by being overdue; persons who have given no value for the bill; purchasers with notice that the instrument is void in the hands of the assignor,[1] whether from fraud, or from want, failure, or illegality of consideration.[2] These parties are regarded as taking the bill or note, subject to all the equities attaching to the particular bill in the hands of the holder; but not to equities, which may exist between the parties, arising from other transactions.[3] But on the other hand, no defect or infirmity of consideration, either in the creation or in the transfer of a negotiable security, can be set up against a mere stranger to the transaction, such as a *bona fide* holder of the bill or note, who received it for a valuable considera-

[2] Pfiel *v.* Vanbatenburg, 2 Campb. 439; Chitty & Hulme on Bills, *ubi supra*. And see Scholey *v.* Walsby, 1 Peake's Cas. 25; Phillips *v.* Warren, 14 M. & W. 379.

[1] But if a promissory note or bill is available to the holder, and he transfers it to another, the want of consideration cannot be set up against the latter, though he had notice that it was given without consideration, before it came to his hands: Dudley *v.* Littlefield, 8 Shep. 418; [Uniform Act, § 58; Donnerberg *v.* Oppenheimer, 15 Wash. 290; Jones *v.* Wiesen, 50 Neb. 243.]

[2] [Uniform Act, § 28.]

[3] Story on Bills, § 187; Burrough *v.* Moss, 10 B. & C. 558; Hughes *v.* Large, 2 Barr 103. In the United States, the defendant has in many instances been allowed to claim a set-off in such cases, founded on other transactions. See Bayley on Bills, pp. 544, 548, cases in Phillips & Sewall's notes, *infra*, § 200. In an action by an indorsee against a remote indorser, it is a good defence, that the defendant, at the time when he indorsed the bill, was so intoxicated and under the influence of liquor, and thereby so deprived of the use of his reason, as to be unable to understand the nature or effect of the indorsement; provided the plaintiff, at the time of the indorsement, was aware of his being in that state: Gore *v.* Gibson, 13 M. & W. 623; s. c. 9 Jur. 140. {A contract entered into under such circumstances is voidable only: Matthews *v.* Baxter, 28 L. T. N. S. 169; Intoxication is no defence against an innocent holder: St. Bank *v.* McCoy, 69 Pa St. 204; Miller *v.* Finley, 26 Mich. 249; [Smith *v.* Williamson, Utah, 30 P. 753.] Where a firm purchases for a good consideration, and before maturity, a promissory note given to one of the partners for his accommodation, the firm cannot recover thereon, as it is affected with notice of the want of consideration: Quinn *v.* Fuller, 7 Cush. (Mass.) 224.}

tion, at or before it became due, and without notice of any infirmity therein.[4] The same rule will apply, though a present holder has such notice, if he derives his title to the bill from a prior *bona fide* holder for value.[5] Every such holder of a negotiable instrument is entitled to recover upon it, notwithstanding any defect of title in the person from whom he derived it; and even though he derived it from one who acquired it by fraud, or theft, or robbery.[6]

§ 172. **Burden of Proof.** *Secondly*, as to the *burden of proof*, it is to be observed, that bills of exchange enjoy the privilege, conceded to no unsealed instruments not negotiable, of being *presumed* to be founded upon a valid and valuable consideration. Hence, between the original parties, and, *a fortiori*, between others who became *bona fide* holders, it is wholly unnecessary to establish, that the bill was given for such consideration; the burden of proof resting upon the other party to establish the contrary, and to rebut the presumption of value, which the law raises for the protection of all negotiable paper.[1] The same principle applies to the consideration paid by each successive holder of the bill. But even in an action by the indorsee against an original party to a bill, if it be shown, on the part of the defendant, that the bill was made under *duress*, or that

[4] [Uniform Act, § 57.]

[5] [Uniform Act, § 58.]

[6] Story on Bills, §§ 187–194; Chitty & Hulme on Bills, pp. 68–81 (6th ed.). {In Moore *v.* Hershey, 90 Pa. St. 196, the court says that this rule as to consideration does not apply to commercial paper made by lunatics, and that the true rule is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the *status* of the maker, as in the case of a married woman or minor, and in the case of a lunatic, the holder of the note may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration. The rule in this case is probably at least as favorable to the lunatic as would be adopted by most courts, putting, as it does, the burden of proof on the plaintiff, of these three facts:} [Hosler *v.* Beard, 54 Ohio 398.]

[1] Story on Bills, § 178; Emery *v.* Estes, 1 Redingt. 155; [Uniform Act, § 24;] {Harger *v.* Worrall, 69 N. Y. 370. A promissory note is given for "value received;" this is signed by the maker, and is an admission on his part that value has been received for it, which is a good consideration. Its being produced by the holder is proof that after being signed it was delivered to the promisee, and is therefore evidence of a contract, on good consideration, between promisor and promisee, under the promisor's hand. But as between the original parties, such proof is not conclusive. It is therefore *prima facie* evidence; that is, it is competent evidence tending to prove a proposition of fact, and, if not rebutted or controlled by other evidence, will stand as sufficient proof of such proposition of fact. If, then, on the trial of a suit on a note by the promisee against the promisor, the signature is admitted or proved, and the plaintiff produces and reads his note for value received, he has ordinarily no occasion to go further. He has the burden of proof to show consideration; but he sustains that burden by his *prima facie* evidence, which, if not rebutted, stands as conclusive evidence. But, in a suit between the original parties, the consideration may be inquired into; and as the burden is on the plaintiff to prove a good consideration, if the whole evidence offered on both sides leaves it in doubt whether there was a good consideration or not, the plaintiff fails to make out his case. In general, the proof of want or failure of consideration must commence on the part of the defendant after the production and proof of the note by the plaintiff, not because the defendant has the burden, or the burden of proof has shifted, but because the plaintiff has offered *prima facie* proof sufficient to sustain the burden of proof on his part unless it is rebutted and controlled by counter-proof: Shaw, C. J., in Burnham *v.* Allen, 1 Gray (Mass.) 500;} [Stevenson *v.* Gunning, 64 Vt. 601.]

he was *defrauded* of it, or if a strong *suspicion of fraud* be raised, the plaintiff will then be required to show under what circumstances and for what value he became the holder.[2] It is, however, only in *such* cases, that this proof will be demanded of the holder; it will not be required, where the defendant shows nothing more than a mere absence or want of consideration on his part.[3] Nor will it

[2] Chitty & Hulme on Bills, pp. 648, 649 (9th ed.); Duncan *v.* Scott, 1 Campb. 100; Rees *v.* Marq. of Headfort, 2 Campb. 574; Heydon *v.* Thompson, 1 Ad. & El. 210; Whitaker *v.* Edmunds, 1 M. & Rob. 366, per Patteson, J.; s. c. 1 Ad. & El. 638; Heath *v.* Sansom, 2 B. & Ad. 291, as limited and explained by Patteson, J., in 1 M. & Rob. 367, and by Tindal, C. J., in 1 Bing. N. C. 267; Munroe *v.* Cooper, 5 Pick. 412; Story on Bills, §§ 193, 194; Musgrave *v.* Drake, 5 Ad. & El. N. S. 185; Small *v.* Smith, 1 Denio 583; Harvey *v.* Tower, 15 Jur. 544. {The plaintiff in such cases, by producing the note and proving the signatures, makes out a *prima facie* case: [Voorhees *v.* Fisher, 9 Utah 303; Third N. B. *v.* Angell, R. I., 29 A. 500; Cobleskill Bank *v.* Emmitt, 52 Kans. 603.] If the defendant then establishes the fact that the note was fraudulently put into circulation, and diverted from the use intended, and makes out a case of fraud or duress, the burden of introducing evidence to prove that he is a *bona fide* holder for value is then shifted on the plaintiff: Nickerson *v.* Ruger, 76 N. Y. 279; [Uniform Act, § 59; Hadson *v.* Eugene Glass Co., 156 Ill. 397; Campbell *v.* Hoff, Mo., 31 S. W. 603; Grant *v.* Walsh, 145 N. Y. 502; Bank of Montreal *v.* Richter, Minn., 57 N. W. 61; Brook *v.* Teague, 52 Kans. 119; Hart *v.* West, 42 S. W. 544, Tex.; Limerick N. B. *v.* Adams, 40 A. 166, Vt.; David *v.* Merchants' N. B., 45 S. W. 878, Ky. Where there is evidence on both sides as to notice of illegality, the burden of proof is on the holder: Wing *v.* Ford, 89 Me. 140.] This may be done by proving that the note was indorsed to him for value, before maturity, and this raises a presumption that he took the note in good faith without notice of the fraud, for it is not likely that he would give full value for a note which he knew or believed to be fraudulent: [First N. B. *v.* Foote, 12 Utah 157; Market, etc. N. B. *v.* Sargent, 85 Me. 349; Arnold *v.* Lane, 40 A. 921, Conn. The Uniform Act, § 52 and § 59, seems to throw the burden of showing both good faith and lack of notice on the plaintiff. Whether the foregoing presumption still remains is therefore doubtful.] This presumption of good faith, however, may be rebutted by showing that the plaintiff knew of the fraud when he took the note. Mere proof of suspicious circumstances will not do this, but if strong enough they may satisfy the jury that he had actual knowledge: Kellog *v.* Curtis, 69 Me. 212; Farrell *v.* Lovett, 68 Me. 326.}

[3] Ibid.; Lowe *v.* Chifney, 1 Bing. N. C. 267; s. c. 1 Scott 95. [See Uniform Act, §§ 55, 59; Little *v.* Mills, 98 Mich. 423; Crosby *v.* Ritchey, 76 N. W. 895, Neb.;] {*post*, § 639. The burden of proving good faith is all the law imposes on the holder; that is, that he came by it honestly: Clarke *v.* Pease, 41 N. H. 414; Worcester County Bank *v.* D. & M. Bank, 10 Cush. 491; recognized in Wyer *v.* D. & M. Bank, 11 id. 53; Goodman *v.* Harvey, 4 Ad. & El. 870, and 6 Nev. & Man. 372; Uther *v.* Rich, 10 Ad. & El. 790; Arbouin *v.* Anderson, 1 Ad. & El. N. S. 504; Hall *v.* Featherstone, 3 Hurlstone & Norman 284. A note or check taken in payment of a pre-existing debt is taken *bona fide:* Currie *v.* Misa, 10 L. R. Ex. 153; Washburn *v.* Splater, 47 Vt. 273; [Uniform Act, § 25.]

But the holder of a bank-bill, proved to have been stolen, is not bound to show how he came by the bill, to enable him to recover upon it. The burden of proof is upon the defendant to show that the holder took it under such circumstances that he has no claim upon it: Wyer *v.* Dorchester & M. Bank, 11 Cush. 53; Solomons *v.* Bank of England, 13 East 135, n.; King *v.* Milsom, 2 Campb. 5; De la Chaumette *v.* Bank of England, 2 Barn. & Adolph. 385; Louisiana Bank *v.* Bank of U. S., 9 Martin 398. "The law is well settled, that a party who takes negotiable paper, before due, for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title:" Hotchkiss *v.* Nat. Sh. & Leath. Bk., 21 Wall. (U. S.) 354; Murray *v.* Lardner, 2 id. 110; Raphael *v.* Bank of England, 17 C. B. 161; Comstock *v.* Hannah, 76

suffice for the acceptor to show that the drawer procured all the indorsements to be made without consideration, in order that the action might be brought by any indorsee, under an agreement between the plaintiff and the drawer, to share the money when recovered;[4] nor, that the bill was accepted in order to raise money for his own use, of which the payee had subsequently defrauded him.[5]

§ 173. **Same Subject.** The burden of proof is somewhat affected by the *form of the issue.* Thus, in an action by the drawer against

Ill. 530; Goodman *v.* Simonds, 20 How. (U. S.) 343; Seybel *v.* Nat. Com. Bk., 54 N. Y. 288; Wyer *v.* D. & M. Bk., 11 Cush. (Mass.) 53; Smith *v.* Livingston, 111 Mass. 342; Goodman *v.* Harvey, 4 Ad. & El. 870, overruling Gill *v.* Cubitt, 3 B. & C. 466; Clark *v.* Pease, 41 N. H. 414; Wait *v.* Chandler, 63 Me. 257; Phelan *v.* Moss, 67 Penn. St. 59; Lake *v.* Reed, 29 Iowa 258; Rock Island Nat. Bk. *v.* Nelson, Sup. Ct. Iowa, and note, 3 Cen. L. J. 6. See also *ante*, Vol. I. § 81, n.; [Atlas N. B. *v.* Holm, 34 U. S. App. 472; Tourtelot *v.* Reed, 62 Minn. 384; Lancaster County N. B. *v.* Garber, 178 Pa. 91; Bowman *v.* Metzger, 27 Or. 23.] *Contra*, Gould *v.* Stevens, 43 Vt. 125; and Sturgis *v.* Met. Bk., 49 Ill. 220; Corby *v.* Weddle, 57 Mo. 452. If the signature be obtained by fraud, as to the character of the paper itself, and without negligence on the part of the maker, who does not intend to sign a note, in contemplation of law it is not his note, any more than if it was forged, and there can therefore be no *bona fide* holder of *his* note, to sue or recover: Walker *v.* Ebert, 29 Wis. 194; Cline *v.* Guthrie, 42 Ind. 227; Wait *v.* Pomeroy, 20 Mich. 425. See also Taylor *v.* Atchison, 54 Ill. 196; Putnam *v.* Sullivan, 4 Mass. 45; Awde *v.* Dixon, 20 L. J. Ex. 295; Calkins *v.* Whistler, 29 Iowa 495. But signing a paper without reading it is negligence which deprives the party of the defence of fraud as against a *bona fide* holder: Chapman *v.* Rose, 56 N. Y. 137; Nebeker *v.* Catsinger, 48 Ind. 436. See also Abbott *v.* Rose, 62 Me. 194; Fenton *v.* Robinson, 6 N. Y. Sup. Ct. (T. & C.) 427. Where there is an intention to make and deliver a note, the case is different, although the intention be induced by fraud: Burson *v.* Huntington, 21 Mich. 415. So where a note is so carelessly drawn as to enable a third person, by filling in another line, to practise a fraud, [it has been held that] the drawer or maker, and not the innocent holder, must bear the loss: Garrard *v.* Hadden, 67 Penn. St. 82; Zimmerman *v.* Rote, 75 id. 188; Griggs *v.* Howe, 31 Barb. (N. Y.) 100; Van Duzer *v.* Howe, 21 N. Y. 531; Yocum *v.* Smith, 63 Ill. 321; [Cason *v.* Grant County Bank, 97 Ky. 487; Winter *v.* Pool, 104 Ala. 580. But the better view is that if the instrument is complete when delivered, any material alteration destroys it, even in the hands of a holder for value. The loss in such a case is caused by forgery, and negligence, though it may afford opportunity for such forgery, is not the proximate cause thereof. See] Holmes *v.* Trumper, 22 Mich. 427; [Derr *v.* Keough, 96 Ia. 397; Scholfield *v.* Londesborough, 1896, A. C. 514; Searles *v.* Seipp, 6 S. D. 472; Exchange N. B. *v.* Bank of Little Rock, 58 F. 140, U. S. App.] It has been held in several cases that, when a note is given with a memorandum attached that it is payable only on a certain condition, a *bona fide* holder of the note, the memorandum having been detached, cannot recover: Benedict *v.* Cowden, 49 N. Y. 396; Wait *v.* Pomeroy, 20 Mich. 425; Jaqua *v.* Montgomery, 33 Ind. 36. See also Strough *v.* Gear, 48 Ind. 100; Abbott *v.* Rose, 62 Me. 194. If the drawee of a check, in good faith and without negligence, pay a fraudulently altered check, even to a *bona fide* holder, he may recover the amount overpaid. The drawee is presumed to know whether the signature is genuine or not, but not the filling in of the check: Reddington *v.* Woods, 45 Cal. 406. The responsibility, however, of the drawee, who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who is free from fraud or negligence: Nat. Bk. of N. A. *v.* Bangs, 106 Mass. 441. The *bona fide* holder for value of municipal bonds may recover, notwithstanding they were irregularly or fraudulently issued: Grand Chute *v.* Winegar, 15 Wall. (U. S.) 355. But if he purchases them when overdue, he cannot hold against the true owner, from whom they were stolen: Vermilye *v.* Adams Exp. Co., 21 Wall. 138.]

[4] Whitaker *v.* Edmunds, 1 M. & Rob. 367.

[5] Jacob *v.* Hungate, 1 M. & Rob. 445. See further, Chitty & Hulme on Bills, 649-651 (9th ed.).

the acceptor of a bill, if the consideration of the acceptance is impeached under the general issue, as is ordinarily the course in the American courts, the burden of proof is on the acceptor. And so it is, where the plaintiff, in his replication, merely alleges that there was a valid consideration for the acceptance, without specifying what it was; or, where he states the kind of consideration under a *videlicet*, so as not to confine himself to precise proof of the allegation. But, where he chooses specially to allege the sort of consideration on which he relies, concluding with a verification, so that the defendant has an opportunity to traverse it, and does so, the burden of proof is on the plaintiff, precisely to maintain his replication.[1]

§ 174. **Plaintiff must show Breach of Contract.** In the FOURTH PLACE *the plaintiff must show a breach of contract, by the defendant.* And here it is to be observed, that the engagement of the defendant is either direct and absolute, or conditional. In the former case, as, in an action against the maker of a promissory note, or, against the acceptor of a bill, upon a general acceptance to pay the bill according to its tenor, it is not necessary for the plaintiff to prove a *presentment for payment*, it being not essential to his right to recover.[1] Where the bill is drawn generally, but the *acceptance* is made *payable at a particular place*, it has been much questioned whether it was necessary for the holder to prove a presentment for payment at the place named in the acceptance, in order to show the acceptor's default. In England, it was formerly held, that, in such case, a presentment at the place must be shown;[2] but subsequently, by statute,[3] such acceptance has been declared to be a general acceptance, unless restrictive words are added, making the bill payable at that place alone. But in the Supreme Court of the United States, it is held, that as between the holder and the acceptor, no demand at the place named in the acceptance is necessary, to entitle the plaintiff to recover; though the want of such demand may affect the amount of damages and interest; but that to charge the drawer or indorsers of the bill, a demand at the place, at the maturity of the bill, is indispensable.[4]

§ 175. **Same Subject; Condition.** But in the latter case, as in actions against the drawer or indorser of a bill, or the indorser of a

[1] Batley *v.* Catterall, 1 M. & Rob. 379, and n. (*a*). See also Lacey *v.* Forrester, 2 C. M. & R. 59; Chitty & Hulme on Bills, pp. 648, 649 (9th ed.); *ante*, Vol. I. §§ 58–60.

[1] [See Uniform Act, § 70; which provides, however, that "if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."] In *Maine*, if a promissory note is payable at a place certain upon demand, or upon demand after a certain day, the plaintiff is not entitled to recover, unless he proves a demand made at the place: Stat. 1846, c. 218.

[2] Rowe *v.* Young, 3 B. & C. 165. And see Picqnet *v.* Curtis, 1 Sumn. 478.

[3] 1 & 2 Geo. IV. c. 78; [Uniform Act, § 140.]

[4] Wallace *v.* McConnell, 13 Pet. 136; Story on Bills, § 239; 3 Kent Comm. 99, n. (5th ed.). And see *infra*, §§ 180 *a*, 180 *b*. [And see *supra*, note 1.]

note, the *undertaking* of the defendant being *conditional*, namely, to pay in case the party primarily liable does not, the default of such party must be proved, or the proof be dispensed with by the introduction of other evidence. The receiver of a bill or note is understood thereby to contract with every other party, who would be entitled to bring an action on paying it, that he will present in proper time to the drawee for acceptance, when acceptance is necessary, and to the acceptor for payment when the bill has arrived at its maturity and is payable; to allow no extra time for payment, to the acceptor; and to give notice in a reasonable time, and without delay, to every such person, of a failure in the attempt to procure a proper acceptance or payment. Any default or neglect in any of these respects will discharge every such person from responsibility on account of a non-acceptance or a non-payment; and will make it operate, generally, as a satisfaction of any debt, demand, or value for which it was given.[1]

§ 176. **Same Subject; Presentment.** Thus, in an action by the *payee* of a bill, or the *indorsee* of a bill or note, *against the drawer, or indorser*, it is necessary to prove a *presentment* to the drawee for payment.[1] If the bill is payable at sight, or in so many days after sight, or after demand, or upon any other contingency, a presentment, in order to fix the period of payment, must be made, and of course be proved.[2] But if the bill is payable on demand, or in so many days after date, or the like, it need not be presented merely for acceptance; but if it is so presented, and is not accepted, the holder must give notice of the dishonor in the same manner as if the bill were payable at sight.[3] The presentment for acceptance must be shown to have been made by the holder or his agent, if acceptance was refused; but if the bill was accepted on presentment by a stranger, it is available to the holder. If it is drawn on partners, a presentment to one of them is sufficient; but if drawn on several persons not partners, it has been said, that it should be presented to each;[4] but the better opinion seems otherwise, for if one of the drawees should refuse to accept, the holder would not be bound to take the acceptance of the others alone.[5] It is not necessary to

[1] Story on Bills, §§ 112, 227; Bayley on Bills, pp. 217, 286 (5th ed.); {Howard Bank *v.* Carson, 50 Md. 18. If a person indorses a promissory note after it is due, he is entitled to have a demand made on the maker within a reasonable time, and immediate notice of the non-payment: Tyler *v.* Young, 30 Penn. St. 143.} In *Texas*, the liability of drawers and indorsers may be fixed without notice, by the institution of proceedings, within a limited time, against the acceptor, if the bill has been accepted, or against the drawer if acceptance is refused: Hartley's Dig. art. 2528–2531.

[1] [Uniform Act, § 70.]

[2] [Uniform Act, § 143.]

[3] Story on Bills, §§ 112, 227, 228; Chitty & Hulme on Bills, pp. 653, 654 (9th ed.).

[4] [Uniform Act, § 145; Benedict *v.* Schmieg, 13 Wash. 476; Closz *v.* Miracle, 103 Ia. 198.]

[5] Story on Bills, § 229; Chitty & Hulme on Bills, pp. 272-274 (9th ed.). [See Legg *v.* Vinal, 165 Mass. 555.]

prove that the presentment was made *by the person named* in the declaration, the material fact being the presentment alone, by some proper person.[6] Nor is it necessary for the plaintiff, in an action against the indorser, for non-payment of an accepted bill, to show any demand of or inquiry after the drawer.[7]

§ 177. **Presentment not excused by Death, etc.** Presentment of the bill for acceptance is *not excused* by the drawee's death, bankruptcy, insolvency, or absconding. If he is dead, it should be presented to his personal representatives, if any, or at his last domicile; and if he has absconded, it should be presented at his last domicile or place of business.[1]

§ 178. **Time of Presentment.** Whenever it is essential to prove a *presentment* for acceptance or a demand of payment,[1] it must appear to have been made at the *proper time*.[2] No drawee can be required to accept a bill on any day which is set apart by the laws or observances or usages of the country or place, for religious or other purposes, and is not deemed a day for the transaction of secular business; such as a *Sunday, Christmas Day*, or a day appointed by public authority for a solemn *fast* or *thanksgiving*, or any other general *holiday;* or a *Saturday*,[3] where the drawee is a Jew.[4] And in all cases, the presentment must have been made at a *reasonable hour* of the day. If made at the place of business, it must be made within the usual hours of business, or, at farthest, while some person is there who has authority to receive and answer the presentment.[5] If made at the dwelling-house of the drawee, it may be at any seasonable hour while the family are up.[6]

[6] Boehm *v.* Campbell, 1 Gow 55; s. c. 3 Moore 15.

[7] Heylin *v.* Adamson, 2 Burr. 669; Bromley *v.* Frazier, 1 Stra. 441; Chitty & Hulme on Bills, p. 653 (9th ed.).

[1] Story on Bills, § 260; Chitty & Hulme on Bills, pp. 279, 280 (9th ed.); Groton *v.* Dalheim, 6 Greenl. 476; Greely *v.* Hunt, 8 Shepl. 455; Weems *v.* Farmers' Bank, 15 Md. 231.

[1] [" Presentment for acceptance is excused: (1) Where the drawee is dead or has absconded, or is a fictitious person, or a person not having capacity to contract by bill; (2) where, after the exercise of reasonable diligence, presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground:" Uniform Act, § 148.]

[2] [" At a reasonable hour on a business day:" Uniform Act, § 72.]

[3] [Except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock when that entire day is not a holiday: Uniform Act, § 85.]

[4] Story on Bills, §§ 233, 240.

[5] {The Court will take judicial notice of the calendar, so as to see that presentment on Dec. 14 of a note due Dec. 15, was good, because Dec. 15 in that year was Sunday: Reed *v.* Wilson, 41 N. J. L. 29.}

[6] Story on Bills, § 236; Chitty & Hulme on Bills, pp. 454, 455, 654 (9th ed.); Parker *v.* Gordon, 7 East 385; Wilkins *v.* Jadis, 2 B. & Ad. 155, 188; Garnet *v.* Woodcock, 6 M. & S. 44. {"No fixed rule can be established by which to determine the hour beyond which the demand of payment, when made at the maker's residence, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such an hour, that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. And whether the presentment is within a rea-

§ 179. **Same Subject.** The presentment of a *promissory note* for payment should be made at its maturity, and not before, nor generally after.[1] But where the maker lived two hundred miles from the holder, a demand made six days afterwards has been held sufficient.[2] If the note is payable at a certain day *after sight*, the payment of interest, or of part of the principal, duly indorsed thereon, is *prima facie* evidence that it was presented for sight before the time of such payment, and that it became due on the day when the payment was made.[3] If it is payable *on demand*, or is indorsed after it is overdue, payment should be demanded within a reasonable time, in order to charge the indorser.[4] A *banker's check* may be presented on the next day after the date, this being considered a reasonable time.[5]

§ 180. **Place of Presentment.**[1] It must also appear, that the *pre-*

sonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder, but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it reasonable or otherwise: Barclay *v.* Bailey, 2 Camph. 527; Triggs *v.* Newnham, 10 Moore 249; 1 Car. & P. 631; Cayuga Co. Bank *v.* Hunt, 2 Hill (N. Y.) 635." By Bigelow, J., in Farnsworth *v.* Allen, 4 Gray (Mass.) 454. A promissory note dated at Boston, but expressing no place of payment, and held in Boston by a bank for collection, falling due at the end of August, was presented for payment at nine o'clock in the evening of the last day of grace at the house of the maker, ten miles from Boston, after he and his family had retired for the night, and it was held a sufficient demand to charge the indorser: ibid. Notice issued by a bank in which a note is placed for collection, to the maker of the note, a day or two before the maturity of the note, that the note would be payable on a certain day named, being the true day, and requesting him to pay it, is held in Massachusetts sufficient demand: Warren Bank *v.* Parker, 8 id. 221. A note payable at a particular bank, where the maker had no funds, was delivered after business hours on the last day of grace, to the teller, who was also a notary, at his dwelling-house, for the purpose of demanding payment. He went to the bank, and, being unable to obtain entrance, demanded payment of himself at the bank door. It was held a sufficient presentment to charge an indorser: Bank of Syracuse *v.* Hollister, 17 N. Y. 46. In Merchants' Bank *v.* Elderkin, 25 id. 178, it is held to be a sufficient demand of a note that the same was left for collection at the bank where it was payable on the last day of grace, and, the maker having no funds, it was returned to the holder before the expiration of the last business hour. A demand after banking hours will fix the indorser, although at his request the maker, several times during banking hours, inquired for the note. It might have been otherwise if the maker had been prepared to pay, and waited till the expiration of banking hours: Salt Springs Nat. Bk. *v.* Burton, 58 id. 430.]

[1] Henry *v.* Jones, 8 Mass. 453; Farnum *v.* Fowle, 12 id. 88; Woodbridge *v.* Brigham, ib. 403; Barker *v.* Parker, 6 Pick. 80, 81; [Uniform Act, § 71. "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence:" Uniform Act, § 81.]

[2] Freeman *v.* Boynton, 7 Mass. 483.

[3] Way *v.* Bassett, 5 Hare 55.

[4] Chitty & Hulme on Bills, pp. 379–386 (9th ed.); Colt *v.* Barnard, 18 Pick. 260; [Uniform Act, § 71.] Seven days after the date has been held sufficient: Seaver *v.* Lincoln, 21 Pick. 267; and eight months an unreasonable delay: Field *v.* Nickerson, 13 Mass. 131; Thayer *v.* Brackett, 12 id. 450. See also Sylvester *v.* Crapo, 15 Pick. 92; Thompson *v.* Hale, 5 id. 259; Martin *v.* Winslow, 2 Mason 241. See *infra*, § 199, n., as to the time when a note payable on demand is to be considered as dishonored.

[5] Chitty & Hulme on Bills, p. 385 (9th ed.). [Reasonable time is not defined in the Uniform Act, § 186.]

[1] ["Presentment for payment is made at the proper place: (1) Where a place of

sentment was made at the *proper place;* and this, in general, is the town or municipality of the domicile of the drawee. If he dwells in one place, and has his place of business in another, whether it be in the same town, or in another town, the bill may be presented for acceptance at either place, at the option of the holder; and this, even though a particular place be designated as the place of payment.[2] If the bill is addressed to the drawee at a place where he never lived, or if he has removed to another place, the presentment should be at the place of his actual domicile, if by diligent inquiries it can be ascertained; and if it cannot be ascertained, or if the drawee has absconded, the bill may be treated as dishonored.[3]

payment is specified in the instrument and it is there presented; (2) where no place of payment is specified but the address of the person to make payment is given in the instrument and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence:" Uniform Act, § 73.]

[2] Story on Bills, § 236; Chitty & Hulme on Bills, pp. 365, 366 (9th ed.); *supra*, § 174.

[3] Story on Bills, § 325. {Where it appeared that the notary "went to various places, making diligent inquiry of divers persons for the promisor, but could not find him, nor any one knowing him, nor any one with funds for the payment of the note, and thereupon left official notice of the default, addressed to the several indorsers, at their respective places of business;" this showed that the notary had not used such reasonable diligence to ascertain the residence of the maker as would excuse the want of legal notice to him of the dishonor of the note, it appearing that he knew the places of business of the indorsers, and it not appearing that he inquired of them as to the residence of the maker: Porter *v.* Judson, 1 Gray (Mass.) 175; Granite Bank *v.* Ayers, 16 Pick. (Mass.) 392. See, as to the effect of failure on the part of the notary to inquire of the other parties to the note (the maker and second indorser): Pierce *v.* Pendar, 5 Met. (Mass.) 352; as to sufficiently diligent inquiry of parties and others: Phipps *v.* Chase, 6 id. 491; and as to the duty of the holder of a note to inform the notary or bank officer, of whom to make inquiry, and where the persons to be inquired of may be found: Wheeler *v.* Field, ib. 290. Where a notary certified that he went several times to the place of business of the acceptor and found the doors closed, and no one there to answer his demand for payment, he cannot be charged with neglect for not presenting the bill, at the residence of the acceptor, in the same city: Wiseman *v.* Chiapella, 23 How. 368. When the maker of a note has no place of business and the note does not specify any place of payment, it is payable at the house of the maker, and presentment at a place which had formerly been occupied as a place of business by the maker, without inquiry as to his place of residence, does not show such diligent search for the maker and failure to find him as would excuse a want of presentment of the note and demand of payment: Talbot *v.* Bank of Commonwealth, 129 Mass. 67. But if a bill is accepted payable at a particular place, if the notary makes reasonable and diligent inquiry for the acceptors in that place, or their place of business or residence, and cannot find either, and then makes demand during business hours at a place or places frequented by them when in the city, such presentment is sufficient: Cox *v.* National Bank, 100 U. S. 704.} ["Presentment for payment is dispensed with: (1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied:" Uniform Act, § 82.] The *place* at which a promissory note is dated is *prima facie* evidence of the residence of the maker at that place; but it is no indication of the place of payment, nor does it authorize a demand there for the purpose of charging an indorser. If the maker of a note has absconded; or, being a seaman and without a domicile in the State, is absent on a voyage; and also, if he has no known residence or place of business at which a demand can be made, — a presentment for payment is excused, and the indorser will be liable, on receiving notice of the facts constituting the excuse. [See § 195, *infra*, and notes.] So, if the maker, after making the note, transfers his domicile

§ 180 *a.* **Same Subject.** Where the *bill* or *note* is made *payable at a particular place*, as, at a bank, or a banker's, the question, whether a presentment for payment must be made at that place, in order to entitle the holder to recover, has been held diversely in England and in the United States. In a recent work of the highest merit,[1] the law in the two countries is thus stated: "According to the commercial law of England, if a promissory note is made payable at any particular place, as, for example, at a bank, or a banker's, a presentment should be there made for payment.[2] Before the statute of 1 & 2 Geo. IV. c. 78, a bill of exchange, as well as a promissory note, payable at a bank or banker's, was required to be presented at the bank or banker's for payment, before the acceptor or maker was bound to pay the same.[3] That statute changed the antecedent responsibility of the acceptor of a bill of exchange, by providing that an acceptance, payable at a banker's or other specified place, without adding the words, 'and not otherwise or elsewhere,' should be deemed a general acceptance of the bill to all intents and purposes, so that no presentment or demand of payment at such banker's or other specified place was thereafter necessary to be made, in order to charge the acceptor.[4] But the statute did not touch the rights of the drawers or indorsers of any such bill, but left them to be governed by the antecedent general law. Hence, so far as the drawer and indorsers are concerned, a due presentment and demand of payment is still necessary to be made at the banker's, or other specified place, in order to found any right of action against them.[5] The statute does not comprehend promissory notes payable at a banker's or other specified place; and therefore it is indispensable, in order to charge the maker or indorsers of a promissory note, that a due presentment and demand of payment

permanently to another State, the holder need not follow him, but a demand at his former place of residence will suffice. If the note is made and dated at one place, the maker having and continuing to have a known residence at another, the demand must be made at the latter place, and not at the former: Taylor *v.* Snyder, 3 Den. 145. And see Gilmore *v.* Spies, 1 Barb. 158. To enable the holder to charge an indorser, without a demand on the maker, the facts, excusing the demand, must be distinctly proved: Taylor *v.* Snyder, *supra*.

[1] Story on Promissory Notes, §§ 227, 228.

[2] Story on Bills, § 239 and n.; id. § 355; Chitty on Bills, c. 7, pp. 321, 322 (8th ed.); id. c. 9, pp. 391, 392; Bayley on Bills, c. 1, § 9, pp. 29, 30 (5th ed.); id. c. 9, § 1, pp. 199, 200; id. c. 7, § 1, pp. 219–222; 1 Bell Comm. b. 3, c. 2, § 4, pp. 412, 413 (5th ed.); Gibb *v.* Mather, 2 Cromp. & Jerv. 254; s. c. 8 Bing. 214.

[3] Story on Bills, § 239.

[4] Ibid.; Chitty on Bills, c. 4, pp. 172–174 (8th ed.); id. c. 7, pp. 321–323; id. c. 9, pp. 391, 393, 396, 397; Bayley on Bills, c. 1, § 9, p. 29 (5th ed.); id. c. 6, § 1, pp. 199–201; Gibb *v.* Mather, 2 Cromp. & Jerv. 254; s. c. 8 Bing. 214; Fayle *v.* Bird, 6 Barn. & Cressw. 531; 3 Kent Comm. Lect. 44, p. 97, and n. (*e*), and id. p. 99, n. (*b*) (5th ed.); Story on Bills, § 355; Thompson on Bills, c. 6, § 2, pp. 420–428 (2d ed.).

[5] Gibb *v.* Mather, 2 Cromp. & Jerv. 254; s. c. 8 Bing. 214; Ambrose *v.* Hopwood, 2 Taunt. 61. This whole subject was very much discussed in the House of Lords in the case of Rowe *v.* Young, 2 Brod. & Bing. 165; s. c. 2 Bligh 391. See also Gibb *v.* Mather, *supra*. In Indiana, the English doctrine is adopted: Palmer *v.* Hughes, 4 Blackf. 329.

should be made at the banker's or other specified place. If a due presentment is not so made, the indorsers are discharged from all liability.[6] The maker, indeed, is not so discharged; but he is in no default, and is under no obligation to pay the note until presentment and demand has been actually made at the banker's or other specified place;[7] and if he has suffered any loss or injury by the want of a due presentment, to the extent of the loss or injury he will be discharged as against the holder." [8]

§ 180 *b*. **Same Subject.** "In America a doctrine somewhat different prevails, if not universally, at least to a great extent. It was probably in the first instance adopted from the supposed tendency of the English authorities to the same result; and there certainly was much conflict in the authorities, until the doctrine was put at rest by the final decision in the House of Lords, — a decision which seems founded upon the most solid principles, and to be supported by the most enlarged public policy as to the rights and duties of parties. The received doctrine in America seems to be this, that as to the acceptor of a bill of exchange, and the maker of a promissory note, payable at a bank, or other specified place, the same rule applies, — that is, that no presentment or demand of payment need be made at the specified place, on the day when the bill or note becomes due, or afterwards, in order to maintain a suit against the acceptor, or maker; and of course, that there need be no averment in the declaration in any suit brought thereon, or any proof at the trial, of any such presentment or demand. But that the omission or neglect is a matter of defence on the part of the acceptor or maker. If the acceptor or maker had funds at the appointed place, at the time, to pay the bill or note, and it was not duly presented, he will, in the suit, be exonerated, not, indeed, from the payment of the principal sum, but from the payment of all damages and costs in that suit. If by such omission or neglect of presentment and demand he has sustained any loss or injury, as if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then, and in such case, the acceptor or maker will be exonerated from liability to the extent of the loss or injury sustained." [1]

[6] Bayley on Bills, c. 7, § 1, pp. 219–222 (5th ed.); Chitty on Bills, c. 9, pp. 396, 397 (8th ed.); Sanderson *v.* Bowes, 14 East 500; Roche *v.* Campbell, 3 Camp. 247; Gibb *v.* Mather, 2 Cromp. & Jerv. 254; s. c. 8 Bing. 214; Dickinson *v.* Bowes, 16 East 110; Howe *v.* Bowes, ib. 112; s. c. in error, 5 Taunt. 30; Trecothick *v.* Edwin, 1 Stark. 468; Emblem *v.* Dartnell, 12 Mees. & Wels. 830; Vander Donckt *v.* Thelusson, 8 M. G. & S. 812.

[7] Chitty on Bills, c. 5, p. 174 (8th ed.); Turner *v.* Hayden, 4 Barn. & Cressw. 1.

[8] Rhodes *v.* Gent, 5 Barn. & Ald. 244; Turner *v.* Hayden, 4 Barn. & Cressw. 1.

[1] {Wallace *v.* McConnell, 13 Peters (U. S.) 136, 150; Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Wolcott *v.* Van Santvoord, 17 id. 248; Hills *v.* Place, 48 N. Y. 520;} Story on Promissory Notes, §§ 227, 228; Wallace *v.* McConnell, 13 Pet. 36. "The ground," says Mr. Justice Story, "upon which the American doctrine is placed is, that the acceptor or maker is the promissory debtor, and the debt is not as to him dis-

§ 181. **Time of Presentment.** Where the bill is *not* made payable in so many days *after sight*, it is sufficient to prove a *presentment for payment at the maturity* of the bill, and a refusal of payment. And it suffices to show a presentment for acceptance, and a *refusal* to accept at any time previous to the maturity of the bill; for, upon its dishonor, the drawer becomes liable immediately.[1] It also suffices to show, that the drawee refused to accept according to the tenor of the bill, notwithstanding the defendant should offer to prove that the drawee offered a different acceptance, equally beneficial to the holder.[2] But the plaintiff must, in all cases, show that the refusal proceeded from the drawee: a declaration by some unauthorized person, that the bill would not be accepted, is not sufficient.[3]

§ 182. **Presentment and Notice, how proved.** Presentment for payment, as well as notice of dishonor, may be proved by entries in the books of a deceased notary, clerk, messenger of a bank, or other person, whose duty or ordinary course of business it was to make such entries.[1]

charged by the omission or neglect to demand payment, when the debt became due, at the place where it was payable. Assuming this to be true, it by no means follows, that the acceptor or maker is in default, until a demand of payment has been made at the place of payment; for the terms of his contract import an express condition, that he will pay upon due presentment, at that place, and not that he will pay upon demand elsewhere; and the omission or neglect of duty, on the part of the holder, to make presentment at that place, ought not to change the nature or character of the obligations of the acceptor or maker. Now, the right to bring an action presupposes a default on the part of the acceptor or maker; and it may, after all, make a great difference to him, not only in point of convenience, but in point of loss by exchange, as well as of expense, whether, if he agrees to pay the money in Mobile, or in New Orleans, he may be required, without any default on his own part, notwithstanding he has funds there to pay the same money in New York or in Boston. He may well say *Non in hæc fœdera veni:*" Story on Promissory Notes, § 229; 3 Kent Comm. 97, n. (*e*); id. 99, n. (*b*). "The learned commentator," he says, "holds the English rule to be the true one, and adds: 'This is the plain sense of the contract, and the words, "accepted, payable at a given place," are equivalent to an exclusion of a demand elsewhere:' Story on Bills, § 356. See also North Bank *v.* Abbot, 13 Pick. 465; Payson *v.* Whitcomb, 15 id. 212; Church *v.* Clark, 21 id. 310; Carley *v.* Vance, 17 Mass. 389; Ruggles *v.* Patten, 8 id. 480; Mellon *v.* Croghan, 15 Martin 423; Smith *v.* Robinson, 2 Miller (La.) 405; Palmer *v.* Hughes, 1 Blackf. 328; Gale *v.* Kemper, 10 La. 208; Warren *v.* Allnut, 12 id. 454; Thompson *v.* Cook, 2 McLean 125; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112; Picquet *v.* Curtis, 1 Sumner 478." See also Story on Bills, p. 263, n. (2). In Maine, in an action upon a note payable on demand at a place certain, or on demand at or after a specified time, at a place certain, the plaintiff is required to prove a demand at the place, before suit: Stat. 1846, c. 218. In Georgia, it has been held, that, in the case of *bank-notes* made payable at a place certain, the *bank* is entitled to a presentment at the place, before it is liable to a suit upon the notes; this case constituting an exception, on grounds of public policy and convenience, from the general rule in regard to private bills and notes: Dougherty *v.* The Western Bank of Georgia, 1 Am. Law Reg. 689.

[1] Chitty & Hulme on Bills, p. 654 (9th ed.); Ballingalls *v.* Gloster, 3 East 481.

[2] Chitty & Hulme on Bills, pp. 654, 655 (9th ed.); Boehm *v.* Garcias, 1 Campb. 425, n.; [Uniform Act, § 142.]

[3] Cheek *v.* Roper, 5 Esp. 175.

[1] See *ante*, Vol. I. § 116. {The letters of a deceased agent were admitted as evidence of a demand, made upon a debtor of his principal, the debtor being an inhabitant of the coast of Africa, on the ground of commercial necessity: Greenwood *v.* Curtis, 6 Mass. 358.} In New Jersey, the notary is bound to keep a record of his acts, in regard to protested bills of exchange or promissory notes; and in case of his death

§ 183. **Foreign Bills ; Protest.** In an action *against the drawer or indorser* of a *foreign bill* (and even of an inland bill, if a protest is alleged), the plaintiff must prove, beside the presentment and notice of dishonor, a *protest* for non-acceptance, or non-payment.[1] The proper evidence of the protest is the production of the notarial act itself;[2] and if this was made abroad, the seal is a sufficient authentication of the act, without further proof;[3] but it is said, that if the protest was made within the jurisdiction, it must be proved by the notary who made it, and by the attesting witness, if any.[4]

§ 184. **Excuse for Want of Protest.** But the *want of protest is excused* by proof, that the defendant requested that, in case of the dishonor of the bill, no protest should be made; or, that the defendant, being the drawer, had no funds in the drawee's hands, or

or absence in parts unknown, the record is made competent evidence of the matters therein contained: Rev. Stat. 1846, tit. 29, c. 1, §§ 7–9.

In Pennsylvania, the want of demand and notice is no defence, unless the places of demand and of notice, or the names and residences of the parties thereto, are distinctly set forth on the bill or note. And if such names and places are not so set forth, the bills and notes are deemed payable and protestable at the place where they are dated; or if without place of date, then at the place where they are deposited or held for collection; and drafts on third persons are deemed acceptable, payable, and protestable at the place where they are addressed to the drawee; and, in all such cases, demand of acceptance, protest, and notice of non-acceptance may be made and given before maturity of the bill; and demand of payment, protest, and notice of non-payment may be made and given at any time after maturity of the bill, and before suit: Dunlop, Dig. c. 894, §§ 7–9.

[1] Story on Bills, §§ 273, 281; Chitty & Hulme on Bills, pp. 445, 655 (9th ed.); [Uniform Act, § 152.] Protest of an inland bill is not necessary: ibid.; Young *v.* Bryan, 6 Wheat. 146. Nor is it necessary to serve a copy of the protest with the notice of the dishonor of a bill: Cowperthwaite *v.* Sheffield, 1 Sandf. S. C. 416.

[2] Lenox *v.* Leverett, 10 Mass. 1; Chitty & Hulme on Bills, pp. 445, 655 (9th ed.). [Since the abrogation of the rule disqualifying a witness for interest, a notary public may protest a note held by a bank of which he is cashier: Nelson *v.* First N. B., 32 U. S. App. 554.]

[3] Townsley *v.* Sumrall, 2 Peters 170; Halliday *v.* McDougall, 20 Wend. 85; Grafton Bank *v.* Moore, 14 N. H. 142. The United States are, in this respect, foreign to each other: Williams *v.* Putnam, ib. 540. [An inland bill is one drawn and payable within the same State. Any other bill is a foreign bill: Uniform Act, § 129; Nelson *v.* First N. B., 32 U. S. App. 554.]

[4] Chesmer *v.* Noyes, 4 Campb. 129; Marin *v.* Palmer, 6 C. & P. 466. In some of the United States, the *certificate* of the notary, under his hand and official seal, is, by statute, made competent evidence, *prima facie*, of the matters by him transacted, in relation to the presentment and dishonor of the bill, and of notice thereof to the parties liable: {Mass. Pub. Stat. c. 77, § 22;} LL. New York, 1833, c. 271, § 8; Smith *v.* McManus, 7 Yerg. 477; LL. Mississippi, 1833, c. 70; 2 Kent Comm. 93, n.; Rev. LL. Maine, c. 44, § 12; Beckwith *v.* St. Croix Man. Co., 10 Shepl. 284. See also Clark *v.* Bigelow, 4 Shepl. 246; Warren *v.* Warren, ib. 259. Connecticut, Rev. Stat. 1849, tit. 1, § 128; Texas, Hartley, Dig. art. 2532, Stat. March 20, 1848, § 5; [North Dakota, Ashe *v.* Beasley, 6 N D. 191; Arkansas, Fletcher *v.* Arkansas N. B., 62 Ark. 265.] {The protest of a promissory note, duly authenticated by the signature and official seal of a notary public, and found among his papers after his death, is competent secondary evidence of the acts of the notary stated therein, respecting presentment, demand, and notice: Porter *v.* Judson, 1 Gray (Mass.) 175. But such proof cannot be made by the affidavit of an attorney-at-law, since deceased, it not appearing that such acts were done in the discharge of a duty, and in the regular course of business: Bradbury *v.* Bridges, 38 Me. 346. It is allowable to permit a notary to state his usual course of proceeding and his customary habits of business: Union Bank *v.* Stone, 50 id. 601.}

had no right to draw the bill; or, that the protest was prevented by inevitable casualty, or by superior force.[1] So, if the defendant has admitted his liability, by a partial payment, or a promise to pay, a protest need not be proved.[2]

§ 185. **Inland Bills; when Protest necessary.** In regard to *inland bills*, a protest is not in general necessary to be proved, unless it is made so by the local municipal law.[1]

§ 186. **Notice of Dishonor.** In an action against the drawer of a bill, or the indorser of a bill or note, it is also necessary for the plaintiff to prove, that the defendant had *due notice of the dishonor* of the bill or note.[1] To constitute a sufficient notice, it must contain such a description of the bill or note as will serve to identify it, to the understanding of the party addressed; and must state in substance, or by natural implication, that it has been presented for acceptance or payment, as the case may be, and has been dishonored;[2] and, where a protest is by law or usage required, that it has been protested.[3] And if the notice proceeded as it now seems it may in some cases, from a person who was not at that time the holder of the bill, it must clearly intimate that the party addressed is looked to for payment.[4] But if it proceeded from the holder, the American courts do not require any formal declaration to that

[1] Story on Bills, §§ 275, 280; Chitty & Hulme on Bills, p. 452 [*post*, § 195].

[2] Gibbon *v.* Coggon, 1 Campb. 188; Taylor *v.* Jones, ib. 105; Chitty & Hulme on Bills, pp. 456, 655 (9th ed.); Campbell *v.* Webster, 9 Jur. 992.

[1] Story on Bills, § 281.

[1] [Uniform Act, § 89.] {The insolvency of the drawer or indorser does not excuse a failure to notify him. Lowell, J., *In re* Battey, 16 Nat. Bk. Reg. 397, says: "It was decided by Lord Eldon, in 1812, that when a bill was dishonored after the bankruptcy of the drawer, a notice to him is a sufficient and proper notice if his assignee has not been appointed. 'The bankrupt,' says the learned judge, 'represents his estate till assignees are chosen:' *Ex parte* Moline, 19 Ves. 216; cf. Story, Bills of Exchange, § 305; *Ex parte* Johnson, 3 Dea. & Ch. 433." Where the indorsee of a note was dead, a notice of its dishonor sent by mail, directed "to the Estate of H. O., deceased," was held not sufficient to charge the executor, there being no proof that such notice was received by the executor, and the holder not having used due diligence to learn the executor's name. The notice should be given to the executor or administrator; but if the holder does not know, and cannot by reasonable diligence know, whether there is one, or who he is, or where he resides, he is excused from giving the notice: Massachusetts Bank *v.* Oliver, 10 Cush. (Mass.) 557. See also Brailsford *v.* Hodgewerf, 15 Md. 150. It is sufficient if one of several administrators or executors of a deceased indorser receive notice of protest: Beals *v.* Peck, 12 Barb. (N. Y.) 245.}

[2] [Uniform Act, § 96. The notice may be in writing or merely oral: ib. A written notice need not be signed: § 95.]

[3] See Story on Bills, §§ 301, 390; Story on Promissory Notes, §§ 348–354. Notice to the indorser of a foreign bill, that the bill, describing it, has been *protested* for non-payment, and that the holder looks to him for payment thereof, is sufficient notice of dishonor; the term *protested*, when thus used, implying that payment had been demanded and refused: Spies *v.* Newbury, 2 Doug. (Mich.) 425. So, where the notice merely stated that the bill was due and unpaid, requesting immediate payment of the amount; adding thus, — "Amount of bill, £98 15*s.*, noting 5*s.*;" it was held, that the word "*noting*" implied presentment, and non-payment, and rendered the notice sufficient: Armstrong *v.* Christiani, 17 Law Jour. C. P. 181; 5 M. G. & S. 687. See, for other examples, Bromage *v.* Vaughan, 9 Ad. & El. n. s. 608; Chard *v.* Fox, 13 Jur. 960; Caunt *v.* Thompson, ib. 495; D'Wolf *v.* Murray, 2 Sandf. S. C. 166.

[4] East *v.* Smith, 11 Jur. 412; 4 Dowl. & L. 744.

effect, it being the natural inference from the nature of the notice.[5] It must appear that the notice was given within a reasonable time after the dishonor, and protest, if there be one, and that due diligence was exercised for this purpose. When the facts are ascertained, the question whether they prove due diligence, or notice within reasonable time, is a question of law.[6] Where this reasonable time is positively fixed by the law of the particular country, it must be strictly followed.[7] Thus, though the protest must be made according to the law of the place of acceptance, yet notice to the drawer must be given according to the law of the place where the bill was drawn, and to the indorsers, according to the law of the place where the indorsements were respectively made.[8] In other cases, the reasonableness of the time of notice depends on the particular circumstances of each case; but in general it may be remarked, that where there is a regular intercourse carried on between the two places, whether by post or by packet-ships, sailing at stated times, the notice should be sent by the next post or ship, after the dishonor and protest, if a reasonable time remains for writing and forwarding the notice; and where there are none but irregular communications, that which is most probably and reasonably certain and expeditious should be resorted to.[9] If the usual mercantile intercourse is by post or mail, that mode alone should be adopted, though others may concurrently exist.[10] But whatever be the mode of notice, the *time* of its transmission should be proved with sufficient precision; for, where a witness testified that he gave notice in two *or* three days after the dishonor, notice in two days being in time, but notice on the third day being too late, it was held not sufficient evidence to go to the jury, and the plaintiff was nonsuited; for the burden of proof of seasonable notice is on him.[11]

§ 186 *a*. **When not Necessary.** If the bill or note has been received by the holder merely as a *collateral security*, the party from

[5] Bank of United States *v.* Carneal, 2 Pet. 543, 553; Story on Promissory Notes, § 354; Mills *v.* Bank of United States, 11 Wheat. 431, 437. And the same view is taken by Coleridge, J., in East *v.* Smith, 11 Jur. 412; 16 Law Jour. N. S. 292. The holder of a bill may take advantage of a notice of dishonor, given by any person who is himself liable to be sued on the bill, if it were given in sufficient time to maintain an action in favor of such party: Harrison *v.* Ruscoe, 15 M. & W. 231; 10 Jur. 142; Lysaght *v.* Bryant, 19 Law J. 160; 2 C. & K. 1016.

[6] Bank of Columbia *v.* Lawrence, 1 Pet. S. C. 578, 583; Carrol *v.* Upton, 3 Comst. 272.

[7] [The time is fixed by the Uniform Act, §§ 103, 104.]

[8] Story on Bills, §§ 284, 285, 382–385; Chitty & Hulme on Bills, pp. 167–171 (9th ed.). A promissory note, payable by instalments, is negotiable, and the indorser is entitled to a presentment upon the last day of grace after each day of payment, and to notice, if each particular instalment is not paid when due: Oridge *v.* Sherborne, 11 M. & W. 374.

[9] Story on Bills, §§ 286, 382, 383. Notice, sent by the post, will be considered as notice from the time at which, by the regular course of the post, it ought to be received: Smith *v.* Bank of Washington, 5 S. & R. 385.

[10] Story on Bills, §§ 287, 382, 383.

[11] Lawson *v.* Sherwood, 1 Stark. 314. See Brailsford *v.* Hodgewerf, 15 Md. 150.

whom he received it being neither drawer nor indorser, nor the transferrer of it by delivery, if payable to the bearer, the holder is not bound to prove a strict presentment of the bill or note; nor will the other party be exonerated from the debt collaterally secured by the delivery of such bill or note, unless he can show that he has actually sustained some damage or prejudice by such non-presentment. And the same rule applies to a party who is a mere *guarantor* of a bill or note; the burden of proof being in both these cases on the debtor, or the guarantor, to show an actual loss, or prejudice to his remedy over.[1]

§ 187. **Time and Mode of Notice.** Where the notice is sent by post, it need not be sent on the day of dishonor, but it should go by the *next practicable post after that day*, having due reference to all the circumstances of the case.[1] But if the action is commenced on the same day on which the notice is sent (as it well may be[2]), the burden of proof being on the plaintiff to show that the right of action was complete before the suit was commenced, he must prove, not only that the notice was sent, but that it reached its destination before process was sued out. For the rule of law is, that where there is a doubt which of two occurrences took place first, the party who is to act upon the assumption that they took place in a particular order, is to make the inquiry.[3] The same rule applies to *successive indorsers;* each one being generally entitled to at least one full day after he has received the notice before he is required to give notice to any antecedent indorser, who may be liable to him for payment of the bill or note.[4] Sunday, not being a business-day, is not taken into the account, and notice on Monday, of a dishonor on Saturday, is sufficient.[5]

§ 187 *a*. **Same Subject; Agency.** If the bill or note has been

[1] Story on Bills, § 372; Story on Promissory Notes, § 485; Hitchcock *v.* Humfrey, 5 M. & G. 559; Oxford Bank *v.* Hayes, 8 Pick. 423; Talbot *v.* Gay, 18 id. 534; Gibbs *v.* Cannon, 9 S. & R. 202; Phillips *v.* Astling, 2 Taunt. 206. Where notice to a guarantor is requisite, it will be seasonable if given at any time before action brought, if he has not been prejudiced by the want of earlier notice; ibid.; Babcock *v.* Bryant, 12 Pick. 133; Salisbury *v.* Hale, ib. 416; Walton *v.* Mascall, 13 M. & W. 72.

[1] If the notice be put in the post-office in due time, the holder of the bill or note is not prejudiced if, through mistake or delay of the post-office, it be not delivered in due time: Woodcock *v.* Houldsworth, 16 M. & W. 124.

[2] Greely *v.* Thurston, 4 Greenl. 479.

[3] Castrique *v.* Bernabo, 6 Ad. & El. N. S. 498.

[4] Story on Bills, §§ 288, 291, 297, 298, 384, 385; Bayley on Bills, pp. 268, 270 (5th ed.); Chitty & Hulme on Bills, pp. 337, 482 (9th ed.). {This is true, though one of the holders takes the note for collection only. Each one of the holders has a day in which to give notice to his predecessors: Myers *v.* Courtney, 11 Phila. 343.} [See Uniform Act, § 107.] If there are two mails on the same day, notice by the latest of them is sufficient: Whitwell *v.* Johnson, 17 Mass. 449, 454. See also Chick *v.* Pillsbury, 11 Shepl. 458. And if there are two post-offices in the same town, notice sent to either is, *prima facie*, sufficient: Story on Bills, § 297; Yeatman *v.* Erwin, 3 Miller (La.), 264. So is notice sent to any post-office to which the party usually resorts for letters: Bank of Geneva *v.* Howlett, 3 Wend. 328; Reid *v.* Paine, 16 Johns. 218; Cuyler *v.* Nellis, 4 Wend. 398.

[5] Eagle Bank *v.* Chapin, 3 Pick. 180; Story on Bills, §§ 288, 293, 308, 309.

transmitted to an *agent* or *banker*, for the purpose of obtaining acceptance or payment, he will be entitled to the same time to give notice to his principal or customer, and to the other parties to the instrument, as if he were himself the real holder, and his principal or customer were the party next entitled to notice; and the principal or customer will be entitled, after such notice, to the like time, to give notice to the antecedent parties, as if he received notice from a real holder, and not from his own banker or agent. In short, in all such cases, the banker or agent is treated as a distinct holder.[1] And a central or principal bank, and its different branches, are also treated as distinct holders, in regard to bills and notes transmitted from the one to the other for presentment or collection.[2]

§ 188. **Same Subject; Residence.** If the parties *reside in* or near the *same town* or place where the dishonor occurs, the notice, whether given verbally, or by a special messenger, or by the local or penny post, should be given on the day of the dishonor, or, at farthest, upon the following day, early enough for it to be actually received on that day.[1] But where both parties reside in the same town or city, the rule is, that the notice must be personal;[2] that is, must be given to the individual, in person, or be left at his domicile or place of business; for in such case it is not competent for the holder to put a letter into the post-office and insist upon that as a sufficient notice, unless he also proves that it did in fact reach the other party in due season; for it will not be presumed.[3] And

[1] Story on Bills, § 292; Story on Promissory Notes, § 326; [Uniform Act, § 94.]

[2] Clode *v.* Bayley, 12 M. & W. 51.

[1] Story on Bills, § 289; Chitty & Hulme on Bills, pp. 337, 472, 473 (9th ed.); Grand Bank *v.* Blanchard, 23 Pick. 305; Seaver *v.* Lincoln, 21 id. 267.

[2] [Notice "may in all cases be given by delivering it personally or through the mails:" Uniform Act, § 96.]

[3] Story on Promissory Notes, § 322; Eagle Bank *v.* Hathaway, 5 Met. 215; Peirce *v.* Pender, ib. 352; 3 Kent Comm. 107 (5th ed.); 1 Hare & Wallace's Leading Cases, p. 254. {Phipps *v.* Chase, 6 Met. (Mass.) 492 } [This rule is changed by the Uniform Act, § 105.] In respect to this rule, the term "*holder*" includes the *bank* at which the note is payable, and the *notary* who may hold the note as the agent of the owner, for the purpose of making demand and protest: Bowling *v.* Harrison, 6 How. S. C. 248. {Whether the rule stated in the text may, perhaps, under peculiar circumstances, admit of exceptions, *quære*. See *infra*, Cabot Bank *v.* Russell, 4 Gray (Mass.), 169, by Shaw, C. J. In a large commercial city, where the parties live within the limits of a penny post, by which the party to whom a notice is to be given is accustomed to receive his letters, a notice deposited in the post-office is sufficient. Walters *v.* Brown, 15 Md. 285. Where there is a general delivery of mail matter by messengers, and a letter is put into the post-office to be transmitted to a party resident in the same town, and not merely deposited till called for, it is probably sufficient: Shelburne, etc. *v.* Townsley, 102 Mass. 177. But a drop-letter, when there is no general delivery in the town where the party to whom the letter is addressed usually receives his mail matter, is not the equivalent of mailing a letter in another town to his address: ibid.

In commenting on this rule, Shaw, C. J., in Cabot Bank *v.* Russell, 4 Gray (Mass.), 169, says: "Even the rule that where notice is to be given to an indorser in the same town, it must be personal and ought not to be by mail, which seems to be as nearly fixed by judicial decision as such rule can be, may perhaps, under peculiar circumstances, admit of exceptions. Shall the party notifying and the party to be notified

a custom among the notaries of a city to give notice in such cases through the post-office will not control this rule.[4] But a by-law or usage of a bank, establishing this mode of giving notice, will bind parties to bills or notes made payable to such bank.[5]

§ 189. **Contents of Notice.** It will be sufficient if the note or bill described in the notice, *substantially* corresponds with that described on the record. A *variance* in the notice, to be fatal, must be such as conveys to the party no sufficient knowledge of the particular note or bill, which has been dishonored. If it does not mislead him, but conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights, or to avoid his reponsibility.[1] Thus, where the written notice, given on the 22d of September, described the note as dated on the 20th of the same month payable in sixty days, whereas in fact it bore date on the 20th of July, but it appeared that there was no other note between the parties, this was held sufficient, the note being otherwise correctly described.[2] So, where the bill was payable at the London Joint-Stock Bank, but in the notice it was described as payable at the London *and Westminster* Joint-Stock Bank, which was shown to be a different bank, yet it was held sufficient.[3] So, where there

be held to live in the same place within this rule, because they live within the territorial limits of one of the large townships of New England, and all under one municipal government and known by one name as a town, but where there are several distinct villages, each with its post-office, churches, school-houses, and other incidents of a distinct community? Such towns exist having many post-offices, to the extent of eight or more, one bearing simply the name of the town, others with the name of the town and with some local designation, as 'east,' 'north,' 'upper,' or 'lower,' and the like, and others with entirely distinct names, as post-offices." And after mentioning the decision in Chicopee Bank *v.* Eager, 9 Met. (Mass.) 585, *infra*, note 5, he says, "The court there held the notice (by mail) good, but placed the decision upon the ground of usage, which brought the case clearly within the rule as established by the adjudicated cases, and so it became unnecessary to give an opinion whether such a notice would have been good or not, without such usage. Had the fact of usage been otherwise, or the defendant not been held to have assented to it, upon the general principles previously laid down on the subject, there would have been at least plausible ground for arguing that the notice was good."

Where there are two post-offices in a town, notice by letter to an indorser, addressed to him at the town generally, is sufficient, unless the party has been generally accustomed to receive his letters at one of the offices in particular. The plaintiff makes out a *prima facie* case by proving notice by letter addressed to the defendant at the town generally. The defendant may rebut this by showing that he usually receives his letters at one office only, and that this might have been known by reasonable inquiry at the place where the letter was mailed. Morton *v.* Westcott, 8 Cush. (Mass.) 427. See also Manchester Bank *v.* White, 30 N. H. 456; Same *v.* Fellows, 28 id. 302; Windham Bank *v.* Norton, 22 Conn. 213. A notice addressed to "Mrs. Susan Collins, Boston," is *prima facie* sufficient to charge her as an indorser, if she lived in Boston: True *v.* Collins, 3 Allen (Mass.) 438.]

[4] Wilcox *v.* McNutt, 2 How. (Miss.) 776.

[5] Renner *v.* Bank of Columbia, 9 Wheat. 581; Jones *v.* Fales, 4 Mass. 245; 1 Hare & Wallace's Leading Cases, pp. 254–256; Chicopee Bank *v.* Eager, 9 Met. 583.

[1] Mills *v.* Bank of United States, 11 Wheat. 431, 435; Saltmarsh *v.* Tuthill, 13 Ala. 390; [Uniform Act, § 95.]

[2] Mills *v.* Bank of United States, 11 Wheat. 431, 435.

[3] Bromage *v.* Vaughan, 10 Jur. 982. See also Bailey *v.* Porter, 14 M. & W. 44; Rowlands *v.* Springett, ib. 7; 9 Jur. 356.

was but one note between the parties to which the notice could apply, but the sum was erroneously stated in the notice, it was held sufficient.[4] And in such cases, the question is for the jury to determine, whether the defendant must or may not have known to what note the notice referred.[5]

§ 190. **When Notice Unnecessary.** The plaintiff, however, need not prove notice of the dishonor of a bill or note if the defendant has *waived* his right to such notice, or has admitted it.[1] This may be shown not only by an express waiver, or admission, but, as against the drawer it may be inferred from circumstances amounting to it, such as an express promise to pay the amount of the bill or note, even though conditional as to the mode of payment; or, a partial payment; or, any acknowledgment by the drawer of his liability to pay.[2] But the promise or partial payment, to have this

[4] Bank of Alexandria *v.* Swann, 9 Pet. 33, 46, 47; Stockman *v.* Parr, 1 C. & K. 41; 11 M. & W. 809.

[5] Smith *v.* Whiting, 12 Mass. 6; Bank of Rochester *v.* Gould, 9 Wend. 279; Ready *v.* Seixas, 2 Johns. Cas. 337. {See also Housatonic Bank *v.* Laflin, 5 Cush. (Mass.) 546; Crocker *v.* Getchell, 10 Shep. (Me.) 392; Wheaton *v.* Wilmarth, 13 Met. (Mass.) 422; Clark *v.* Eldridge, ib. 96; Cayuga Co. Bank *v.* Warden, 1 Comst. (N. Y.) 413; Dennistoun *v.* Stewart, 17 How. (U. S.) 606; Youngs *v.* Lee, 18 Barb. (N. Y.) 187; Shelton *v.* Braithwaite, 7 M. & W. 436; Stockman *v.* Parr, 11 id. 809.}

[1] [Waiver of protest waives presentment and notice of dishonor: Uniform Act, § 111.]

[2] Story on Bills, § 320; Hopkins *v.* Liswell, 12 Mass. 52; Thornton *v.* Wynn, 12 Wheat. 183; Martin *v.* Ingersoll, 8 Pick. 1; Creamer *v.* Perry, 17 id. 332; Central Bank *v.* Davis, 19 id. 373; Warder *v.* Tucker, 7 Mass. 449; Boyd *v.* Cleaveland, 4 Pick. 525; Farmer *v.* Rand, 2 Shepl. 225; Ticonic Bank *v.* Johnson, 8 id. 426; Levy *v.* Peters, 9 S. & R. 125; Fuller *v.* McDonald, 8 Greenl. 213; Chitty & Hulme on Bills, p. 660 (9th ed.); Lawrence *v.* Ralston, 3 Bibb 102; Ritcher *v.* Selin, 8 S. & R. 438; Pierson *v.* Hooker, 3 Johns. 71; Campbell *v.* Webster, 2 M. G. & S. 258, and cases there cited; Walker *v.* Walker, 2 Eng. 542; Washer *v.* White, 16 Ind. 136; [Uniform Act, § 109.] {Bundy *v.* Buzzell, 51 Vt. 428. In Maine, by Stat. 1868, c. 152, R. S. c. 32, § 10, no waiver of demand and notice by an indorser of any promissory note or bill of exchange is valid unless it is in writing signed by such indorser or his lawful agent. It was held in Parshley *v.* Heath, 69 Me. 90, that when an indorser writes "waiving demand and notice" on a note above his signature, and other indorsers merely write their names, they adopt the waiver of demand and notice and will be bound by it. If any one of them wishes not to adopt it, he should write, "requiring demand and notice" over his signatures. This is perhaps an extreme case. ["Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only:" Uniform Act, § 110.] As to circumstantial evidence in proof of waiver, the case of Armstrong *v.* Chadwick, 127 Mass. 156, is in point. There was evidence that the indorser was told by the holder of the note that the note was worthless, and that he should hold him as indorser on the note, to which the indorser assented, and said he would take the mortgaged property (given to secure the note), sell it and take care of the note. The indorser did so take the mortgaged property, but failed to sell it or pay the note, but often told plaintiff he would take care of the note. There was no evidence that a demand was made and notice of non-payment given to the indorser, but the holder contended that there was evidence which would justify the jury in finding that the indorser had waived demand and notice. The court rejected the evidence, but on appeal its decision was reversed, and the court above affirmed the doctrine of the text, that the oral promise of an indorser to pay the note after it is overdue, with knowledge that there has been no demand or notice, and of all the facts, is a waiver of such demand. Cf. Third National Bank *v.* Ashworth, 105 Mass. 503.} Whether the evidence establishes the fact of a waiver, or admission, is a question for the jury: Union Bank of Georgetown *v.* Magruder, 7 Pet. 287. Parol evidence of statements verbally

effect, must be made with a full knowledge of all the facts, must be unequivocal, and amount to an admission of the right of the holder.[3] So, the acceptance, by the indorser, of adequate *collateral security* from the maker, or accepting an assignment of all the maker's property, for this purpose, though it be inadequate, has been held a waiver of notice, if taken before the maturity of the note;[4] but not if taken afterwards.[5] Nor is an *assignment* of property to *trustees*, for the security, among others, of an indorser, sufficient to dispense with proof of a regular demand and notice.[6] And even an express waiver of notice will not amount to a waiver of a demand on the maker of the note.[7] A known *usage* may also affect the general law on this subject. Thus, if a note is made payable at a particular bank, the usage of that bank, as to the mode and time of demand and notice, will bind the parties, whether they had knowledge of it or not; and if the note is discounted at a bank, its usages, known to the parties, are equally binding.[8]

§ 190 *a*. **Same Subject.** Proof of notice will also be *dispensed with*,[1] where it was morally or physically impossible to give it; as, by the absconding of the party, or where the holder was justifiably ignorant of the place of his abode; or, by the general prevalence of a malignant disease; or, the sudden illness or death of the holder; or any other inevitable casualty or obstruction. The omission of notice is also excused, where the holder of the bill stands in the relation of an accommodation holder or indorser to the drawer or other indorser, the latter being the real debtors.[2] So, if the drawer of a bill had no right to draw, and no reasonable ground to expect that the bill would be honored by the drawee; as, if he had drawn it without funds in the hands of the drawee, or any expectation of funds in his hands to meet it, or any arrangement or agreement on his part to accept it; for in these cases he would have no remedy against any one in consequence of the dishonor of the bill.[3] But if he were a mere accommodation drawer, or would be entitled to some

made by the indorser, at the time of a blank indorsement of a note, though not admissible to vary the contract which the law implies from the indorsement, are admissible to show a waiver of a demand and notice. Sanborn *v.* Southard, 12 Shepl. 499. In *Texas*, parol evidence of a waiver of the right to due diligence in the holder is inadmissible: Hartley's Dig. art. 2526.

[3] Story on Bills, § 320: [Glidden *v.* Chamberlin, 167 Mass. 486.]

[4] Bond *v.* Farnham, 5 Mass. 70; Andrews *v.* Boyd, 3 Met. 434; Mead *v.* Small, 3 Greenl. 207. [And so if the property so given as collateral security has been appropriated to that purpose, and the indorser has been authorized to use it for payment of the note: Wright *v.* Andrews, 70 Me. 86.]

[5] Tower *v.* Durell, 9 Mass. 332.

[6] Creamer *v.* Perry, 17 Pick. 332.

[7] Berkshire Bank *v.* Jones, 6 Mass. 524; Backus *v.* Shepherd, 11 Wend. 629.

[8] Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Blanchard *v.* Hilliard, 11 Mass. 85; Smith *v.* Whiting, 12 Mass. 6; City Bank *v.* Cutter, 3 Pick. 414.

[1] ["When, after the exercise of reasonable diligence, it cannot be given to, or does not reach the parties sought to be charged:" Uniform Act, § 112.]

[2] [Uniform Act, § 115.]

[3] [Uniform Act, § 114.]

remedy over against some other party, or would otherwise be exposed to loss and damage, he is entitled to notice. So, if having funds in the hands of the drawee, or on the way to him, the drawer has withdrawn, or stopped them, no proof of notice is requisite. Nor is it required in an action against the indorser of a bill or note, where he is the real debtor, for whose accommodation the instrument was created, and no funds have been provided in the hands of other parties for its payment.[4] Nor, where, being an accommodation indorser, he has received funds sufficient for the payment of the bill or note in full, and to secure him an ample indemnity. Nor where, by arrangement between any of the parties, the necessity of notice has been expressly or impliedly dispensed with.[5]

§ 191. **Proof of Contents of Written Notice.** If the *notice* has been given *by letter* or other *writing*, it is now held, that secondary evidence of the contents of the letter or writing is admissible, without any previous notice to the defendant to produce the original; for the rule, which requires proof of notice to produce a paper, in order to let in secondary evidence of its contents, is not capable of application to that, which is itself a notice, without opening an interminable inquiry.[1] But where the secondary evidence is uncertain or doubtful, or without sufficient precision as to dates or the like, it is always expedient to give due notice to the defendant to produce the paper. And whenever notice to produce a paper is given, it should particularly specify the writing called for.[2]

§ 192. **Same Subject; Notice to Produce.** But the rule of not requiring notice to produce a written notice of the dishonor of a bill or note, is *restricted* to the bill or note, on which the *action is brought;* for if the question is upon notice of the dishonor of *other bills or notes*, notice to produce the letters giving such notice must be given and proved, as in ordinary cases.[1] And if notice to produce has been given, the attorney of the adverse party may be called to testify whether he has in his possession the paper sought for; in order to let in secondary evidence of its contents.[2]

§ 193. **Same Subject.** When notice of the dishonor of a bill or note has been *given by letter*, it will in general suffice to show that

[4] [Uniform Act, § 115.]

[5] Story on Bills, §§ 308–317; Story on Promissory Notes, §§ 355–357. Knowledge in fact of the dishonor of a bill, where the drawer is himself the person to pay it, as executor of the acceptor, amounts to notice: Caunt *v.* Thompson, 7 M. G. & S. 400; 6 D. & L. 621. But knowledge of the probability, however strong, that the bill will be dishonored, is not sufficient to dispense with notice: ibid.; Fuller *v.* Hooper, 3 Gray, 334. [For other cases where notice is dispensed with see Uniform Act, §§ 114, 115.]

[1] See *ante*, Vol. I. § 561; Chitty & Hulme on Bills, pp. 656, 657 (9th ed.); Ackland *v.* Pierce, 2 Campb. 601; Roberts *v.* Bradshaw, 1 Stark. 28; Eagle Bank *v.* Chapin, 3 Pick. 180; Lindenberger *v.* Beall, 6 Wheat. 104.

[2] France *v.* Lucy, Ry. & M. 341; Jones *v.* Edwards, 1 M'Cl. & Y. 139; Morris *v.* Hauser, 2 M. & Rob. 392; *ante*, Vol. I. §§ 560–563; Chitty & Hulme on Bills, pp. 657, 658.

[1] Lananze *v.* Palmer, 1 M. & Malk. 31; Aflalo *v.* Fonrdrinier, ib. 335, n.

[2] Beavan *v.* Waters, 1 M. & Malk. 235; Chitty & Hulme on Bills, p. 658 (9th ed.).

a letter, containing information of the fact, and properly directed, was in due time put into the proper post-office,[1] or left at the defendant's house.[2] It is ordinarily sufficient, that it be directed to the town in which the party resides, though there may be several post-offices in it; unless it is known to the holder that he usually receives his letters at a particular office; in which case it should be directed to that office; the rule being, that the notice should be sent to the place where it will be most likely promptly to reach the party for whom it is intended.[3] In civil cases,[4] but not in criminal,[5] the *postmark* on the letter will be sufficient *prima facie* evidence of the time and place of putting it into the post-office. And if there is any doubt of the genuineness of the postmark, it may be established by the evidence of any person in the habit of receiving letters with that mark, as well as by a clerk in the post-office.[6] The fact of sending the letter to the post-office, after evi-

[1] Lawson *v.* Farmers' Bank of Salem (Supreme Court of Ohio, 1853), 1 Am. Law Reg. p. 617; [Uniform Act, §§ 105, 106.] {"A difficulty arises when the domicile or place of business of the indorser is doubtful or uncertain; where there are several post-offices in the same town; where the indorser is nearer the post-office of a town other than the one in which he resides; where he is accustomed to receive his letters at one post-office or at several different ones, in the same or another town. The nearest approximation to a general rule to be deduced from the cases seems to be this, — that whenever circumstances of the foregoing nature exist, to take the case out of the ordinary one of a fixed and known residence of the indorser and a regular mail to the established post-office of such place, it is the duty of the holder or of the notary, or other officer or agent employed by him, to make reasonable inquiries at the proper sources, to ascertain the residence or place of business of the indorser; at what post-office, one or more in the same or another town, he is accustomed to receive his letters; and in the absence of such information, to find out the post-office nearest, or in some other respect most convenient to, his residence; and then address and forward the notice by such mail and to such post-office as that it would be most likely to reach him certainly and promptly." By Shaw, C. J., in Cabot Bank *v.* Russell, 4 Gray (Mass.) 169, 170.

[2] Chitty & Hulme on Bills, p. 658 (9th ed.); Story on Bills, §§ 297, 298, 300; Shed *v.* Brett, 1 Pick. 401; Hartford Bank *v.* Hart, 3 Day, 491. Delivery to the bell-man is sufficient: Pack *v.* Alexander, 3 M. & Scott 789. And any delay in the post-office will not prejudice the holder who has sent the notice: Dobree *v.* Eastwood, 3 C. & P. 250; Woodcock *v.* Houldsworth, 15 M. & W. 124. It is not necessary that the notice should reach the party before the action is brought: it is sufficient that it is seasonably sent: New England Bank *v.* Lewis, 2 Pick. 128.

[3] See 1 Hare & Wallace's Leading Cases, pp. 256, 257, and the authorities there cited [*ante*, § 188]. [This rule is somewhat altered by Uniform Act, § 108.] {In Burlingame *v.* Foster, 128 Mass. 125, the rule as laid down was slightly more favorable to the indorser, and was as follows: "It was the duty of the plaintiff and notary to make reasonable inquiries to ascertain the residence of the defendant, that if the only information they had was that her post-office address was Rutland, and had no information that there were two post-offices in Rutland, and the notice was sent to Rutland in due season, it would be sufficient to charge the defendant as indorser, unless the defendant satisfied the jury that she was accustomed to receive her letters only from the West Rutland post-office; and further satisfied them that this fact could upon *reasonable inquiry* have been *ascertained* at Worcester, where the notice was mailed:" Cf. to same effect, Morton *v.* Westcott, 8 Cush. (Mass.) 427; Cabot Bank *v.* Russell, 4 Gray (Mass.) 169; Manchester Bank *v.* White, 30 N. H. 456; Manchester Bank *v.* Fellows, 28 id. 302; Windham Bank *v.* Norton, 22 Conn. 213.}

[4] Arcangelo *v.* Thompson, 2 Campb. 623; New Haven County Bank *v.* Mitchell, 15 Conn. 206.

[5] Rex *v.* Watson, 1 Campb. 215.

[6] Abbey *v.* Lill, 5 Bing. 299; Woodcock *v.* Houldsworth, 15 M. & W. 124.

dence has been given that it was written, may be shown by proof of the general and invariable course of the plaintiff's business or office, in regard to the transmission of his letters to the post-office, with the testimony of all the persons, if living, whose duty it was to hand over the letters, or to carry them thither, that they invariably handed over or carried all that were delivered to them, or were left in a certain place for that purpose; and if books and entries were kept of such letters sent, they should be produced, with proof of the handwriting of deceased clerks, who may have made the entries. The mere proof of the course of the office or business, without calling the persons actually employed, if living, will not ordinarily suffice.[7]

§ 194. **Where Notice to be Given.** As to the *place* to which *notice* may be sent, this may be either at the party's counting-room, or other place of business, or at his dwelling-house; or at any other place agreed on by the parties. And if a verbal notice is sent to the place of business during the usual business-hours, and no person is there to receive it, nothing more is required of the holder.[1]

§ 195. **Excuse for Failure to give Notice, etc.** If no notice of dishonor has been given, or no presentment of protest has been made, the plaintiff may *excuse his neglect* by proof of facts, showing that presentment or notice was not requisite.[1] Thus, where the defendant was drawer of the bill, the want of presentment is excused by proving that he had *no effects* in the hands of the drawee, and no reasonable grounds to expect that the bill would be honored, from the time it was drawn until it became due.[2] So if, having funds in the hands of the drawee, or on the way to him, the drawer has withdrawn or stopped them.[3] So, the want of notice of dishonor is

[7] Sturge *v.* Buchanan, 2 M. & Rob. 90; s. c. 10 Ad. & El. 598; s. c. 2 Per. & Dav. 573; Hetherington *v.* Kemp, 4 Campb. 193; Toosey *v.* Williams, 1 M. & Malk. 129; Chitty & Hulme on Bills, p. 659 (9th ed.); Hawkes *v.* Salter, 4 Bing. 715; 1 M. & P. 750.

[1] Chitty & Hulme on Bills, p. 454 (9th ed.); Crosse *v.* Smith, 1 M. & S. 545; Whitwell *v.* Johnson, 17 Mass. 449; State Bank *v.* Hurd, 12 id. 172; Allen *v.* Edmonson, 2 C. & K. 547; *ante*, §§ 178–180. {When an indorser has a residence in one town previous to making the note, and then moves to another, but leaves a member of his family in possession of his former residence, together with his servants, and keeps up his establishment there, stopping there from time to time whenever he comes into that town, a notice sent to that house is sufficient: Murray *v.* Ormes, 3 MacArthur (Dist. of Columbia) 60.}

[1] Where a note is payable at a certain place and on demand after a certain time, no averment or proof of a demand is necessary to the maintenance of the action: Gammon *v.* Everett, 12 Shepl. 66.

[2] Chitty & Hulme on Bills, pp. 436, 437 (9th ed.); Story on Bills, §§ 308–317, 329, 367–369; Rucker *v.* Hiller, 16 East 43; Legge *v.* Thorpe, 12 id. 171; Bickerdike *v.* Bollman, 1 T. R. 405; Hammond *v.* Dufrene, 3 Campb. 145; [Uniform Act, § 114.] So as to the indorser of a note: Corney *v.* Da Costa, 1 Esp. 302. [This is doubtful law merchant, and is not recognized in the Uniform Act, § 115.] See also Campbell *v.* Pettengill, 7 Greenl. 126; French *v.* Bank of Columbia, 4 Cranch 141; Austin *v.* Rodman, 1 Hawks 194; Robinson *v.* Ames, 20 Johns. 146. And see Dollfus *v.* Frosch, 1 Denio 367; Fuller *v.* Hooper, 3 Gray 334.

[3] Bayley on Bills, 296; Story on Bills, § 313; Fuller *v.* Hooper, 3 Gray 334; [Uniform Act, § 114.]

excused, in an action against the drawer, by proof that the bill was accepted, merely for the *accommodation* of the drawer, who was therefore bound at all events to pay it; and this fact may well be inferred by the jury, if the bill is made payable at the drawer's own house.[4] And the want of effects in the drawee's hands, he being the drawer's banker, may be shown by the banker's books; the production and verification of which by one of his clerks is sufficient, though the entries are in the handwriting of several.[5] Nor is proof of notice requisite in an action against the indorser of a bill or note, where he is the real debtor, for whose accommodation the instrument was created, and no funds have been provided in the hands of other parties for its payment.[6] So, if the holder was *ignorant of the drawer's residence,* this excuses the want of notice to him, if he has made diligent inquiry for the place of his residence; of which fact the jury will judge.[7] So, if the notice was *sent to the wrong person,* the mistake having arisen from indistinctness in the drawer's writing on the bill;[8] or if the drawer verbally *waives* the notice, by promising to pay the bill, or to call and see if the bill is paid;[9] or if the indorser himself informs the holder that the maker has absconded, and negotiates for further time of payment,[10] — the want of notice is excused. If the agent of a corporation draws a bill in its name on its treasurer, payable to its own order, and indorses it in the name of the corporation, a presentment to the treasurer, and his refusal to honor the bill, is of itself notice to the corporation of both those facts.[11] So, if the presentment in season was impossible, by reason of unavoidable accident, a subsequent presentment, when it becomes possible, will excuse the delay.[12] But the actual insolvency of the maker of a note, at the

[4] Sharp *v.* Bailey, 9 B. & C. 44; 4 M. & Ry. 4; Callott *v.* Haigh, 3 Campb. 281; [Uniform Act, § 114.] If the transaction between the drawer and drawee is illegal, the payee being the indorser, and conusant of the illegality, is liable without notice: Copp *v.* McDougall, 9 Mass. 1.

[5] Furness *v.* Cope, 5 Bing. 114.

[6] Story on Bills, §§ 314–316; [Uniform Act, § 115.]

[7] Browning *v.* Kinnear, Gow 81; Bateman *v.* Joseph, 12 East 433; Harrison *v.* Fitzhenry, 3 Esp. 240; Siggers *v.* Brown, 1 M. & Rob. 520; Hopley *v.* Dufresne, 15 East 275; Holford *v.* Wilson, 1 Taunt. 15; Whittier *v.* Graffham, 3 Greenl. 82; [Uniform Act, § 112.]

[8] Hewitt *v.* Thomson, 1 M. & Rob. 541. {But in Davey *v.* Jones, 42 N. J. L. 28, when A indorsed a note to B, and B indorsed it and sent it to a bank for collection, and the notary employed by the bank mistook B's name and sent the notices of B and A, in one envelope wrongly directed to B, in consequence of which the notices never reached A or B, it was held in suit by B against A that as the default arose either from the negligence of the plaintiff, in writing his name ambiguously on the note, or from the carelessness of the bank, his collecting agent, in not telling the notary the true name of the plaintiff, the lack of notice was not excused.}

[9] Phipson *v.* Kneller, 4 Campb. 285; 1 Stark. 116; Chapman *v.* Annett, 1 C. & K. 552; [Uniform Act, § 109.] Or if, before maturity of the note or bill, the indorser promises to pay, upon the agreement of the holder to enlarge the time: Norton *v.* Lewis, 2 Conn. 478.

[10] Leffingwell *v.* White, 1 Johns. Cas. 99. See also *ante,* § 184.

[11] Commercial Bank *v.* St. Croix Man. Co., 10 Shepl. 280.

[12] Scholfield *v.* Bayard, 3 Wend. 488; Patience *v.* Townley, 2 Smith 223; [Uniform Act, § 113.]

time when it fell due, does not excuse the want of notice to the indorser;[13] even though the fact was known to the indorser, who indorsed it to give it currency.[14] Nor does the insolvency of the acceptor excuse the want of notice to the drawer.[15]

§ 195 *a*. **Same Subject.** But in the case of a *banker's check*, the drawer is treated as in some sort the principal debtor; and he is not discharged by any laches of the holder, in not making due presentment, or in not giving him due notice of the dishonor, unless he has suffered some injury or loss thereby; and then only *pro tanto*.[1] And the burden of proof is on the holder, to show, as part of his case, that no damage has accrued or can accrue to the drawer by his omission of any earlier demand or notice; or, in other words, that his situation, as regards the drawer, remains as it was at the time of the dishonor.[2]

§ 196. **Same Subject.** So, as we have already seen, if the drawer of a bill, after full notice of the laches of the holder, *pays part* of the bill, *or promises* to pay it, this excuses the want of evidence of due presentment, protest, and notice.[1] The *like evidence suffices* in an action against the *indorser* of a bill or note.[2] But it has been considered, that though the waiver by the *drawer*, of his right to presentment and notice, may be inferred from circumstances and by implication, yet that an *indorser* is not chargeable after laches by the holder, unless upon his *express promise* to pay.[3]

[13] Groton *v.* Dalheim, 6 Greenl. 476; Jackson *v.* Richards, 2 Caines 343; Crossen *v.* Hutchins, 9 Mass. 205; Sandford *v.* Dallaway, 10 Mass. 52; [Phipps *v.* Harding, 34 U. S. App. 148.]

[14] Nicholson *v.* Gouthit, 2 H. Bl. 609; Buck *v.* Cotton, 2 Conn. 126; Gower *v.* Moore, 12 Shepl. 16.

[15] Whitfield *v.* Savage, 2 B. & P. 277; May *v.* Coffin, 4 Mass. 341; [National Bank *v.* Bradley, 117 N. C. 526.] {Notice of the non-acceptance and non-payment of a bill of exchange drawn by a partner upon his partnership need not be given to the drawer, after all the partners have gone into insolvency: Fuller *v.* Hooper, 3 Gray (Mass.) 334. If the maker of a note absconds, leaving no visible attachable property, a want of a demand or inquiry for him is not thereby excused, so as to charge the indorser, although the latter knew of such absconding: Pierce *v.* Cate, 12 Cush. (Mass.) 190; Wheeler *v.* Field, 6 Met. (Mass.) 290. In such case "there must be a presentment and demand of payment at his last place of business or of residence, or of due and reasonable efforts to find them for that purpose, in order to fix the indorser and render his liability absolute. Such demand will be sufficient if made at either of those places, if they were both left and abandoned at the same time; but if there be a difference in the time, it should be made at that which was most recently occupied. In such case the holder is not required, as an essential preliminary to a claim upon the indorser, to resort to or inquire for the new residence to which the maker has gone beyond the State into a foreign country:" Grafton Bank *v.* Cox, 13 Gray 504.}

[1] [Uniform Act, § 186.]

[2] Story on Promissory Notes, §§ 492, 498; 3 Kent Comm. 104, n. (*a*), (5th ed.); Little *v.* Phenix Bank, 2 Hill (N. Y.) 425; Kemble *v.* Mills, 1 M. & Gr. 757; [Kirkpatrick *v.* Puryear, Tenn., 24 S. W. 1130.]

[1] *Supra*, § 190; Chitty & Hulme on Bills, p. 660 (9th ed.); Duryee *v.* Dennison, 5 Johns. 248; Miller *v.* Hackley, ib. 375; Crain *v.* Colwell, 8 id. 384; Myers *v.* Standart, 11 Ohio St. 29.

[2] Ibid.; Taylor *v.* Jones, 2 Campb. 105. See also Trimble *v.* Thorn, 16 Johns. 152; Jones *v.* Savage, 6 Wend. 658; Leonard *v.* Gray, 10 id. 504.

[3] Borradaile *v.* Lowe, 4 Taunt. 93. And see Wilkinson *v.* Jadis, 1 M. & Rob. 41; 2 B. & Ad. 188; Lord *v.* Chadbourne, 8 Greenl. 198; Fuller *v.* McDonald, ib. 213.

§ 197. **Same Subject.** It may be proper here to add, that, where *matter in excuse* of the want of demand and notice is relied upon, it is *usual to declare* as if there had been due presentment and notice, some latitude in the mode of proof being allowed, and the evidence being regarded not strictly as matter in excuse, but as proof of a qualified presentment and demand, or of acts which, in their legal effect, and by the custom of merchants, are equivalent thereto.[1] Moreover, in all cases, where a note is given in evidence upon the money counts, any proof which establishes the plaintiff's right to recover upon the note supports the count.[2]

§ 198. **Defences.** The DEFENCE to an action on a bill of exchange or a promissory note most frequently is founded on some defect of proof on the part of the plaintiff, in making out his own title to recover; which has already been considered. Several other issues, such as *Infancy*, *Tender*, the *Statute of Limitations*, etc., which are common to all actions of *Assumpsit*, will be treated under those particular titles. It will therefore remain to consider some defences, which are peculiar to actions on bills and notes.

§ 199. **Want of Consideration.** In regard to the *consideration*, it is well settled in the law-merchant, that, in negotiable securities, in the hands of innocent third persons, a valid and sufficient consideration for the drawing or acceptance is conclusively presumed. But as between the original parties, and those identified in equity with them, this presumption is not conclusive but disputable, and the consideration is open to inquiry.[1] Wherever, therefore, the plaintiff, being an indorsee, is shown to stand in the place of the original promisee or party, as, by receiving the security after it was dishonored, or the like, the defendant, as we have already seen,[2]

[1] [Armstrong *v.* Chadwick, 127 Mass. 156.]

[2] North Bank *v.* Abbott, 13 Pick. 465, 469, 470; Hill *v.* Heap, 1 D. & R. 57. And see Cory *v.* Scott, 3 B. & Ald. 619, 625, per Holroyd, J., acc. But Bailey, J., was inclined to think, that the excuse for want of notice should be specially alleged: id. p. 624. See also, in accordance with the text, Norton *v.* Lewis, 2 Conn. 478; Williams *v.* Matthews, 3 Cowen 252.

[1] [Uniform Act, § 28.]

[2] *Supra*, § 171. At what time a note, payable on demand, is to be considered by the purchaser as a dishonored security, merely from its age, is not perfectly clear, and perhaps the case does not admit of determination by any fixed period, but must be left to be determined upon its own circumstances. In Barough *v.* White, 4 B. & C. 325, the time of the transfer of the note does not appear; but it was payable *with interest*, which Bailey, J., mentioned as indicating the understanding of the parties, that it would remain for some time unpaid. See also Sandford *v.* Mickels, 4 Johns. 224; Losee *v.* Dunkin, 7 id. 70; Thurston *v.* McKown, 6 Mass. 76. In the last case the note had been running seven days from the date, and was held not dishonored. But the lapse of eight months, and upwards, has been held sufficient evidence of dishonor: Ayer *v.* Hutchins, 4 Mass. 370. See also Freeman *v.* Haskins, 2 Caines 368; Sylvester *v.* Crapo, 15 Pick. 92; Sice *v.* Cunningham, 1 Cowen 397, 408–410. In this case the lapse of five months was held to discharge the indorser. See 3 Kent Comm. pp. 91, 92; Niver *v.* Best, 4 Law Rep. N. S. 183. By a statute of Massachusetts respecting notes payable on demand, a demand made at the end of sixty days from the date, without grace or at any earlier period, is to be deemed made in reasonable time; but after sixty days it is deemed overdue: Gen. Sts. c. 53, § 8. In Merritt *v.* Todd,

may set up the defence of illegality or insufficiency in the consideration; in which case he must be prepared with evidence to prove the circumstances under which the bill or note was drawn, and that it was transferred after its dishonor.[3] Thus, in an action against the acceptor of a bill, given for the price of a horse, warranted sound, it appearing that the holder of the bill and the original payee were identical in interest, the breach of the warranty, with an offer to return the horse, were held to constitute a good defence.[4] If the consideration has only *partially* failed, and the deficiency is susceptible of definite computation, this may be shown in defence *pro tanto*.[5] But if the precise amount to be deducted is *unliquidated*, this cannot be shown in reduction of damages, but the defendant must resort to his cross-action.[6] Mere *inadequacy* of consideration cannot be shown simply to reduce the damages, though it may be proved as evidence of fraud, in order to defeat the entire action.[7]

§ 200. **Other Equities.** How far *other equities* between the original parties may be set up in defence, against an indorsee affected with actual or constructive notice, is a question on which the decisions are not perfectly uniform. It has already been intimated,[1] that, in the law-merchant, the equities thus permitted to be set up are those only that attach to the particular bill, and not those arising from other transactions.[2] But in the courts of several of the

23 N. Y. 28, it is held that a promissory note, payable on demand, with interest, is a continuing security; an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time. The question is here fully discussed by Comstock, C. J. See also Lockwood *v.* Crawford, 18 Conn. 361.

[3] Chitty & Hulme on Bills, pp. 648, 662 (9th ed.); Webster *v.* Lee, 5 Mass. 334; Ranger *v.* Carey, 1 Met. 369; Wilbour *v.* Turner, 5 Pick. 526. Thus he may show that the note or bill was void, by the statute of the State, being made and delivered on Sunday: Lovejoy *v.* Whipple, 3 Washb. 379. And see Story on Contracts, §§ 616–620 (2d ed.).

[4] Lewis *v.* Cosgrave, 2 Taunt. 2.

[5] [Uniform Act, § 28.]

[6] See *supra*, tit. Assumpsit; Chitty & Hulme on Bills, pp. 76–79, 662 (9th ed.). {Where a promissory note is given upon two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract will be apportioned as between the original parties or those that have the same relative rights, and the holder will recover to the extent of the valid consideration and no further; and when the parts of the note are not respectively liquidated and definite, a jury will settle, on the evidence before them, what amount is founded on one consideration and what on the other: Parish *v.* Stone, 14 Pick. (Mass.) 198. See also Chicopee Bank *v.* Chapin, 8 Met. (Mass.) 40; Stoddard *v.* Kimball, 6 Cush. (Mass.) 469; Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89; Lothrop *v.* Snell, 11 Cush. (Mass.) 453.} [The Uniform Act allows failure of consideration as a defence whether the failure is an ascertained or liquidated amount or otherwise: § 28.]

[7] Solomon *v.* Turner, 1 Stark. 51.

[1] *Supra*, § 171; Burrough *v.* Moss, 10 B. & C. 558; Story on Bills, § 187 and n. (3); Story on Promissory Notes, § 178. Though the note is made payable to the maker's own order, he will be entitled to the same defence against an indorsee who received it when overdue, as if it were made payable to and indorsed by a third person: Potter *v.* Tyler, 2 Met. 58.

[2] [This seems to be the rule under the Uniform Act, Title I, Art. IV.]

United States, the defendant has been permitted, in many cases, to claim any set-off, which he might have claimed against the original party, though founded on other transactions.[3] In all cases, where the plaintiff is identified with the original contracting party, the declarations of the latter, made while the interest was in him, are admissible in evidence for the defendant.[4] But, where the plaintiff does not stand on the title of the prior party, but on that acquired by the *bona fide* taking of the bill, it is otherwise.[5]

§ 201. **Discharge of Acceptance.** The acceptor of a bill may also show as a defence, that his *acceptance* has been *discharged* by the holder; as, if the holder informs him that he has settled the bill with the drawer, and that he needs give himself no further trouble; or, where the holder, knowing him to be an accommodation acceptor, and having goods of the drawer, from the proceeds of which he expects payment, informs him that he shall look to the drawer alone, and shall not come upon the acceptor; or, if he should falsely state to the acceptor, that the bill was paid, or otherwise discharged, whereby the acceptor should be induced to give up any collateral security; or, if he should expressly agree to consider the acceptance at an end, and make no demand on the acceptor for several years.[1] And whatever discharges the acceptor will discharge the indorser; as, indeed, whatever act of the holder discharges the principal debtor will also discharge all others contingently liable, upon his default;[2] and, more generally speaking, the release of any party, whether drawer or indorser, will discharge from payment of the bill every other party to whom the party released would have been liable, if such party released should have paid the bill.[3]

[3] Sargent *v.* Southgate, 5 Pick. 312; Ayer *v.* Hutchins, 4 Mass. 370; Holland *v.* Makepeace, 8 id. 418; Shirley *v.* Todd, 9 Greenl. 83. See also the cases cited in Bayley on Bills, pp. 544–548, Phillips & Sewall's notes (2d Am. ed.); Tucker *v.* Smith, 4 Greenl. 415; Sylvester *v.* Crapo, 15 Pick. 92. By a statute of Massachusetts, the maker of a note payable on demand is admitted to any defence against the indorsee, which would be open to him in a suit brought by the payee. Stat. 1839, c 121.

[4] *Ante*, Vol. I. § 190; Beauchamp *v.* Parry, 1 B. & Ad. 89; Welstead *v.* Levy, 1 M. & Rob. 138; Chitty & Hulme on Bills, pp. 664, 665 (9th ed.); Shirley *v.* Todd, 9 Greenl. 83; Hatch *v.* Dennis, 1 Fairf. 244; Pocock *v.* Billings, 2 Bing. 269; Hacket *v.* Martin, 8 Greenl. 77. [In a suit against the maker of a promissory note by one to whom it was transferred long after it was overdue, the declarations of a former holder, made while he held the note, but after it was due, are admissible in evidence to show payment to such former holder, or any right of set-off which the maker had against him. Such declarations, made by such holder before he took the note, are inadmissible; and such declarations by such holder, made after assigning the note to one from whom the plaintiff since took it, are not competent testimony, unless such assignment was conditioned to be void upon the payment to the assignor of a less sum than the amount due on the note, in which case such declarations are competent evidence for the defendant to defeat the recovery against him of any interest remaining in the assignors, after such conditional assignment: Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89; Fisher *v.* Leland, 4 Cush. (Mass.) 456; Stoddard *v.* Kimball, ib. 604.]

[5] Smith *v.* De Wruitz, Ry. & M. 212; Shaw *v.* Broom, 4 Dowl. & Ry. 730.

[1] Story on Bills, §§ 252, 265–268, 430–433. [Under the Uniform Act, renunciation must be in writing: § 122.]

[2] Story on Bills, §§ 269, 270, 437; [Uniform Act, § 120.]

[3] Story on Bills, § 270; Sargent *v.* Appleton, 6 Mass. 85; [Uniform Act, § 120.]

§ 202. **Where Parties are collaterally liable.** If the defendant is not the principal and absolute debtor, but is a party collaterally and *contingently liable*, upon the principal debtor's default, as is the drawer or indorser, he may set up in defence any valid *agreement* between the holder of the security and the principal debtor, founded upon an adequate consideration, and made without his own concurrence, whereby a *new and further time of payment* is given to the principal debtor; and this, though the liability of the drawer or indorser had previously become fixed and absolute, by due presentment, protest, and notice.[1] But mere neglect to sue the principal debtor, or a receipt of part payment from him, will not have this effect.[2] This defence, however, may be rebutted on the part of the plaintiff, by proof that the agreement was made with the assent of the defendant; or, that, after full notice of it, he promised to pay;[3] or, that the agreement was without consideration, and therefore not binding.[4]

§ 203. **Competency of Parties as Witnesses.** The *competency* of the *parties* to a bill or note, as *witnesses*, in an action upon it between other parties, has been briefly considered in the preceding volume;[1] where it has been shown that they are generally held admissible or not, like any other witnesses, according as they are or are not interested in the event of the suit. Thus, in an action against the acceptor of a bill, *the drawer* is a competent witness for either party; for if the plaintiff recovers, he pays the bill by the hands of the acceptor, and if not, then he is liable directly for the amount.[2] So, if a bill has been drawn by one *partner* in the name of the firm, to pay his own private debt, another member of the firm is a competent witness for the acceptor to prove that the bill was drawn without authority.[3]

But if the acceptance was given for the accommodation of the

[1] Story on Bills, §§ 425–427; Chitty & Hulme on Bills, pp. 408–415 (9th ed.); Philpot *v.* Bryant, 4 Bing. 717, 721; Bank of United States *v.* Hatch, 6 Peters 250; Mottram *v.* Mills, 2 Sandf. S. C. 189; Greely *v.* Dow, 2 Met. 176; [Uniform Act, § 120.]

[2] Ibid.; Kennedy *v.* Motte, 3 McCord 13; Walwyn *v.* S. Quintin, 1 B. & P. 652; Frazier *v.* Dick, 4 Rob. (La.) 249.

[3] Chitty & Hulme on Bills, pp. 415, 416 (9th ed.); Story on Bills, § 426.

[4] McLemore *v.* Powell, 12 Wheat. 554; [Uniform Act, § 120.] {Or that it was void under the Statute of Frauds, and so not binding: Berry *v.* Pullen, 69 Me. 101. The test is whether the agreement to give time or vary the contract in any other particular could have been enforced against the creditor: Draper *v.* Romeyn, 18 Barb. (N. Y.) 166; Wheeler *v.* Washburn, 24 Vt. 293; Greely *v.* Dow, 2 Met. (Mass.) 176. On this question see the very able argument of Mr. Myers, in *Re* Goodwin, 5 Dill. C. Ct. 140, p. 144.}

[1] *Ante*, Vol. I. § 399. Whether a party to a negotiable instrument, which he has put in circulation, is a competent witness to prove it void in its creation, *quære;* and see *ante*, Vol. I. §§ 383–385.

[2] Dickinson *v.* Prentice, 4 Esp. 32; Rich *v.* Topping, Peake's Cas. 224; Lowber *v.* Shaw, 5 Mason 241; Humphrey *v.* Moxon, 1 Peake's Cas. 72; Chitty & Hulme on Bills, p. 673 (9th ed.); Storer *v.* Logan, 9 Mass. 55; Crowley *v.* Barry, 4 Gill 194.

[3] Ridley *v.* Taylor, 13 East 176.

drawer, he is not a competent witness for the acceptor, to prove usury in the discounting of the bill, without a release.[4] Nor is he competent, where the amount of his liability over, in either event of the suit, is not equal.[5]

§ 204. **Same Subject.** So, also, in an action against one of several *makers of a note*, another *maker* of the same note is a competent witness for the plaintiff, as he stands indifferent;[1] but not for the defendant, to prove illegality of consideration.[2] The maker is also a competent witness for the plaintiff, in an action by the indorsee against the indorser.[3] But it seems, that he is not competent for the defendant, in such action, if the note was made and indorsed for his own accommodation; for a verdict for the plaintiff, in such case, would be evidence against him.[4]

§ 205. **Same Subject.** The *acceptor* or *drawee* of a bill is also a competent witness, in an action between the holder and the drawer, to prove that he had no funds of the drawer in his hands, for this evidence does not affect his liability to the drawer.[1] And even the declaration of the drawee to the same effect, if made at the time of presentment and refusal to accept the bill, is admissible, as *prima facie* evidence of that fact, against the drawer.[2] But it has been held, that a joint acceptor is not competent to prove a set-off, in an action by the holder against the drawer, because he is answerable to the latter for the amount which the plaintiff may recover.[3] Nor is he a competent witness for the drawer to prove that he received it from the drawer to get it discounted, and delivered it to the plaintiff for that purpose, but that the plaintiff had not furnished the money; for, being absolutely bound, by his acceptance, to pay the bill, he is bound to indemnify the drawer against the costs of the suit.[4]

§ 206. **Same Subject.** In an action by the indorsee against the drawer of a bill, the *payee* is a competent witness to prove the consideration for the indorsement.[1] The payee of a note, who has

[4] Hardwick *v.* Blanchard, Gow 113; Burgess *v.* Cuthil, 6 C. & P. 282. And see Bowne *v.* Hyde, 6 Barb. S. C. 392.

[5] Scott *v.* McLellan, 2 Greenl. 199; Jones *v.* Brooke, 4 Taunt. 463; *ante*, Vol. I. § 401; Faith *v.* McIntyre, 7 C. & P. 44.

[1] York *v.* Blott, 5 M. & S. 71. [2] Slegg *v.* Phillips, 4 Ad. & El. 852.

[3] Venning *v.* Shuttleworth, Bayley on Bills, 422 [536] [593]; Fox *v.* Whitney, 6 Mass. 118; Baker *v.* Briggs, 8 Pick. 122; Levi *v.* Essex, 2 Esp. Dig. 707; *ante*, Vol. I. §§ 329, 400; Skelding *v.* Warren, 15 Johns. 270; Taylor *v.* McCune, 1 Jones, 460.

[4] Pierce *v.* Butler, 14 Mass. 303; Van Schaack *v.* Stafford, 12 Pick. 565; Hubbly *v.* Brown, 16 Johns. 70.

[1] Staples *v.* Okines, 1 Esp. 332; Legge *v.* Thorpe, 2 Campb. 310.

[2] Prideaux *v.* Collier, 2 Stark. 57; *ante*, Vol. I. §§ 108, 109, 111, 113.

[3] Mainwaring *v.* Mytton, 1 Stark. 83; *ante*, Vol. I. § 401. *Sed quære*, for it seems that the acceptor would be liable to the drawer for the whole amount of the bill which he had not paid to the holder: Reid *v.* Furnival, 5 C. & P. 499; s. c. 1 C. & M. 538; Johnson *v.* Kennion, 2 Wils. 262.

[4] Edmonds *v.* Lowe, 8 B. & C. 407; s. c. 2 M. & R. 427.

[1] Shuttleworth *v.* Stephens, 1 Campb. 407, 408.

indorsed it without recourse, is also a competent witness to prove its execution by the maker.[2] But where the note was payable to the payee *or bearer*, the payee has been held inadmissible to prove the signature of the maker, on the ground that he was responsible, upon an implied guaranty, that the signature was not forged.[3]

§ 207. **Same Subject.** In an action by the indorsee against the drawer or acceptor, an *indorser* is, in general, a competent witness for either party, as he stands indifferent between them.[1] But an intermediate indorser of a bill is not a competent witness in a suit on the bill by a subsequent indorsee against a prior indorser, to prove notice of its non-acceptance.[2] Thus, under the general rule that the indorser, standing indifferent, is a competent witness, he has been admitted to prove payment;[3] time of negotiation by indorsement;[4] alteration of date by fraud;[5] want of interest in the indorsee;[6] usury;[7] and the fact of his own indorsement.[8] So, to prove that the claim which the defendant insisted on by way of set-off, was acquired by him after he had notice of the transfer of the note to the plaintiff.[9] And generally the payee, after having indorsed the note, is competent to prove any matters arising after the making of the note, which may affect the right of the holder to recover against the maker.[10]

[2] Rice *v.* Stearns, 3 Mass. 225. Or that the note had been fraudulently altered, Parker *v.* Hanson, 7 Mass. 470; or fraudulently circulated, Woodhull *v.* Holmes, 10 Johns. 231.

[3] Herrick *v.* Whitney, 15 Johns. 240; Shaver *v.* Ehle, 16 id. 201.

[1] Richardson *v.* Allen, 2 Stark. 334; Stevens *v.* Lynch, 2 Campb. 332; s. c. 12 East 38; Birt *v.* Kershaw, 2 id. 458; Charrington *v.* Milner, 1 Peake's Cas. 6; Reay *v.* Packwood, 7 Ad. & El. 917; Chitty & Hulme on Bills, p. 674 (9th ed.). But see Barkins *v.* Wilson, 6 Cowen 471. See further, *ante*, Vol. I. § 385, n., and §§ 399–401.

[2] Talbot *v.* Clark, 8 Pick. 51; Cropper *v.* Nelson, 3 Wash. 125. But a prior indorser has been held a competent witness, for the defendant, in an action against a subsequent indorser: Hall *v.* Hale, 8 Conn. 336.

[3] Warren *v.* Merry, 3 Mass. 27; White *v.* Kibling, 11 Johns. 128; Bryant *v.* Rittorbush, 2 N. H. 212. So in Louisiana, if the indorser has not been charged with notice: Bourg *v.* Bringier, 20 Martin 507.

[4] Baker *v.* Arnold, 1 Caines 248; Baird *v.* Cochran, 4 S. & R. 397; Smith *v.* Lovett, 11 Pick. 417.

[5] Parker *v.* Hanson, 7 Mass. 470; Shamburg *v.* Commagere, 10 Martin 18.

[6] Barker *v.* Prentiss, 6 Mass. 430; Maynard *v.* Nekervis, 9 Barr 81.

[7] Tuthill *v.* Davis, 20 Johns. 287; Tucker *v.* Wilamonicz, 3 Eng. 157.

[8] Richardson *v.* Allen, 2 Stark. 334.

[9] Zeigler *v.* Gray, 12 S. & R. 42.

[10] See the cases already cited in this section; also Powell *v.* Waters, 17 Johns. 176; McFadden *v.* Maxwell, ib. 188. In several of the United States, all the parties liable on a bill or note may be sued in one action; in which case, however, the parties are respectively entitled to the testimony of any other parties defendant in the suit, in the same manner as if they had been sued in several actions. See Wisconsin Rev. Stat. 1849, c. 93, §§ 9, 19, 20; Mich. Rev. Stat. 1846, c. 99, §§ 6, 12, 17.

CARRIERS.

§ 208. **Carriers by Land and Water subject to Same Liabilities.** There is no distinction, in regard to their duties and liabilities, between carriers of goods by water and carriers by land, nor between carriers by ships, steamboats, and barges, and by railroad cars and wagons. The action against a carrier in any of these modes is usually in *assumpsit* upon the contract; and this is generally preferable, as the remedy in this form survives against his executor or administrator. The declaration involves three points of fact, which the plaintiff must establish, upon the general issue, — namely, the contract; the delivery of the goods, or, in the case of a passenger, his being in the carriage; and the defendant's breach of promise or duty. Carriers are also liable in trover, for the goods, and in case, sounding in tort, for malfeasance or misfeasance; but although the remedy in tort is on some accounts preferable to *assumpsit*,[1] the form of action does not very materially affect the evidence necessary to maintain it.

§ 209. **Contract to be proved as laid.** In any form of action, the *contract* must be proved as laid in the declaration.[1] If the contract is stated as absolute, proof of a contract in the alternative

[1] See 1 Chitty on Plead. 161, 162 (7th ed.) [125, 126]; Govett *v.* Radnidge, 3 East 70. {Trover will not lie against a common carrier for non-feasance only: Bowlin *v.* Nye, 10 Cush. (Mass.) 416; Collins *v.* Boston & M. R. R., ib. 610; Scoville *v.* Griffith, 2 Kernan (N. Y.) 509. There must be a previous demand: Robinson *v.* Austin, 2 Gray (Mass.) 564. And where a carrier, having no legal claim upon the goods except for the freight, refuses to deliver them unless a further sum should be first paid, the consignee is not bound to tender the freight money, and the carrier's refusal to deliver is evidence of a conversion of them: Adams *v.* Clark, 9 Cush. (Mass.) 217; Rooke *v.* Midland R. Co., 14 Eng. Law & Eq. 175. The receipt by the owner of the whole number of casks of goods shipped does not prevent him from maintaining an action against the carrier for a loss of part of their contents, unless he receives the property as and for a compliance with the contract of the carrier: Alden *v.* Pearson, 3 Gray (Mass.) 342. A common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage, as against such owner: Robinson *v.* Baker, 5 Cush. (Mass.) 137; Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

The distinction between assumpsit and case is now generally unimportant, by reason of the changes in the modes of pleading. Cf. Hutchinson on Carriers, § 737 *et seq.* When the form of declaration is only on the liability of a *common carrier*, the plaintiff cannot recover for losses happening from *misrepresentations* of the defendant's agent: Maslin *v.* Balt. & Oh. R. R. Co., 14 W. Va. 180. When a common carrier refuses to carry goods, as in the case of his employees striking, and leaving him unable to handle the freight, the shipper's remedy is by an action at law, not by mandamus: People *v.* New York, etc. R. R. Co., 22 Hun (N. Y.) 533.}

[1] Ireland *v.* Johnson, 1 Bing. N. C. 162; Bretherton *v.* Wood, 3 B. & B. 54; Max *v.* Roberts, 12 East 89.

will not support the allegation, even though the option has been determined;[2] neither will it be supported by proof of a contract containing an exception from certain classes of liability; as, for example, that the carrier will not be responsible for losses by fire, perils of the seas, or the like.[3] But if the exception does not extend to the obligation of the contract itself, but only affects the damages to be recovered, the declaration may be general, without any mention of the exception, the proof of which at the trial will be no *variance*.[4] Thus, where the action was in the common form of *assumpsit*, and the evidence was, that the carrier had given notice that he would not be accountable for a greater sum than £5 for goods, unless they were entered as such and paid for accordingly, the variance was held immaterial.[5] And if, in a like form of action by the consignor of goods, the allegation is, that the consideration or hire was to be paid by the plaintiff, and the evidence is, that it was to be paid by the consignee, it is no variance; the consignor being still in law liable.[6] A variance between the allegation and proof of the *termini* will be fatal.[7] But here, the place, mentioned as the *terminus*, is to be taken in its popular extent, and not strictly according to its corporate and legal limits; and therefore an averment of a contract to carry from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath.[8] But in an action on the case for non-delivery of goods, the *terminus a quo* is not material.[9]

§ 210. **Proof that Defendant is Common Carrier proves Contract.** If the defendant is alleged and proved to be a *common carrier*, the law itself supplies the proof of the contract, so far as regards the extent or degree of his liability. But if he is not a common carrier, the terms of his undertaking must be proved by the plaintiff. And in either case, where there is an express contract, that alone must be relied on, and no other can be implied.[1]

[2] Penny *v.* Porter, 2 East 2; Yate *v.* Willan, ib. 128; *ante*, Vol. I. §§ 58, 66; Hilt *v.* Campbell, 6 Greenl. 109.

[3] Latham *v.* Rutley, 2 B. & C. 20. And see Smith *v.* Moore, 6 Greenl. 274; Ferguson *v.* Cappeau, 6 H. & J. 394.

[4] {Ferguson *v.* Cappeau, 6 H. & J. 394; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329; Tuggle *v.* St. Louis, etc. R. R. Co., 62 Mo. 425; Lawson, Carriers, p. 380. But no evidence is admissible of goods shipped at any other time than that mentioned in the writ: Witzler *v.* Collins, 70 Me. 290.}

[5] Clark *v.* Gray, 6 East 564.

[6] Moore *v.* Wilson, 1 T. R. 659; Turney *v.* Wilson, 7 Yerg. 340; Moore *v.* Sheridine, 2 H. & McH. 453. If the declaration is on a loss by negligent carrying, it will not be supported by proof of a loss in the defendant's warehouse, before the goods were taken to the coach to be carried: Roskell *v.* Waterhouse, 2 Stark. 461; *In re* Webb, 8 Taunt. 443; s. c. 2 Moore 500.

[7] Tucker *v.* Cracklin, 2 Stark. 385; {Fowles *v.* Great Western R. Co., 16 Eng. Law & Eq. 531.}

[8] Beckford *v.* Crutwell, 1 M. & Rob. 187; s. c. 5 C. & P. 242; Ditcham *v.* Chivis, 4 Bing. 706; s. c. 1 M. & Payne 735. See also Burbige *v.* Jakes, 1 B. & P. 225.

[9] Woodward *v.* Booth, 7 B. & C. 301.

[1] Robinson *v.* Dunmore, 2 B. & P. 416; 2 Steph. N. P. 994, 995.

If it appears that the goods were delivered by the owner to one common carrier, and that he, without the owner's knowledge or authority, delivered them over to another, to be carried, this evidence will support an action brought directly against the latter, with whom the contract will be deemed to have been made through the agency of the former, ratified by bringing the action.[2]

[2] Sanderson *v.* Lamberton, 6 Binn. 129. {The English cases hold that the shipper of goods can sue only that carrier with whom he makes the contract and to whom he delivers the goods, on the ground that there is a want of privity of contract between the shipper and any connecting company: Coxon *v.* Great Western R. Co., 5 H. & N. 274; Bristol & Exeter R. R. Co. *v.* Collins, 7 H. L. 194; Scothorn *v.* S. Staffordshire R. Co., 8 Ex. 341; Crouch *v.* Great Western R. Co., 2 H. & N. 491 · Lawson, Carriers, p. 351 *et seq.* But cf. Hall *v.* N. E. R. Co., L. R. 10 Q. B. 437.

In the United States, however, the rule is different. It has been held that a railroad company receiving goods for transportation to a place situated beyond the line of its own road on another road which connects with its own (with which it has no connection in business), but taking pay for the transportation over its own road only, is not liable, in the absence of any special contract, for the loss of the goods after their delivery, within a reasonable time, to the other railroad: Nutting *v.* Conn. River R. R., 1 Gray (Mass.) 502. See also Van Santvoord *v.* St. John, 6 Hill (N. Y.) 157, reversing the decision of the Supreme Court in St. John *v.* Van Santvoord, 25 Wend. 660, and explaining Weed *v.* Saratoga & S. R. R., 19 Wend. 534; Hood *v.* New York & N. H. R. R. Co., 22 Conn. 1; Elmore *v.* Naugatuck R. R. Co., 23 id. 457; Farmers' & Mech. Bank *v.* Champlain Transportation Co., 16 Vt. 52, 18 id. 140, 23 id. 209, 214, and note by Redfield, J. The general rule in the United States is in accord with these decisions, and is that when a carrier receives goods marked for a particular destination, beyond the route for which he professes to carry, and beyond the terminus of his road, he is only bound to transport and deliver them to the next carrier according to the established usage of his business, and is not liable for losses beyond his own line: Clyde *v.* Hubbard, 88 Pa. St. 358; Detroit, etc. R. Co. *v.* McKenzie, 43 Mich. 609; McCarthy *v.* Terre Haute, etc. R. Co., 9 Mo. Ap. 159; Railroad Co. *v.* Pratt, 22 Wall (U. S.) 123; Stewart *v.* Terre Haute, etc. R. Co., 1 McCr. C. Ct. 312; Camden, etc. R. R. *v.* Forsyth, 61 Pa. St. 81; Packard *v.* Taylor, 35 Ark. 402; Burroughs *v.* Norwich, etc. R. Co., 100 Mass. 26; Converse *v.* Norwich R. Co., 33 Conn. 166; Lawson, Carriers, p. 351 *et seq.*; [Page *v.* Chicago, etc. R., 7 S. D. 297; Hoffman *v.* Cumberland, etc. R., 85 Md. 391; Wehmann *v.* Minneapolis, etc. R., Minn., 59 N. W. 546.]

In some States, however, he is held liable for any loss whether on his line or on a connecting line: Mobile *v.* Girard R. Co., 63 Ala. 219; Erie R. Co. *v.* Wilcox, 84 Ill. 239; Illinois, etc. R. R. Co. *v.* Frankenborg, 54 id. 88; Mulligan *v.* Illinois, etc. R. R. Co., 36 Iowa 181; Cutts *v.* Brainerd, 42 Vt. 566; [Chicago, etc. R. *v.* Simon, 160 Ill. 648.] But if there is evidence in the contract or agreement of an intention on the part of the carrier to enlarge this liability, the American cases hold that the first carrier will be liable for all: Philadelphia, etc. R. R. Co. *v.* Ramsey, 89 Pa. St. 474; [Chicago, etc. R. *v.* Dumser, 161 Ill. 190.] This intention may be shown by receiving pay for the whole transportation: Detroit, etc. R. Co. *v.* McKenzie, 43 Mich. 609; Clyde *v.* Hubbard, 88 Pa. St. 358. But compare Hadd *v.* U. S., etc. Express, 52 Vt. 335; [Taylor *v.* Maine C. R., 87 Me. 299.] So where the first company gave a ticket, and took pay through, it has been held to be responsible throughout the entire route: Weed *v.* Saratoga, etc. R. R. Co., 19 Wend. 534. See Noyes *v.* Rutland & B. R. R. Co., 27 Vt. 110. But it has also been held that where a carrier, the first of several connecting lines, sells a through ticket with coupons, the seller is not responsible for injuries happening at a point beyond its own line: Railroad Co. *v.* Sprayberry, Sup. Ct. Tenn. 1874; [Chicago, etc. R. *v.* Mulford, 162 Ill. 522.] But see Great Western R. R. Co. *v.* Blake, 7 H. & N. 987; Van Buskirk *v.* Roberts, 31 N. Y. 661. The company which loses baggage checked through is liable for the loss of the baggage: C., H., etc. R. R. Co. *v.* Fahey, 52 Ill. 81. And so also is the company which issues the check: Burrell *v.* N. Y. Cen. R. R. Co., 45 N. Y. 184.

If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and such company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charge

§ 211. **Who is Common Carrier.** The defendant is *proved* to be *a common carrier*, by evidence that he undertakes to carry for per-

of its predecessors, will not render it liable for an injury done to the goods before it received them: Darling *v.* B. & W. R. R. Co., 11 Allen (Mass.) 295.]

The declaration against a common carrier is as follows: "For that whereas the said (*defendant*), on ——, was a common carrier of goods and chattels for hire, from —— to ——; and being such carrier, the plaintiff then, at the request of the said (*defendant*), caused to be delivered to him certain goods of the plaintiff, to wit [*here describe them*], of the value of ——, to be taken care of and safely and securely conveyed by the said (*defendant*), as such carrier, from said —— to said ——, there to be safely and securely delivered by said (*defendant*) to the plaintiff (*or*, to ——, *if the case is so*), for a certain reward to be paid to the said (*defendant*); in consideration whereof the said (*defendant*), as such carrier, then received said goods accordingly, and became bound by law, and undertook and promised the plaintiff to take care of said goods, and safely and securely to carry and convey the same from said —— to ——, and there to deliver the same safely and securely to the plaintiff (*or*, to ——), as aforesaid. Yet the said (*defendant*) did not take care of said goods, nor safely and securely carry and convey and deliver the same as aforesaid; but, on the contrary, the said (*defendant*) so negligently conducted and so misbehaved in regard to said goods in his said calling of common carrier, that by reason thereof the said goods became and were wholly lost to the plaintiff."

Against a private carrier, charged with the loss of goods by negligence, the declaration in assumpsit is as follows: —

"For that on ——, in consideration that the plaintiff, at the request of the said (*defendant*), had delivered to him certain goods and chattels, to wit [*here describe them*], of the value of ——, to be safely conveyed by him from —— to ——, for a certain reward to be paid to the said (*defendant*), he the said (*defendant*) promised the plaintiff to take good care of said goods, while he had charge of the same, and with due care to convey the same from —— to —— aforesaid, and there safely to deliver the same to the plaintiff (*or*, to ——, *as the case may be*). Yet the said (*defendant*) did not take due care of said goods while he had charge of the same as aforesaid, nor did he with due care convey and deliver the same as aforesaid; but, on the contrary, so carelessly and improperly conducted in regard to said goods, that by reason thereof they became and were wholly lost to the plaintiff."

In England, it has been held that when a railway company takes into its care a parcel directed to a particular place, and does not by a positive agreement limit its liability to a part only of the distance, it is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company, in general, professes to carry on its business as a carrier: Muschamp *v.* Lancaster & P. J. Railway, 8 M. & W. 421. This decision was followed in Watson *v.* Ambergate, N. & B. Railway, 3 Eng. Law & Eq. 497. See also Scothorn *v.* S. Staffordshire R. Co., 18 id. 553. But see cases in 1 Gray, 6 Hill, 18 Vt., and 22 Conn., *supra*.

Where it is the general custom of a carrier to forward by sailing-vessels all goods destined for points beyond the end of his line, he is not liable for not forwarding a particular article by a steam-vessel, unless the direction to do so is clear and unambiguous: Simkins *v.* Norwich, etc. Steamboat Co., 11 Cush. 102.

A railroad company, as a common carrier of merchandise, is responsible as a *common carrier*, until the goods are removed from the cars at the place of delivery, and placed on the platform. If for any reason they cannot then be delivered, or if, for any reason, the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely under the charge of competent and faithful servants, ready to be delivered, and actually to deliver them, when duly called for by the parties authorized to receive them. For the performance of these duties, after the goods are delivered from the cars, the company is liable as a *warehouseman*, or as a keeper of goods for hire: Thomas *v.* Boston & Prov. R. R., 10 Met. 472; Norway Plains Co. *v.* Boston & M. R. R., 1 Gray 263; Gibson *v.* Culver, 17 Wend. 305; Miller *v.* Steam, etc. Co., 13 Barb. 361. See also Garside *v.* Trent & Mers. Nav., 4 T. R. 581; Hyde *v.* Same, 5 id. 389; Webb's Case, 8 Taunt. 443. [As to the termination of a carrier's responsibility as insurer, the cases differ, some holding, as above, that the removal of the goods from the car or landing-place, at their destination, discharges him from responsibility as a carrier, and changes his liability to that of a warehouseman: Shepherd *v.* Bristol & Ex. R. R. Co., L. R. 3 Exch. 189; Bryan *v.* Paducah R. R. Co., 11 Bush (Ky.) 597; Shenk *v.* Phila. St. Prop., 60 Penn. St. 109. See also 2 Am. Law

sons generally, exercising it as a public employment, and holding himself out as ready to engage in the transportation of money or goods for hire, as a business, and not as a casual occupation.[1] This

Rev. 426. And this without notice to the consignees: Norway Plains Co. *v.* Boston & M. R. R., 1 Gray (Mass.) 263. But see Michigan Cent. R. R. *v.* Ward, 2 Mich. 538; Goold *v.* Chapin, 10 Barb. (N. Y.) 612; 13 id. 361; [East Tennessee, etc. R. *v.* Kelly, 91 Tenn. 699.] Others, however, hold that the carrier's liability continues till the consignee has notice and a reasonable time to remove: Redmond *v.* Liv., N. Y., & Phila. St. Co., 46 N. Y. 578; Moses *v.* B. & M. R. R. Co., 32 N. H. 523; Winslow *v.* Vt. & Mass. R. R. Co., 42 Vt. 700; Graves *v.* Hart. & N. Y. St. Co., 38 Conn. 143; [Railroad Co. *v.* Hatch, 52 Ohio 408; Missouri Pac. R. *v.* Nevill, 60 Ark. 375; Berry *v.* West Va. R., 30 S. E. 143, W. Va.] Custom may modify the liability: McMaster *v.* Pa. R. R. Co., 69 Penn. St. 374. [Illinois C. R. *v.* Carter, 165 Ill. 570, holding notice necessary in case of water carriers, but not in case of carriers by rail.] Where the carrier is to deliver to a connecting line, his responsibility as carrier holds till the delivery; and a provision in the charter, limiting their liability to that of warehousemen, after deposit in their warehouse, was held to refer only to goods which had reached their destination: Mich. Cen. R. R. *v.* Min. Spr. Manuf. Co., 16 Wall. (U. S.) 318. [Delivery of a car is insufficient without delivery of shipping directions: Bosworth *v.* Chicago, etc. R., 87 F. 72, U. S. App.] If the delivery is to be "on board," the carrier is liable as carrier if the goods are burnt in his warehouses before delivered on board: Moore *v.* Michigan Cent. R. R., 3 Mich. 23.]

[1] Story on Bailm. § 495; [Fuller *v.* Bradley, 25 Penn. St. 120; Russell *v.* Livingston, 19 Barb. (N. Y.) 346. In an action against a street-railway corporation to recover for the loss of a box of merchandise delivered to them to be carried for hire on the front platform of one of their cars, the plaintiff, for the purpose of showing them to be common carriers of goods, may prove that other persons had paid money to their conductors, with the knowledge of their superintendent, for the carriage of merchandise by them; and evidence that two other persons had paid money at other times to the defendants' conductors for the transportation of merchandise, with the knowledge of the superintendent of the road, in the absence of anything to control or contradict it, would be sufficient to warrant the jury in finding that the defendants had assumed to be and were common carriers: Levi *v.* Lynn & Boston R. Company, 11 Allen (Mass.) 300. Whether the persons engaged in towing boats are considered common carriers, and should be held responsible as such for the boats towed and cargo, *quære:* Ashmore *v.* Penn. S. T. & Trans. Co., 4 Dutch. (N. J.) 180. Proprietors of hacks are common carriers and bound to exercise the greatest diligence: Bonce *v.* Dubuque Street R. R. Co., 53 Iowa 278.

A keeper of a public-house in the neighborhood of a railway station gave public notice that he would furnish a free conveyance to and from the cars to all passengers, with their baggage, travelling thereby, who should come to his house as guests, and for this purpose employed the proprietors of certain carriages to take all such passengers free of charge to them, and to convey them and their baggage to his house. A traveller by the cars, to whom this arrangement was known, employed one of the carriages thus provided to take him and his baggage to such public-house, and his baggage was lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver, and the keeper of the house was held liable therefor, either as an innkeeper or as a common carrier, it being immaterial which: Dickinson *v.* Winchester, 4 Cush. (Mass.) 114. So when a railroad company allowed shippers of cattle to travel on a free pass, to take care of the cattle, for which freight was paid, the company was held liable as a carrier: Maslin *v.* Baltimore, etc. R. R. Co., 14 W. Va. 180. But this liability may be avoided by a stipulation in the pass that the travelling is at the risk of the passenger: McCawley *v.* Furness R. Co., L. R. 8 Q. B. 57; Sutherland *v.* Great West. R. Co., 7 Up. Can. C. P. 409; Alexander *v.* Toronto R. Co., 35 Up. Can. Q. B. 453. [*Contra*, Saunders *v.* Southern Pac. R., 13 Utah 275.] Expressmen who forward goods for hire from place to place, in conveyances owned by others, are not liable as common carriers, but as bailees for hire to forward goods by the ordinary modes of conveyance: Hersfield *v.* Adams, 19 Barb. (N. Y.) 577. [A railroad acts as a private and not as a common carrier in carrying goods for an express company under a special contract: Louisville, etc. R. *v.* Keefer, 146 Ind. 21.] And a sleeping-car company has been held not to be a common carrier: Blum *v.* S. Pullman Palace Car Co., 1 Flip. C. Ct. 500; Pullman Palace Car

description includes both carriers by land and by water; namely, proprietors of stage wagons, coaches, and railroad cars, truckmen, wagoners, teamsters, cartmen, and porters; as well as owners and masters of ships and steamboats, carrying on general freight, and lightermen, hoymen, barge-owners, ferry-men, canal-boatmen, and others, employed in like manner.[2] But hackney-coachmen, and others, whose employment is solely to carry passengers, are not regarded as common carriers in respect of the persons of the passengers, but only as to their baggage, and the parcels which they are in the practice of conveying.[3] Nor is evidence that the defendant kept a booking-office for a considerable number of coaches and wagons sufficient of itself to prove him a common carrier.[4]

§ 212. **Contract must be between Plaintiff and Defendant.** The *contract* must also appear to have been made *with the plaintiff* and *by the defendant*. If, therefore, the goods were sent by the vendor to the vendee, at the risk of the latter, the contract of the carrier is with the vendee, whose agent he becomes by receiving the goods, and who alone is entitled to sue; unless the vendor expressly contracted with the carrier, in his own behalf, for the payment of the freight; or the property was not to pass to the vendee until the goods reached his hands; in which case the vendor is the proper plaintiff.[1] If goods are ordered by the vendee, but no order at all is given in regard to sending them; and yet the vendor sends them by a common carrier, by whom they are lost; the carrier in such case

Co. *v.* Smith, 73 Ill. 360; [Pullman Co. *v.* Gavin, 93 Tenn. 53; Barrett *v.* Pullman Co., 51 F. 796; Lemon *v.* Pullman Co., 52 id. 262.]

Although it has been intimated (McAndrews *v.* Electric Tel. Co., 17 C. B. 3), and even expressly held, that telegraph companies are liable to the same extent as common carriers (Parks *v.* At. & Cal. Tel. Co., 13 Cal. 422); [Kirby *v.* Western Union T. Co. 7 S. D. 623], it seems to be now generally agreed that such is not the law; some cases holding them liable only for reasonable diligence and skill (Leonard *v.* N. Y. A. & B. Tel. Co., 41 N. Y. 544; Rittenhouse *v.* Tel. Co., 44 id. 263; Ellis *v.* Am. Tel. Co., 13 Allen (Mass.) 226; West. Un. Tel. Co. *v.* Carew, 15 Mich. 525); and others holding them liable for the greatest diligence and skill (N. Y. & Mob. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; Stevenson *v.* Montreal Tel. Co., 16 U. C. 530). And they may limit their responsibility by any reasonable conditions: Wolf *v.* West. Un. Tel. Co., 62 Penn. St. 83. See Hutchinson on Carriers, § 47 *et seq.*, and Lawson, Carriers, § 1.} [And see *post*, § 222 *a*, note. Owners of passenger elevators owe the duty of a common carrier to their passengers: Southern Bldg. & L. Ass'n *v.* Lawson, 97 Tenn. 367; Mitchell *v.* Marker, 22 U. S. App. 325. But this does not apply to freight elevators: Hall *v.* Murdock, 72 N. W. 150, Mich.]

[2] Story on Bailm. §§ 496, 497. [3] Story on Bailm. §§ 498, 499, 590–604.

[4] Upston *v.* Slark, 2 C. & P. 598.

[1] Dawes *v.* Peck, 8 T. R. 330, 332; Hart *v.* Sattley, 3 Campb. 528; Moore *v.* Wilson, 1 T. R. 659; Davis *v.* James, 5 Burr. 2680; Sargent *v.* Morris, 3 B. & Ald. 277; [Spence *v.* Norfolk, etc. R., 92 Va. 102.] {A carrier may presume, in the absence of some notice to the contrary, that the consignee is the owner: Sweet *v.* Barney, 23 N. Y. 335. And in an action by the consignor for non-delivery to the consignee, the complaint was held bad on demurrer, because there was no allegation that the ownership of the goods was still in the consignor, and that the carrier knew it: Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

The bill of lading or receipt of the carrier is enough to establish such a *prima facie* case of ownership as will enable a party to sustain an action: Arbuckle *v.* Thompson, 37 Pa. St. 170.}

is the agent of the vendor alone, and the action for the loss is maintainable by him only.[2] So, where the goods were obtained of the vendor by a pretended purchase, by a swindler, who got possession of them by the negligence of the carrier, as no property had legally passed to the consignee, the carrier's implied contract was held to be with the vendor alone.[3] If the transaction was had with the mere servant of the carrier, such as a driver or porter, the contract is legally made with the master; unless the servant expressly undertook to carry the parcel on his own account; in which case he is liable.[4] And it is sufficient if the goods were delivered to a person, and at a house where parcels were in the habit of being left for the carrier.[5]

[2] Coats *v.* Chaplin, 3 Ad. & El. N. S. 483. And see Freeman *v.* Birch, ib. 491, n.

[3] Duff *v.* Budd, 3 B. & B. 177; Stephenson *v.* Hart, 4 Bing. 476.

[4] Williams *v.* Cranston, 2 Stark. 82. {Where the bailee of property delivers it to a common carrier for transportation, either the bailee or the bailor may maintain an action against the carrier for its loss: Elkins *v.* Boston & Maine R. R., 19 N. H. 337; Moran *v.* Portland, etc. Co., 35 Me. 55. A servant travelling with his master on a railway may have an action in his own name against the railway company for the loss of his luggage, although the master took and paid for his ticket: Marshall *v.* York, etc. Railway Co., 7 Eng. Law & Eq. 519; Burrell *v.* North, 2 C. & K. 681.} [The master also may sue: Meux *v.* Great Western R., 1895, 2 Q. B. 387.]

[5] Burrell *v.* North, 2 C. & K. 681. {To render the carrier liable when the delivery is to a servant, such servant must have authority to accept the goods, but this authority may be implied from the circumstances as well as expressed, *i. e.* his employment, his care of certain kinds of goods, his position on the premises of the carrier: Grover, etc. Co. *v.* Missouri P. R. R. Co., 70 Mo. 672; Mayall *v.* Boston, etc. R. R., 19 N. H. 122. So, if he is handling baggage, a passenger may deliver his baggage to him: Ouimet *v.* Henshaw, 35 Vt. 605. A deck-hand on a ship is not necessarily authorized to receive baggage or freight, but must be shown to have such authority; and the common hands, or crew, of a vessel have no general authority, as agents of the owners, to receive goods: Ford *v.* Mitchell, 21 Ind. 54; Trowbridge *v.* Chapin, 23 Conn. 595, 20 id. 354. And when common carriers advertise that a faithful special messenger is sent in charge of each express, this is not evidence that the messenger has authority to receive freight: Thurman *v.* Wells, 18 Barb. (N. Y.) 500.

The deposit of a trunk in the usual place for passengers' baggage on a steamboat is not a sufficient delivery, unless the owner of the trunk takes passage also: Wright *v.* Caldwell, 3 Mich. 51. In Chouteau *v.* Steamboat St. Anthony, 16 Mo. 216, it is held that the act of the captain of a boat, in taking bank-bills for transportation, is not *prima facie* evidence of the liability of the boat as a common carrier, but to render the boat thus liable, it must be its usage to carry bills for hire, or the known usage of the trade that it should so carry them. See also Haynie *v.* Waring, 29 Ala. 263. The views of Mr. Justice Redfield are expressed in Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186, 203, 204, where it was held that it was not necessary to show by positive proof that the company consented that the captain of their boat should carry money on their account in order to hold the company responsible for the loss of the money. The captain of the boat is to be regarded as the general agent of the owners, and *prima facie* the owners are liable for all contracts for carrying, made by the captain or other general agent, for that purpose, within the powers of the owners themselves; and the burden rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. See also 2 Redfield on Railways, 11; Hutchinson on Carriers, § 82 *et seq.* Immediately on an acceptance, by the carrier or a duly authorized servant, of the goods tendered, the liability of the common carrier begins: Hutchinson, Carriers, § 82. This receipt of the goods must be for immediate transportation: Jones *v.* New England, etc. S. S. Co., 71 Me. 56. So, if a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of

§ 213. **Receipt.** If a *receipt* was given for the goods, it should be produced; and notice should be given to the defendant to produce his book of entries, and way-bill, if any, in order to show a delivery of the goods to him.[1] The plaintiff should also prove what orders were given at the time of delivery, as to the carriage of the goods, and the direction written upon the package.[2] If the *loss or non-delivery* of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character.[3] And in proof of the loss, the declaration of the defendant's coachman or driver, in answer to an inquiry made of him for the goods, is competent evidence for the plaintiff.[4] In proof of the *contents* of a lost trunk or box, it has been held that the plaintiff's own affidavit is admissible, where the case, from its nature, furnishes no better evidence.[5]

§ 214. **Parties jointly interested jointly liable.** If several are *jointly interested* in the profits of a coach or wagon, whether it be owned by one or all, they are jointly liable, though, by agreement among themselves, one finds the horses and driver for one part of the road only, and another for another.[1] If the declaration is in *assumpsit*, a joint contract by all the defendants must be proved, by

facilitating it, his liability as a common carrier begins with the receipt of the goods: Clarke *v.* Needles, 25 Penn. St. 338; Grand Tower, etc. Co. *v.* Ullman, 89 Ill. 244. See Maybin *v.* Railroad Co., 8 Rich. (S. C.) 240; [London & L. F. I. Co. *v.* Rome, etc. R., 144 N. Y. 200; Meloche *v.* Chicago, etc. R., 74 N. W. 301, Mich. The presumption is that he receives the goods as carrier: Berry *v.* Southern R., 30 S. E. 14, N. C.]

In case of several connecting lines, the liability of the first does not terminate and that of the second begin, till the actual delivery of the goods to the second line is complete. In order to secure the safety of the goods from the time at which they are delivered into the hands of the first carrier, until they are either delivered by the last carrier to the consignee at the place of destination, or in default of such delivery are placed in the warehouse of the last carrier, by which act of storage his liability becomes changed, as has been previously stated, to that of a warehouseman, it is necessary that the liability of all the carriers should last till delivery to the next succeeding carrier, even if the goods have been deposited in a warehouse to await the time when the next carrier should take them: Railroad Co. *v.* Manufacturing Co., 16 Wall. (U. S.) 318; Gass *v.* New York, etc. R. Co., 99 Mass. 220; Ill. Cent. R. R. Co. *v.* Mitchell, 68 Ill. 471; Lawrence *v.* Winona R. R. Co., 15 Minn. 390; Mills *v.* Mich. Cent. R. R. Co., 45 N. Y. 622; Hutchinson, Carriers, § 103.}

[1] Where there are several owners, but the receipt mentions some of them only, it is still admissible evidence for them all, accompanied by proof of title in them all: Day *v.* Ridley, 16 Vt. 48.

[2] 2 Stark. Ev. 200.

[3] Tucker *v.* Cracklin, 2 Stark. 385; Griffith *v.* Lee, 1 C. & P. 110; Day *v.* Ridley, 1 Washb. 48; {Woodbury *v.* Frink, 14 Ill. 279.}

[4] Mayhew *v.* Nelson, 6 C. & P. 58. But proof of a loss will not alone support a count in trover: Ross *v.* Johnson, 5 Burr. 2825.

[5] See *ante*, Vol. I. § 348; David *v.* Moore, 2 Watts & Serg. 230. And see Butler *v.* Basing, 2 C. & P. 613; {Dibble *v.* Brown, 12 Ga. 217; Mad River, etc. R. Co. *v.* Fulton, 20 Ohio 318.} In Clark *v.* Spence, 10 Watts 335, it was thought by Rogers, J., that this rule applied with peculiar force to wearing-apparel, and other articles convenient for a traveller, which in most cases are packed by the party himself in his own trunk, and which would therefore admit of no other proof. But it has been decided, in a recent case against a railroad company for the loss of a traveller's trunk, that the plaintiff could not be a witness: Snow *v.* Eastern R. R. Co., 12 Met. 44.

[1] Waland *v.* Elkins, 1 Stark. 272; Fromont *v.* Coupland, 2 Bing. 170. And see Barton *v.* Hanson, 2 Taunt. 49; Helsey *v.* Meers, 5 B. & C. 504.

evidence of their joint ownership, or otherwise. And if the action is in *tort*, setting forth the contract, the contract itself must be proved as laid; though, where the action is founded on a breach of common-law duty, which is a misfeasance, and is several in its nature, as in an action against common carriers, upon the custom, judgment may be rendered against some only, and not all of the defendants.[2]

§ 215. **Limitation of Liability.** It is now well settled, that a common carrier may *qualify his liability* by a *general notice* to all who may employ him of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice, to *limit, restrict*, or *avoid the liability* devolved on him by the common law on the most salutary grounds of public policy, has been denied in several of the American courts, after the most elaborate consideration;[1] and therefore a public notice by stage-coach proprietors, that "all baggage" was "at the risk of the owners," though the notice was brought home to the plaintiff, has been held not to release them from their liability as common carriers.[2] Nor does such a notice apply at all to goods not belonging to any passenger in the coach.[3] But in other American courts it is held that such limitations under proper qualifications and safeguards for securing due notice to the traveller, or the party for whom the goods are to be transported, may be operative and binding on the parties.[4]

[2] Bretherton *v.* Wood, 3 B. & S. 54; Bank of Orange *v.* Brown, 3 Wend. 158. See *ante*, Vol. I. § 64.

[1] But it is admitted in England. See Austin *v.* Manchester, etc. Railw. Co., 16 Jur. 763; 11 Eng. Law & Eq. 506; Carr *v.* Lancashire & Yorkshire Railw. Co., 7 Exch 707; 21 Law J. Exch. 261; 6 Monthly Law R. 222; 14 Eng. Law & Eq. 340.

[2] Hollister *v.* Newlen, 19 Wend. 234; Cole *v.* Goodwin, ib. 251; Jones *v.* Voorhees, 10 Ohio 145; Story on Bailm. § 554 (2d ed.), n.; Fisk *v.* Chapman, 2 Kelly 349; Sager *v.* Portsmouth Railroad Co., 31 Me. 228; {Kimball *v.* Rutland R. R., 26 Vt. 247; Farmers', etc. Bank *v.* Champlain Trans. Co., 23 id. 186; Dorr *v.* New Jersey, etc. Co., 11 N. Y. 485; Coxe *v.* Heisley, 19 Penn. St. 243; Davidson *v.* Graham, 2 Ohio St. 131.} The right of a common carrier in England to limit or effect his liability at common law is now restricted by Stat. 11 Geo. IV. and 1 W. IV. c. 68, to certain enumerated articles, exceeding £10 in value, the nature and value of which must be declared at the time of delivery, and an increased charge paid or engaged; the notice to that effect to be conspicuously posted up in the receiving-house, which shall conclusively bind the parties sending, without further proof of its having come to their knowledge. But this statute, it seems, does not protect the carrier from the consequences of his own gross negligence: Owen *v.* Burnett, 2 C. & M. 353.

[3] Dwight *v.* Brewster, 1 Pick. 50. And see Camden & Amboy Railroad Co. *v.* Burke, 13 Wend. 611; {York Company *v.* Central Railroad, 3 Wall. (U. S.) 107.} But a special contract may always be shown by the carrier, in avoidance of his general liability: Chippendale *v.* Lancashire, etc. Railw. Co., 15 Jur. 1106; Story on Bailments, § 549. {A special contract lessening general responsibility will not excuse negligence: Goldey *v.* Penn. Railw., 30 Penn. St. 242.}

[4] Brown *v.* Eastern Railroad Co., 11 Cush. (Mass.) 99, S. J. C. Mass., March, 1853,

§ 216. **Notice of Limitation; Burden of Proof.** But in every case of public notice, the *burden of proof* is on the *carrier*, to show that the person with whom he deals is fully informed of its tenor

6 Monthly Law Rep. 217. And see Bingham *v.* Rogers, 6 Watts & Serg. 495; Laing *v.* Colder, 8 Pa. St. 484; Swindler *v.* Hilliard, 2 Rich. 286. {The general rule in the United States is that the limitation, if it does not attempt to free the carrier from the results of his or his servants' negligence or fraud [such a stipulation being unreasonable and void, Doyle *v.* Fitchburg R., 166 Mass. 492; Chesapeake, etc. R. *v.* American Ex. Bank, 92 Va. 495; Wood *v.* Southern R., 118 N. C. 1056; Springs *v.* South Bound R., 46 S. C. 104; Bird *v.* Southern R., 42 S. W. 451, Tenn.], and is brought to the knowledge of the sender of the goods and assented to by him, by this means becoming a stipulation in the contract, is, if fair and reasonable, a binding one: Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Merchants' Despatch Co. *v.* Leysor, 89 Ill. 43; Same *v.* Joesting, ib. 152; Erie, etc. Transportation Co. *v.* Duter, 91 Ill. 195; Ashmore *v.* Penn. S. T., etc. Co., 4 Dutch. (N. J.) 180. To prove simply the posting of a general notice is not therefore enough, the knowledge and assent of the sender must also be proved: Brown *v.* Adams Exp. Co., 15 W. Va. 812.

The English rule, after originally denying the right of a common carrier to limit his liability in any way, and then allowing him considerable latitude, has finally become more strict than that of the United States. Under the English statute 17 & 18 Vict. c. 31, § 7, the carrier can only restrict his common-law responsibility by a reasonable limitation, which is embraced in a written contract signed by the party interested, or his agent, and such contract must either in itself, or by reference, set out or embody the condition. A general notice only, consented to by the party, would be valid for limiting the common-law liability of the carrier; but it must under the statute be embodied in a formal contract in writing, signed by the owner or person delivering the goods, and must be decided to be reasonable by the court: Peek *v.* North Staffordshire Railw. Co., 9 Jur. N. S. 914; s. c. 10 H. L. Cas. 473. A condition exempting the carrier from all responsibility is unreasonable; and so is a condition that the carrier shall not be responsible for any damage unless pointed out at the time of delivery by the carrier: Lloyd *v.* Waterford & Limerick Railw. Co., 9 Law T. N. S. 89; 15 Ir. Com. L. 37; Allday *v.* Great Western Railw. Co., 11 Jur. N. S. 12; [*contra*, Wood *v.* Southern R., 118 N. C. 1056.] The burden of showing the reasonableness of a condition annexed to the carrier's undertaking rests upon such carrier: Peek *v.* North Staffordshire Railw. Co., *supra;* 2 Redfield on Railways, 95–98; [Cox *v.* Vermont, etc. R., 49 N. E. 97, Mass.]

Whether an express company is strictly a common carrier, so that it cannot stipulate against liability for its own negligence, or the negligence of its servants, is an open question. For an able presentation of the affirmative, see Railroad Company *v.* Lockwood, 17 Wall. (U. S.) 357, and Judge Redfield's note to Bank of Kentucky *v.* American Express Co., 23 Am. Law Reg. 39; s. c. 9 Am. L. Rev. 155, criticising the principal case which holds the negative. See also Christenson *v.* Am. Exp. Co., 15 Minn. 270, also in the affirmative, which seems to be the view supported by the great weight of authority.

The English statute above referred to has not been adopted in Canada, and there a carrier may limit his liability even for his own negligence: Dodson *v.* Grand Trunk R. Co., 7 Can. L. J. N. S. 263.

As has been stated, the rule in most of the United States is, that carriers may restrict their general liability, by notices brought home to the knowledge of the owner of the goods, before or at the time of delivery to the carrier, if assented to by the owner, which is but another form of defining an express contract, which seems to be everywhere recognized as binding upon those contracting with carriers: 2 Redfield on Railw. 78; Merchants' Despatch Co. *v.* Leysor, 89 Ill. 43; Dillard *v.* Louisville, etc. R. R. Co., 2 Lea (Tenn.) 288; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344. See Moses *v.* Boston & Maine Railw., 4 Fost. 71. And see *post*, § 218.

To this rule, the States of Iowa (Code 1873, § 2184, p. 394), [Kentucky Const. § 196; Ohio, etc. R. *v.* Tabor, 98 Ky. 503), Nebraska (St. Joseph, etc. R. *v.* Palmer, 38 Neb. 463),] and Texas (Rev. Stat. 1879, art. 278, p. 48) furnish exceptions, by statute, the carrier there not being allowed to limit his liability in any manner; and also New York, where he may contract, even to avoid the results of his own or his servants' *negligence* or *fraud*, if the intention to do so plainly appears in the contract: Spinetti *v.* Atlas S. S. Co., 80 N. Y. 71; Knell *v.* U. S. etc. Steamship Co., 33 N. Y. Superior

and extent.[1] And, therefore, if any advertisement is posted up, emblazoning in large letters the advantages of the conveyance, but stating the limit of his liability in small characters, at the bottom, it is not sufficient.[2] It must be in such characters and situation that a person delivering goods at the place could not fail to read it, without gross negligence; and even then it affects only those whose goods are received at that place; for if received at a distance from the carrier's office, though at an intermediate point between the *termini* of his route, he must prove notice to the owner through some other medium.[3] And in an action against a carrier the defendant must satisfy the jury that the notice was actually communicated to the plaintiff. If it was posted up, or advertised in a newspaper, it must appear that he read it. In the latter case the advertisement affords no ground for an inference of notice, unless it be proved that the plaintiff was in the habit of taking or reading the newspaper in which it was inserted, and even then the jury are not bound to find the fact.[4] In the case of notice posted up in the carrier's office, proof that the plaintiff's servant, who brought the

Court, 423; Wells *v.* New York Cent. R. R. Co., 24 N. Y. 181; Bissell *v.* Same, 25 id. 442; Westcott *v.* Fargo, 61 id. 542; Lamb *v.* Camden, etc. R. Co., 46 id. 271.

Notices with regard to the value and character of the goods are favored by the courts, and the fact of their being posted in conspicuous places will justify a jury in finding assent on the part of the shipper: Oppenheimer *v.* U. S. Express Co., 69 Ill. 62; *post*, § 218, note (*a*); Lawson, Carriers, p. 90.}

[1] Butler *v.* Heane, 2 Campb. 415, per Ld. Ellenborough; Kerr *v.* Willan, 2 Stark. 53; Macklin *v.* Waterhouse, 5 Bing. 212. {A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those designed simply to insure good faith and fair dealing on the part of his employer. In the former case, there must be an assent by the employer; in the latter, notice alone, if brought home to the knowledge of the employer, will be sufficient. And if the employer take a receipt limiting the liability of the carrier to a specified amount, unless the value of the package be specially stated in the receipt, he will be presumed to know its contents, and to assent to its conditions: Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; Belger *v.* Dinsmore, 51 N. Y. 166; Grace *v.* Adams, 100 Mass. 505; Mulligan *v.* Ill. Cent. R. R. Co., 36 Iowa 181. But as to the presumption of assent, see Adams Exp. Co. *v.* Stetauers, 61 Ill. 184; Gott *v.* Dinsmore, 111 Mass. 45; Buckland *v.* Adams Exp. Co., 97 id. 125; Blossom *v.* Dodd, 43 N. Y. 264; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 Ill. 88. So, also, that a passenger will be presumed to know the conditions printed upon the ticket which he receives: Steers *v.* Liv., N. Y., & Phila. St. Co., 57 N.Y. 1. But the contrary is held in Henderson *v.* Stevenson, decided in the House of Lords, June, 1875; L. R. 2 H. L. (Sc.) 470. See also Rawson *v.* Pa. R. R. Co., 48 N. Y. 212; Blossom *v.* Dodd, 43 N. Y. 264; Parker *v.* South East. R. R. Co., L. R. 2 C. P. D. 416.}

[2] Butler *v.* Heane, 2 Campb. 415, per Ld. Ellenborough; Kerr *v.* Willan, 2 Stark. 53; Macklin *v.* Waterhouse, 5 Bing. 212; {2 Redfield on Railw. 80; Verner *v.* Sweitzer, 32 Penn. St. 208. A notice in the English language, to a German ignorant of the English language, is not sufficient: Camden & Amboy R. R. *v.* Baldauf, 16 Pa. St. 67. A notice that a railroad corporation "will not be liable for baggage of passengers beyond a certain amount, unless," etc., printed on the back of the passage-ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party at the time of receiving the ticket, and before the train leaves the station, had knowledge of such limitations and conditions. It is a question for the jury whether the plaintiff knew of the notice before commencing the journey: Brown *v.* Eastern R. R., 11 Cush. (Mass.) 97.}

[3] Clayton *v.* Hunt, 3 Campb. 27; Gouger *v.* Jolly, Holt's Cas. 317.

[4] Rowley *v.* Horne, 3 Bing. 2; 10 Moore 247; Leeson *v.* Holt, 1 Stark. 186.

goods, looked at the board on which the notice was painted, is not sufficient, if the servant himself testifies that he did not read it.[5]

§ 217. **Several Notices.** Where there are *several notices*, the carrier must take care that they are all of the same tenor; for if they differ from each other, he will be bound by that which is least favorable to himself.[1]

§ 218. **Effect of Notice.** If such *notice* is proved by the carrier, and brought home to the knowledge of the plaintiff, its effect may be *avoided* by evidence, on the part of the plaintiff, that the loss was occasioned by the *malfeasance, misfeasance,* or *negligence* of the carrier or his servants; for the terms are uniformly construed not to exempt him from such losses.[1] Thus, if he converts the goods to a wrong use, or delivers them to the wrong person, he is liable, notwithstanding such notice.[2] So, though there be notice by a passenger-carrier, that "all baggage is at risk of the owner," he will still be liable for any loss occasioned to the baggage by a culpable defect in the vehicle.[3] The effect of the notice may also be avoided by proof of a *waiver* of it, on the part of the carrier; as, if he is informed of the value of the parcel, and is desired to charge what he pleases, which shall be paid if the parcel is taken care of; and he charges only the ordinary freight;[4] or, if he expressly undertakes to carry a parcel of more than the limited value, for a specified compensation.[5] But in all such cases of notice, the *burden of proof* of the negligence, malfeasance, or misfeasance, or of the waiver, is on the party who sent the goods.[6]

[5] Kerr *v.* Willan, 2 Stark. 53; 6 M. & S. 150; Davis *v.* Willan, 2 Stark. 279. The printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up in conspicuous characters at the place where they book their names. And where the handbill, containing such conditions, had been posted up four years before, and could not now be found, parol evidence of its contents was held admissible: Whitesell *v.* Crane, 8 W. & S. 369.

[1] Munn *v.* Baker, 2 Stark. 256; Cobden *v.* Bolton, 2 Campb. 108; Gouger *v.* Jolly, Holt's Cas. 317; Story on Bailm. § 558.

[1] Story on Bailm. §§ 570, 571 (3d ed.); Wild *v.* Pickford, 8 M. & W. 461; Newborn *v.* Just, 2 C. & P. 76; Sager *v.* P. S. & P. Railw. Co., 31 Me. 228; Ashmore *v.* Penn. Steam Towing and Trans. Co., 4 Dutcher 180. {See on this point, *ante*, § 215, note 4.}

[2] Ibid.; Wild *v.* Pickford, 8 M. & W. 443; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586.

[3] Camden & Amboy Railroad Co. *v.* Burke, 13 Wend. 611, 627, 628; Story on Bailm. § 571 *a*.

[4] Story on Bailm. § 572; Wilson *v.* Freeman, 5 Campb. 527. In this case, however, the carrier declared his intention to charge at a higher rate than for ordinary goods.

[5] Helsby *v.* Mears, 5 B. & C. 564. Mere notice of the value of the parcel is not of itself sufficient to do away the effect of the general notice: Levi *v.* Waterhouse, 1 Price 280.

[6] Harris *v.* Packwood, 3 Taunt. 264; Marsh *v.* Horne, 5 B. & C. 322. {Proof of delivery of goods to the carrier, and of a demand and refusal of the goods, or of such loss of goods as renders a demand useless, throws the burden of evidence on the carrier to show that the loss of goods happened by causes for which he is not liable: Alden *v.* Pearson, 3 Gray (Mass.) 342; Riley *v.* Horne, 5 Bing. 217; [The Mascotte, 1 U. S. App. 251; Louisville, etc. R. *v.* Cowherd, 23 S. 703, Ala.] So if he fails to

§ 219. **Defences.** It is ordinarily a good *defence* for a *private* carrier, that the loss or injury to the goods was occasioned by inevitable accident; but a *common* carrier is responsible for all losses and damages, except those caused by the act of God, or by public enemies. By the *act of God* is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone; such as, the violence of the winds or seas, lightning, or other natural accident.[1] Therefore, if the loss happened by the wrongful act of a third person;[2] or, by an accidental fire, not caused by lightning;[3] or, by the agency of the propelling power in a steamship;[4] or, by striking against

deliver goods intrusted to him within a reasonable time, he is liable for the damage caused by the delay, unless he shows there is no negligence on his part: Nettles *v.* Railroad Co., 7 Rich. (S. C.) 190. See 2 Redfield on Railw. 7; Shriver *v.* Sioux City, etc. R. R. Co., 24 Minn. 506. The burden of evidence is then again shifted to the shipper to prove that the loss was caused by the negligence of the carrier or some cause for which the carrier is liable: Lawson, Carriers, § 248; The Saragossa, 3 Woods C. Ct. 380; Werthheimer *v.* Pennsylvania R. R. Co., 17 Blatchf. C. Ct. 421; Denton *v.* Chicago, etc. R. R. Co., 52 Iowa 161; Colton *v.* Cleveland R. R. Co., 67 Pa. St. 211; Farnham *v.* Camden, etc. R. R. Co., 55 id. 53; Alden *v.* Pearson, 3 Gray (Mass.) 342; Baltimore, etc. R. R. Co. *v.* Brady, 32 Md. 333; Magnin *v.* Dinsmore, 56 N. Y. 173; Lamb *v.* Camden, etc. R. R. Co., 46 id. 271; Six Hundred and Thirty Casks, 14 Blatchf. C. Ct. 517; The Invincible, 1 Lowell 225; Mayo *v.* Preston, 131 Mass. 304; Lamb *v.* Western R. Co., 7 Allen (Mass.) 98; Hunt *v.* The Cleveland, 6 McLean C. Ct. 76; The Peytona, 2 Curtis C. Ct. 21; Bissel *v.* Price, 16 Ill. 408; Shaw *v.* Gardner, 12 Gray (Mass.) 488; Tarbox *v.* East. St. Co., 50 Me. 539; Steamer Niagara *v.* Cordis, 21 How. (U. S.) 7; [The Warren Adams, 38 U. S. App. 356.] *Contra*, Brown *v.* Adams Express Co., 15 W. Va. 812; [Hinton *v.* Eastern R., 75 N. W. 373, Minn.]

The question what constitutes proof of *negligence* is important in such cases. It has been held that the proof of delivery of the goods to the carrier, and an unexplained non-delivery of the goods at the point of destination, alone, is enough to raise a presumption of negligence. In American Express Co. *v.* Sands, 55 Pa. St. 140, the court says: "There are numerous authorities to show that if goods are lost or damaged in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence will follow of course." And see Farnham *v.* Camden, etc. R. R. Co., ib. 58; Westcott *v.* Fargo, 61 N. Y. 542; Magnin *v.* Dinsmore, 56 id. 173; Riley *v.* Horne, 5 Bing. 217; Lawson, Carriers, § 178. Whether proof of loss under such circumstances as show a theft by some one not in the employ of the carrier is evidence of negligence seems a disputed point. Sir William Jones (Bailments, §§ 38–40) thinks it is. Judge Story considers it not to be: Story, Bailments, § 39. Angell (Carriers, § 48, note 1) thinks it is. In Massachusetts, it is held not to be; but it is necessary to show that the goods were stolen by the negligence of the bailee: Mayo *v.* Preston, 131 Mass. 304; Lamb *v.* Western R. Co., 7 Allen 98.]

[1] Per Ld. Mansfield, in Forward *v.* Pittard, 1 T. R. 27; Story on Bailm. §§ 25, 511; Prop'rs Trent Nav. *v.* Wood, 3 Esp. 127, 131; Gordon *v.* Little, 8 S. & R. 553, 557; Colt *v.* McMechen, 6 Johns. 160; Hodgdon *v.* Dexter, 1 Cranch 360; Abbott on Shipping, p. 250; 1 Bell Comm. 489. [The exception of the act of God, or inevitable accident, has by the decisions of the courts been restricted to such narrow limits as scarcely to amount to any relief to carriers. It is in reality limited to accidents which come from a force superior to all human agency, either in their production or resistance: 2 Redf. on Railw. 4, and notes and cases cited.]

[2] 3 Esp. 131, per Ashhurst, J.

[3] Hyde *v.* Trent & Mersey Nav. Co., 5 T. R. 387; Forward *v.* Pittard, 1 id. 27. [That an innkeeper is liable for loss by fire without negligence on his part, though formerly held, is now denied: Merritt *v.* Claghorn, 23 Vt. 177; Vance *v.* Throckmorton, 5 Bush (Ky.) 42; Cutler *v.* Bonney, 30 Mich. 259.]

[4] Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539.

the mast of a sunken vessel, carelessly left floating;[5] or, by mistaking a light, — the carrier is liable.[6] And if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier.[7] But where the loss was occasioned by the vessel being driven against a bridge, by a sudden gust of wind;[8] or, by a collision at sea, without fault;[9] or, by being upset in a sudden squall;[10] or, by the vessel getting aground by a sudden failure of wind while tacking;[11] or, by striking against a sunken rock, or snag, unknown to pilots;[12] in these and the like cases, the carrier, if he is not in fault,[13] has been held not liable. In regard to losses *occasioned by force,* it must have been the act of *public enemies ;* for if the goods were taken by robbers, or destroyed by a mob, though by force which he could not resist, a common

[5] Smith *v.* Shepherd, Abbott on Shipping, pp. 252, 253. The owner of a vessel sunk while in his possession, so as to obstruct a public navigable river, who has without any wrongful act relinquished the possession, is not, in all cases, and for an indefinite time, bound to give notice, or take other means, to prevent damage from coming thereby to other vessels; though it seems there may be circumstances in which the owner, even after a blameless relinquishment of the possession, may still be required to take care that other vessels be not injured by striking against a sunken vessel: Brown *v.* Mallett, 12 Jur. 204. *Quære,* therefore, whether, if the owner has abandoned the possession and property, and taken all due care, but nevertheless a carrier vessel is lost by striking upon the sunken one, it is the act of God, or not. See 3 Am. Law Jour. N. S. 221.

[6] McArthur *v.* Sears, 21 Wend. 190.

[7] Ewart *v.* Street, 2 Bailey 157; Richards *v.* Gilbert, 5 Day 415; Campbell *v.* Morse, 1 Harper's Law 468; Hahn *v.* Corbett, 2 Bing. 205. And see Gordon *v.* Little, 8 S. & R. 533; Hart *v.* Allen, 2 Watts 114; Jones *v.* Pitcher, 3 Stew. & Port. 135; Sprowl *v.* Kellar, 4 id. 382; New Brunswick Co. *v.* Tiers, 4 Zabr. (N. J.) 697; Fergusson *v.* Brent, 12 Md. 9; [Adams Exp. Co. *v.* Jackson, 92 Tenn. 326; Savannah, etc. R. *v.* Commercial Co., 30 S. E. 555, Ga.]

[8] Amies *v.* Stephens, 1 Stra. 128.

[9] Buller *v.* Fisher, Peake Add. Cas. 183.

[10] Spencer *v.* Daggett, 2 Vt. 92. So if thrown over in a storm, for preservation of the ship and passengers: Smith *v.* Wright, 1 Caines 43.

[11] Colt *v.* McMechen, 6 Johns. 160.

[12] Williams *v.* Grant, 1 Conn. 487; Smyrl *v.* Niolon, 2 Bailey 421; Turner *v.* Wilson, 7 Yerger 340; Baker *v.* The Hibernia, 4 Am. Jur. N. S. 1. {Where a violent storm caused an unusually low tide, and the carrier's barge, lying at the pier which he used, was pierced by a projecting timber, covered at ordinary tides, and not known by the carrier to exist, he was held liable, although his individual negligence in leaving his barge there would not have produced the injury without the concurrence of the act of God and the negligence of the wharf builder: New Brunswick Co. *v.* Tiers, 4 Zabr. (N. J.) 697. See also Friend *v.* Woods, 6 Gratt. (Va.) 189.}

[13] Williams *v.* Bransen, 1 Murph. 417; Spencer *v.* Daggett, 2 Vt. 92; Marsh *v.* Blythe, 1 McCord 360. {In Reed *v.* Spaulding, 30 N. Y. 630, when goods were damaged by a flood rising higher than ever before, and which it was no negligence not to have anticipated, and from which the goods could not be delivered after the extent of the rise was seen, it was held to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination, and if so in fault, then he was responsible: S. P. Michaels *v.* N. Y. Centr. Railw., 30 N. Y. 564. See also Merritt *v.* Earle, 29 id. 115. And the proprietors of a railroad, who negligently delay the transportation of goods delivered to them as common carriers, and then transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay: Denny *v.* N. Y. Cent. R. R., 13 Gray (Mass.) 481. Cf. Gillespie *v.* St. Louis, etc. R. R. Co. 6 Mo. App. 554.}

carrier is held responsible for the loss.[14] In all cases of loss by a *common carrier*, the *burden of proof* is on him, to show that the loss was occasioned by the act of God, or by public enemies.[15] And if the acceptance of the goods was special, the burden of proof is still on the carrier, to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care.[16] Thus, where goods were received on board a steamboat, and the bill of lading contained an exception of "the dangers of the river," and the loss was occasioned by the boat's striking on a sunken rock, it was held incumbent on the carrier to prove that due diligence and proper skill were used to avoid the accident.[17]

§ 220. **Same Subject.** A carrier may repel the charge of the plaintiff, by evidence of *fraud in the plaintiff* himself, in regard to the goods; or by proof that the loss resulted from the *negligence of the plaintiff* in regard to their packing or delivery;[1] or from *internal defect* without his fault.[2] Thus, where the plaintiff had just grounds to apprehend the seizure of his goods by rioters, which he concealed from the carrier when the goods were received by him for

[14] 3 Esp. 131, 132, per Ld. Mansfield and Buller, J.; [Missouri Pac. R. *v.* Nevill, 60 Ark. 375; and see Lang *v.* Pennsylvania R., 154 Pa. 342.] In an action against a carrier to recover for goods alleged to have been stolen by defendant's servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of the defendant's servants, than by any one not in their employ; and it is unnecessary to give such evidence as would be necessary to convict any particular servant: Vaughton *v.* Lon. & N. W. R. R. Co., L. R. 9 Ex. 93. But see Gogarty *v.* Gr. S. & W. R. R. Co., 9 Ir. L. T. Rep. 99; M'Queen *v.* Gr. West. R. R. Co., 44 L. J. Q. B. 130. Where goods have been stolen on their passage through the hands of several carriers, there being no evidence from which, the presumption is that they were stolen from the last. *Ante*, Vol. I. § 48, n. {Loss by pirates is regarded as a loss by the public enemy: Magellan Pirates, 25 Eng. L. & Eq. 595. See Bland *v.* Adams Ex. Co., 1 Duvall (Ky.) 232.}

[15] Murphy *v.* Staton, 3 Munf. 239; Bell *v.* Reed, 4 Binn. 127; Ewart *v.* Street, 2 Bailey 157; [The Majestic, 166 U. S. 375; Grieve *v.* Illinois, etc. R., 74 N. W. 192, Ia.]

[16] Swindler *v.* Hillard, 2 Rich. 286; [Shea *v.* Minneapolis, etc. R., 63 Minn. 228; Richmond, etc. R. *v.* White, 88 Ga. 805.] {This is probably not now the law in most States. The burden of proof of showing the loss to have been under an exception is on the carrier, but of showing negligence is on the shipper: *ante*, § 218, note 6, and cases there cited; Colton *v.* Cleveland R. Co., 67 Pa. St. 211; Farnham *v.* Camden, etc. R. R. Co., 55 id. 53; Lawson, Carriers, § 248.}

[17] Whiteside *v.* Russell, 8 W. & S. 44. And see Slocum *v.* Fairchild, 7 Hill (N. Y.) 292. {Where goods were received on board a steam-packet, and the bill of lading contained an exception of "robbers," and the goods were stolen without violence, the loss was held not to be within the exception: De Rothschild *v.* Royal Mail, etc. Co., 14 Eng. Law & Eq. 327. Damage by rats does not come within the exception of "dangers of the sea or navigation:" Laveroni *v.* Drury, 16 id. 510 and n. The responsibility of a common carrier lasts until that of some other party begins, and he must show an actual or legal constructive delivery to the owner, or consignee, or warehouseman, for storage; and the burden of proof is on the carrier to show, by some open act of delivery, that he has changed his liability to that of warehouseman: Chicago, etc. R. R. Co. *v.* Warren, 16 Ill. 502; The Peytona, 2 Curtis C. Ct. 21.}

[1] [Pennsylvania Co. *v.* Kenwood Co., 170 Ill. 645.]

[2] Story on Bailm. §§ 563, 565, 566, 576; Leech *v.* Baldwin, 5 Watts 446; {Clark *v.* Barnwell, 12 How. (U. S.) 272; Rich *v.* Lambert, ib. 347;} [Faucher *v.* Wilson, 38 A. 1002, N. H.]

transportation, and they were seized and lost, it was held that the plaintiff was not entitled to recover.[3] So, where a parcel, containing two hundred sovereigns, was enclosed in a package of tea, and paid for as of ordinary value, and it was stolen, it was held that the carrier was not liable.[4] And where the plaintiff, being a bailee of goods to be booked and conveyed by the coach in which he was a passenger, placed them in his own bag, which was lost, it was held that the loss was not chargeable to the carrier, but was imputable to the plaintiff's own misfeasance.[5] And if the injury is caused partly by the negligence of the plaintiff, and partly by that of the defendant, or of some other person, it seems that the plaintiff cannot maintain the action; unless, perhaps, in case where, by ordinary care, he could not have avoided the consequence of the defendant's negligence.[6] The question of unfair or improper conduct in the plaintiff, in these cases, is left to the determination of the jury.[7]

§ 221. **Carriers of Passengers.** CARRIERS OF PASSENGERS are not held responsible to the same extent with common carriers, except in regard to the baggage.[1] But they are bound to the utmost care

[3] Edwards *v.* Sharratt, 1 East 604.

[4] Bradley *v.* Waterhouse, 1 M. & Malk. 154; s. c. 3 C. & P. 318. See also Bull. N. P. 71. The owner, ordinarily, is not obliged to state the value of a package, unless inquiry is made by the carrier; but if, being asked, he deceives the carrier, the latter, though a common carrier, is not liable without his own default: Phillips *v.* Earle, 8 Pick. 182.

[5] Miles *v.* Cattle, 6 Bing. 743.

[6] Williams *v.* Holland, 6 C. & P. 23; Pluckwell *v.* Wilson, 5 id. 375; Hawkins *v.* Cooper, 8 id. 473; Davies *v.* Mann, 10 M. & W. 546; Smith *v.* Smith, 2 Pick. 621; White *v.* Winnissimmet Co., 5 Monthly Law Rep. 203; 8 Cush. (Mass.) 155; Willoughby *v.* Horridge, 16 Eng. Law & Eq. 437. [*Contra*, McCarthy *v.* Louisville, etc. R., Ala., 14 S. 370.]

[7] Batson *v.* Donovan, 4 B. & Ald. 21. And see Mayhew *v.* Eames, 3 B. & C. 601; s. c. 1 C. & P. 550; Clay *v.* Willan, 1 H. Bl. 298; Izett *v.* Mountain, 4 East 370.

[1] Whether a large sum of money in an ordinary travelling-trunk will be considered as baggage, beyond an ordinary amount of travelling expenses, *quære;* and see Orange Co. Bank *v.* Brown, 9 Wend. 85. In a later case, it was thought that the term "baggage" does not include even money for travelling expenses; but this was not the point in judgment. It was trover against the owner of a steamboat, as a common carrier of passengers, for the loss of one of the plaintiff's two trunks, containing samples of merchandise, carried as part of his personal baggage, by the plaintiff's travelling agent. The court held that the carrier was not liable on that ground; the learned judge expressing himself as follows: "Although I do not find it stated in the case that Mason (the agent) paid anything to the boat-owner, either for freight or passage, yet the whole argument on both sides went upon the ground that he had paid the usual fare of a passenger, and nothing more; that he neither paid, nor intended to pay, anything for the trunk; but designed to have the same pass as his baggage. It was formerly held that the owner of the boat or vehicle was not answerable as a carrier for the luggage of the passenger, unless a distinct price was paid for it. But it is now held that the carrying of the baggage is included in the principal contract in relation to the passenger; and the carrier is answerable for the loss of the property, although there was no separate agreement concerning it. A contract to carry the ordinary luggage of the passenger is implied from the usual course of the business, and the price paid for fare is considered as including a compensation for carrying the freight. But this implied undertaking has never been extended beyond ordinary baggage, or such things as a traveller usually carries with him for his personal convenience in the journey. It neither includes money nor merchandise: Orange Co. Bank *v.* Brown, 9 Wend. 85;

and diligence of very cautious persons; and of course they are

Pardee *v.* Drew, 25 id. 459. It was suggested in the first case that money to pay travelling expenses might perhaps be included. But that may, I think, be doubted. Men usually carry money to pay travelling expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage. It is going far enough to imply an agreement to carry freight of any kind, from a contract to carry the passenger; for the agreement which is implied is much more onerous than the one which is expressed. The carrier is only answerable for an injury to the passenger, where there has been some want of care or skill; but he must answer for the loss of the goods, though it happened without his fault. Still an agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveller usually has with him as a part of his luggage. It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing-apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.

"In this case, the plaintiff sent out Mason as his 'traveller,' or agent, to seek purchasers for his goods, and the trunk in question contained samples of the merchandise which he wished to sell. The samples were not carried for the personal use, convenience, instruction, or amusement of the passenger in his journey, but for the purpose of enabling him to make bargains in the way of trade. Although the samples were not themselves to be sold, they were used for the sole purpose of carrying on traffic as a merchant. They were not baggage, within the common acceptation of the term; and as they were not shipped or carried as freight, the judge was right in holding that the plaintiff could not recover:" Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586. *Sed quære*, whether prudent travellers do not ordinarily carry part of their necessary funds in the trunk.

In regard to the luggage of passengers, it is held that the carrier is bound to deliver it to the passenger at the end of the journey, though it may be in the same carriage with the passenger, and under his personal care; and that if the usual course of delivery is at a particular spot, that is the place of delivery: Richards *v.* The London & S. Coast Railw. Co., 7 M. G. & S. 839. It is sufficient for the plaintiff to prove that the luggage was in the carriage, and its non-delivery at the end of the journey: ibid.; Crouch *v.* The London & N. W. Railw. Co., 2 C. & K. 789. It is the duty of a railroad corporation, that receives passengers and commences their carriage at the station of another road, to have a servant there to take charge of baggage, until it is placed in their cars; and if it is the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him: Jordan *v.* Fall River R. R. Co., 5 Cush. 69; Butcher *v.* London & S. W. R. Co., 29 Eng. Law & Eq. 347.

The term "baggage" may be said, in general terms, to include such articles as are of necessity or convenience for personal use, and such as it is usual for persons travelling to take with them. It has been said that articles for instruction or amusement, as books, or a gun, or fishing-tackle, fall within the term "baggage:" Jordan *v.* Fall River R. R. Co., 5 Cush. 69. The carrier was held responsible for a lady's trunk, containing apparel and jewelry (Brooke *v.* Pickwick, 4 Bing. 218; M'Gill *v.* Rowand, 3 Barr 451); for a watch lost in a trunk (Jones *v.* Voorhees, 10 Ohio 145); and for money *bona fide* taken for travelling expenses and personal use, to a reasonable amount (Weed *v.* Saratoga & S. R. R. Co., 19 Wend. 534; Jordan *v.* Fall River R. R. Co., 5 Cush. 69); [St. Louis S. W. R. *v.* Berry, 60 Ark. 433.] In the case in 19 Wendell the defendant was held liable for the sum of $285 in the trunk of a passenger from Saratoga to New York. In the case from 5 Cushing, $325 were lost in a trunk; and the verdict being for the whole sum, and as there had been in the court below no inquiry and no finding as to the uses and purposes for which the money was designed, the verdict was set aside and a new trial was granted, that such inquiry might be made. A common carrier is not liable for articles of merchandise not intended for personal use as baggage: Collins *v.* Boston & M. R. R., 10 Cush. 506. See also Orange Co. Bank *v.* Brown, Pardee *v.*

responsible for any, even the slightest, neglect.[2] Their contract to

Drew, and Hawkins *v.* Hoffman, *ubi supra;* Dibble *v.* Brown, 12 Ga. 217; Great North. R. Co. *v.* Shepherd, 14 Eng. Law & Eq. 367. Finger-rings have also been regarded as wearing apparel: McCormick *v.* Hudson River Railw., 4 E. D. Smith 81. But a dozen silver teaspoons, or a Colt's pistol, or surgical instruments, except the passenger be connected with the profession, are not properly a portion of travelling baggage: Giles *v.* Fauntleroy, 13 Md. 126. And title-deeds and documents, which an attorney is carrying with him to use on a trial, are not luggage; nor is a considerable amount of bank-notes carried to meet the contingencies or exigencies of the case: Phelps *v.* London & N. W. R. Co., 19 C. B. N. S. 652. In Ill. Cent. Railw. *v.* Copeland, 24 Ill. 332, it is held a reasonable amount of bank-bills may be carried in a trunk, and their value recovered as lost baggage. But in Hickox *v.* Naugatuck R. R. Co., 31 Conn. 281, where the passenger had in his trunk sixty dollars for the purpose of purchasing clothing at the place of his destination, it was held the carriers were not liable as such for any additional damages on account of the loss of this money. See 2 Redfield on Railways, 152-155. {The carrier is an insurer of the passenger's baggage if it is reasonable in amount and value, and proper for a passenger to carry with him: Pennsylvania Co. *v.* Miller, 35 Ohio St. 541; Hutchinson, Carriers, § 678, and cases there cited.

The question whether the baggage is such as the company is liable for as an insurer resembles in its treatment very much the question of reasonable care and reasonable cause. If, on the facts as proved, the court is satisfied that the jury must find the article to be or not to be baggage, then the court rules accordingly (Connolly *v.* Warren, 106 Mass. 146); but if it is doubtful whether the article is properly baggage, the question is left to the jury: New York Central, etc. R. R. Co. *v.* Fraloff, 100 U. S. 24. A collection of various articles which have been decided to be baggage or not is collected in Hutchinson, Carriers, §§ 677, 689. Cf. Dexter *v.* Syracuse, etc. R. R. Co., 42 N. Y. 326; Am. Contract Co. *v.* Cross, 8 Bush (Ky.) 472; First Nat. Bank, etc. *v.* Marietta, 20 Ohio St. 259. It is now well settled that trunks or boxes of samples, such as are carried by commercial travellers, are not baggage (Blumantle *v.* Fitchburg R. R. Co., 127 Mass. 322); [Weber Co. *v.* Chicago, etc. R., 92 Ia. 364; Southern Kansas R. *v.* Clark, 52 Kans. 398; Humphreys *v.* Perry, 148 U. S. 627;] and the company's liability for them is held in Massachusetts to be that of a gratuitous bailee (Alling *v.* Boston, etc. R. R. Co., 126 Mass. 121), but in Ohio to be that of an ordinary bailee for hire (Pennsylvania Co. *v.* Miller, 35 Ohio St. 541). [The carrier is liable for other things than baggage if they are knowingly received and accepted as baggage: Kansas City, etc. R. *v.* McGahey, 63 Ark. 344; St. Louis S. W. R. *v.* Berry, 60 id. 433.]

The carrier's liability as carrier for baggage ceases after the lapse of a reasonable time, and becomes that of a warehouseman, if the baggage be placed in a secure warehouse: Mote *v.* Ch., etc. R. R. Co., 27 Iowa 22; Bartholomew *v.* St. Louis R. R. Co., 53 Ill. 227; [Nealand *v.* Boston, etc. R, 161 Mass. 67.] Express companies are held to the same rules, though the courts seem inclined to extend the period of reasonable time as against them: Witbeck *v.* Holland, 45 N. Y. 13; Weed *v.* Barney, ib. 344.{ [A steamboat company is liable as an innkeeper for the baggage of a passenger in a state-room: Adams *v.* New Jersey Steamboat Co., 151 id. 163.]

[2] Story on Bailm. §§ 601, 602; 2 Kent Comm. 600; {Crawford *v.* Georgia R. R. Co., 62 Ga. 566; Farish *v.* Reigle, 11 Gratt. (Va) 697; Derwort *v.* Loomer, 21 Conn. 245; Fuller *v.* Naugatuck R. R. Co., ib. 557. A ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed; but they are not bound to adopt and use a new and improved method, because it is safer or better than the method employed by them, if it is not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive; and the cost of such improved method may be a sufficient reason for their refusing to adopt it: Loftus *v.* Union Ferry Co., 22 Hun (N. Y.) 33; Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312. So proprietors of hacks are common carriers of passengers, and bound to use the utmost care and foresight: Bonce *v.* Dubuque Street Ry. Co., 53 Iowa 278.

The degree of care and diligence must be in proportion to the seriousness of the consequences of neglect; and where the agencies are powerful and dangerous, the care should be the greater, and any negligence would be culpable: Phila. & Reading R. R. *v.* Derby, 14 How. (U. S.) 486; Hegeman *v.* West. R. R. Co., 13 N. Y. 9; Warren *v.* Fitchburg R. R. Co., 8 Allen (Mass.) 227; Ill. Cent. R. R. Co. *v.* Phillips, 55 Ill.

carry safely means, not that they will insure the limbs of the passengers, but that they will take due care, as far as competent skill and human foresight will go, in the performance of that duty.[3] This extreme care is to be used in regard to the original construction of the coach or vehicle, frequent examination to see that it is safe, the employment of good and steady horses and careful drivers, and the use of all the ordinary precautions for the safety of passengers on the road.[4] The carrier is also bound to give them notice of danger, if any part of the way is unsafe.[5] Accordingly, where the injury resulted from negligent driving,[6] insufficiency of the vehicle,[7] overloading the coach,[8] improper stowage of the luggage,[9] drunkenness of the driver,[10] want of due inspection of the coach previous to the journey, or upon the road,[11] or the like, — the proprietor has been held liable. He is also liable for an injury occasioned by leaping from the coach, where the passenger was justly alarmed for his safety, by reason of something imputable to the proprietor.[12]

194. The highest degree of care, not amounting to an absolute warranty against injury, or involving such an expenditure of money and effort as would paralyze the business itself, will be required: McPadden *v.* N. Y. Cent. R. R. Co., 44 N. Y. 478; Taylor *v.* Gr. Tr. R. R. Co., 48 N. H. 304; [Illinois Central R. *v.* Davidson, 46 U. S. App. 300; Jordan *v.* N. Y., etc. R., 165 Mass. 346; Reynolds *v.* Richmond, etc. R., 92 Va. 400; Illinois Central R. *v.* O'Connell, 160 Ill. 636; Spellman *v.* Lincoln R. T. Co., 36 Neb. 890; Libby *v.* Maine C. R., 85 Me. 34. It is sufficient if the carrier has all improved appliances that are in general use, and which are necessary for the safety of passengers: Wiltsell *v.* West Asheville, etc. R., 120 N. C. 557.]

Whether there is any room for a distinction between negligence and gross negligence as applicable to carriers of passengers, who are held to the utmost care, see Jacobus *v.* St. Paul, 20 Minn. 125. For a full collection of the cases for and against the right to restrict liability by agreement, see Ohio & Miss. R. R. Co. *v.* Selby, 47 Ind. 471.]

[3] Harris *v.* Costar, 1 C. & P. 636; Stokes *v.* Saltonstall, 13 Peters 181; Story on Bailm. §§ 601, 602.

[4] Story on Bailm. §§ 592–594, 598, 599, 601, 602 (3d ed.).

[5] Dudley *v.* Smith, 1 Campb. 167; Christie *v.* Griggs, 2 id. 79.

[6] Aston *v.* Heaven, 2 Esp. 533; Crofts *v.* Waterhouse, 3 Bing. 319. If the driver, having a choice of two ways, elects the most hazardous, the owner is responsible at all events for any damage that ensues: Mayhew *v.* Boyce, 1 Stark. 423.

[7] Christie *v.* Griggs, 2 Campb. 79; Bremner *v.* Williams, 1 C. & P. 414; Sharp *v.* Gray, 9 Bing. 457; Ware *v.* Gay, 11 Pick. 106; Camden & Amboy Railroad Co. *v.* Burke, 13 Wend. 611; Curtis *v.* Drinkwater, 2 B. & Ad. 169.

[8] Israel *v.* Clark, 4 Esp. 259.

[9] Curtis *v.* Drinkwater, 2 B. & Ad. 169.

[10] Stokes *v.* Saltonstall, 13 Peters 181.

[11] Sharp *v.* Gray, 9 Bing. 457; Bremner *v.* Williams, 1 C. & P. 414; Ware *v.* Gay, 11 Pick. 106.

[12] Jones *v.* Boyce, 1 Stark. 493; Stokes *v.* Saltonstall, 13 Peters 181. [Where one person, by negligent breach of duty, puts another to whom the duty is owed in obvious peril, he is responsible, notwithstanding the efforts to escape the peril may have contributed to the injury: Robson *v.* N. E. Ry. Co., L. R. 10 Q. B. 271; 2 Q. B. D. 85; Wilson *v.* Northern, etc. R. R. Co., 26 Minn. 278; Cuyler *v.* Decker, 20 Hun (N. Y.) 173. Cf. Iron R. R. Co. *v.* Mowery, 36 Ohio St. 418; Roll *v.* Northern, etc. Ry. Co., 15 Hun 496; [Ephland *v.* Missouri Pac. R., 137 Mo. 187.] If he puts him in a peril which is not obvious, *a fortiori* he is responsible: Adams *v.* L. & Y. R. R. Co., L. R. 4 C. P. 744.] The following count in assumpsit against a passenger-carrier, for bad management of a sufficient coach, it is conceived, would be good.

"For that the said (*defendant*) on —— was the proprietor of a coach for the carriage of passengers with their luggage between —— and ——, for hire and reward;

§ 222. **Negligence the Ground of Liability.** It is only on the ground of *negligence* that the carrier of passengers is held liable. This is therefore a material point for the plaintiff to make out in evidence, and without which he cannot recover. He must also prove the defendant's engagement to carry him, and that he accordingly took his place in the vehicle.[1] But where the injury

and thereupon, on the same day, in consideration that the plaintiff, at the request of the said (*defendant*), would engage and take a seat and place in said coach, to be conveyed therein from said —— to ——, for a reasonable hire and reward to be paid to him by the plaintiff, the said (*defendant*) undertook and promised the plaintiff to carry and convey him in said coach, from —— to ——, with all due care, diligence, and skill. (*) And the plaintiff avers, that, confiding in the said undertaking, he thereupon engaged and took a seat in said coach and became a passenger therein, to be conveyed as aforesaid, for such hire and reward to be paid by him to the said (*defendant*). But the said (*defendant*) did not use due care, diligence, and skill in carrying and conveying the plaintiff as aforesaid; but, on the contrary, so overloaded, and so negligently and unskilfully conducted, drove, and managed, said coach, that it was overturned; by means whereof the plaintiff was grievously bruised and hurt [*here state any other special injuries*], and was sick and disabled for a long time, and was put to great expense for nursing, medicines, and medical aid."

If the injury arose from insufficiency in the coach or horses, insert at (*) as follows: "and that the said coach was sufficiently stanch and strong, and that the horses drawing the same were and should be well broken, and manageable, and of competent strength;" and assign the breach accordingly.

[1] [He must be received as a passenger, either by implied invitation or otherwise: Illinois Central R. *v.* O'Keefe, 168 Ill. 115; Arkansas M. R. *v.* Griffith, 63 Ark. 491; Janny *v.* Great Northern R., 63 Minn. 380; Southern R. *v.* Smith, 86 F. 292, U. S. App. But the purchase of a ticket before starting is not essential: Inness *v.* Boston, etc. R., 168 Mass. 433; Tillett *v.* Norfolk, etc. R., 118 N. C. 1031. As to who is a passenger, see Warner *v.* Baltimore, etc. R., 168 U. S. 339.] [The plaintiff showed that she purchased a ticket for herself and her baggage from one who purported to be an agent of the road for the sale of tickets, that the conductors accepted it as evidence of her right to ride in the cars, marked it, and finally took it shortly before arrival, and demanded no other fare from her. Held, that these facts offered sufficient proof of an undertaking on the part of the company to transport her and her baggage over the road, and the acts of the company's conductors were sufficient ground for the law to presume that the undertaking of the agent was valid and binding upon the company until the contrary appeared: Glasco *v.* N. Y., etc. Railw., 36 Barb. (N. Y.) 557. Where a railroad company receives upon its track the cars of another company, places them under the control of its agents and servants, and draws them by its own locomotive over its own road, to their place of destination, it assumes towards the passengers coming upon its road in such cars the relation of common carriers of passengers, and all the liabilities incident to that relation; and this is so, whether such passengers purchase their tickets at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company: Schopman *v.* Boston & W. R. R. Co., 9 Cush. (Mass.) 24. And as such passenger-carrier, the railroad company is bound to the most exact care and diligence in the management of the trains and cars, in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers: ibid.; McElroy *v.* Nashua, etc. R. R. Co., 4 Cush. (Mass.) 400; Curtis *v.* Rochester, etc. R. R. Co., 20 Barb. (N. Y.) 282; Galena, etc. R. R. Co. *v.* Fay, 16 Ill. 558.

Free passes. — Hutchinson on Carriers says (§ 554) that it is enough that the person is being lawfully carried as a passenger, to entitle him to all the care which the law requires of the passenger-carrier, and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare: Philadelphia, etc. R. R. Co. *v.* Derby, 14 How. (U. S.) 468; Ohio, etc. R. R. Co. *v.* Nickless, 71 Ind. 271; Maslin *v.* Baltimore, etc. R. R. Co., 14 W. Va. 180. See Nolton *v.* Western Railw., 15 N. Y. Court of Appeals, 444, where it is held that, where a railway voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, if such passenger be injured by the culpable negligence or want

resulted from the breaking of the harness, or the breaking or overturning of the coach or car, or any other accident occurring on the

of skill of the agents of the company, they are liable, in the absence of an express contract exempting them. The cases differ upon the question of liability to a passenger travelling on a free pass, conditioned that the carrier shall not be liable under any circumstances. That the carrier is nevertheless liable for his negligence is held in Ill. Cent. R. R. Co. *v.* Read, 37 Ill. 484; Ind. Cent. R. R. *v.* Mendy, 21 Ind. 48; Mobile & Ohio R. R. Co. *v.* Hopkins, 41 Ala. 489; Pa. R. R. Co. *v.* McClosky, 23 Pa. St. 526; Jacobus *v.* St. Paul & Ch. R. R. Co., 20 Minn. 125; [Chamberlain *v.* Pierson, 87 F. 420, U. S. App.] That he is not liable has been held in Wells *v.* N. Y. C. R. R. Co., 24 N. Y. 181; Kinney *v.* Central R. R. Co., 34 N. J. L. 513; [Rogers *v.* Kennebec Steamboat Co., 86 Me. 261; Muldoon *v.* Seattle City R., 7 Wash. 528.]

In England it has been held that a drover who had cattle on the train, and was travelling gratuitously on condition that he took the risk, could not recover for injuries happening by the negligence of the carrier: Gulliver *v.* Lon. & N. W. R. R. Co., 32 L. T. N. S. 550; Hall *v.* N. E. R. R. Co., L. R. 10 Q. B. 437. But the American courts almost, if not quite, unanimously hold that he can recover: Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Bissell *v.* N. Y. Cent. R. R. Co., 25 N. Y. 442; Pa. R. R. Co. *v.* Henderson, 51 Pa. St. 315; Cleveland R. R. Co. *v.* Curran, 19 Ohio St. 1; [Missouri P. R. *v.* Tietken, 49 Neb. 130; Illinois, etc. R. *v.* Beebe, 174 Ill. 13.]

A person who pays for the privilege of travelling over the road and selling popcorn is a passenger: Com. *v.* Vt., etc. R. R. Co., 108 Mass. 7. See also note to s. c. 11 Am. Rep. 304. But a person gratuitously riding in a coal-train, at the invitation of the conductor, is not a passenger: Eaton *v.* Del., etc. R. R. Co., 57 N. Y. 382. Nor a newsboy travelling on the train by invitation of the conductor against the rules of the road: Duff *v.* Alleghany, etc. R. R. Co., 91 Pa. St. 458. Cf. Sherman *v.* Hannibal, etc. R. R. Co., 72 Mo. 62; Pennsylvania R. R. Co. *v.* Langdon, 92 Pa. St. 21.

Railways are liable not only to passengers, but also to others who are invited to do business with them, as hackmen and others calling for passengers, baggage, or freight, for injuries happening by reason of the negligent non-repair of their stations and surroundings, or other negligence chargeable to the carrier: Tobin *v.* P. S. & P. R. R. Co., 59 Me. 183; Toledo, etc. R. R. Co. *v.* Grush, 67 Ill. 262; Wright *v.* Lon. & N. W. R. R. Co., L. R. 10 Q. B. 298; Holmes *v.* N. E. R. R. Co., L. R. 4 Ex. 254, and 6 Ex. 123.

Through tickets. — When the journey is once begun, the passenger is bound to continue without stopping over, unless by permission. Thus, in Deatrick *v.* Pa. R. R. Co., 71 Pa. St. 432, a drover's ticket good for one seat was held good for one continuous passage only, and not to entitle the passenger to stop over at any intervening point, the ticket not giving notice that such was the rule of the company, and there being no evidence that the plaintiff knew of such rule. See also Johnson *v.* Concord R. R. Co., 46 N. H. 213; C. & C. R. R. Co. *v.* Bartram, 11 Ohio St. 457; McClure *v.* P. W. & B. R. R. Co., 34 Md. 532; Petrie *v.* Pennsylvania, etc. R. R. Co., 42 N. J. L. 449. A passenger bought a ticket, rode part of the distance, stopped over, and then took the train to complete the journey, tendering the same ticket, which the conductor took, refused to return, and demanded the regular fare. This was refused unless the ticket was returned; whereupon the passenger was ejected from the car. Upon these facts it was held that the road was liable, as they were not entitled to the ticket and the fare also: Van Kirk *v.* Penn. R. R. Co., 76 Pa. St. 66. See also Burnham *v.* Gr. J. R. R. Co., 63 Me. 298; Townsend *v.* N. Y. C. R. R. Co., 6 N. Y. Sup. Ct. 495; Hamilton *v.* Third Av. R. R. Co., 53 N. Y. 25; Pittsburg, etc. R. R. Co. *v.* Hennigh, 39 Ind. 509; Palmer *v.* Railroad, 3 S. C. N. S. 580. But see Townsend *v.* N. Y. C. R. R. Co., 56 N. Y. 295. In Auerbach *v.* New York, etc. R. R. Co., 60 How. (N. Y.) Pr. 382, it was held that when a limited ticket has expired, if the traveller, through his own fault, has not reached his destination, he cannot use the ticket. But when the ticket is over several connecting lines and has detachable coupons, the passenger may wait between each journey: Brooke *v.* Railway, 15 Mich. 332.

The defendants ran cars from A to B and advertised that, on the arrival of the cars at B, stages would leave for C. The plaintiff bought of the defendants a ticket for the fare to B. Arriving at B, he took the stage for C, and received an injury while going in the stage from B to C. The defendants did not own or control the stage, nor participate in the profits of its use. The plaintiff brought an action on a special contract to carry him safely by railroad and stage, and it was held that the action could not be maintained: Hood *v.* New Haven, etc. R. R. Co., 22 Conn. 1.

road, while the vehicle or machinery and railway were in the hands and exclusive management of the defendants or their agents,[2] this is itself presumptive evidence of negligence, and the *onus probandi* is on the proprietor of the vehicle to establish that there has been no negligence whatever, and that the damage has resulted from a cause which human care and foresight could not prevent.[3] Where

[2] Carpue *v.* London Railw. Co., 5 Ad. & El. N. S. 747.

[3] Story on Bailm. §§ 601 *a*, 602; McKinney *v.* Neil, 1 McLean 540; Christie *v.* Griggs, 2 Campb. 79; Ware *v.* Gay, 11 Pick. 106; Skinner *v.* London, etc. Railway Co., 4 Am. Law Rep. N. S. 83. [*Burden of proof of negligence and due care.* The burden of proof is upon the plaintiff to show that the defendant was negligent, and that he, the plaintiff, used due care: W. & G. R. R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Murphy *v.* Deane, 101 Mass. 455. If the plaintiff's fault contributed to the accident he cannot recover: Richmond, etc. R. R. Co. *v.* Morris, 31 Gratt. (Va.) 200.

A qualification of the rule first laid down in Tuff *v.* Warman, 5 C. B. N. S. 573, to wit, that the plaintiff may recover, though negligent, if the defendant by ordinary care might have avoided the consequences of the plaintiff's negligence, has been approved by several courts: Austin *v.* N. J. St. Co., 43 N. Y. 75; Lafayette, etc. R. R. Co. *v.* Adams, 26 Ind. 76; Morrisey *v.* Wiggins Ferry Co., 43 Mo. 380. But the soundness of the law of Tuff *v.* Warman is very ably denied in Murphy *v.* Deane, *ubi sup.*

When it does not appear whether the plaintiff did an act which due care required he should do, it will not be presumed that he was negligent; and the presumption that he used due care is, in the absence of other evidence, sufficient to call upon the defendant to show that he did not: Bonce *v.* Dubuque Street R. R. Co., 53 Iowa 278; Penn. R. R. Co. *v.* Weber, 72 Pa. St. 27; s. c. 75 id. 127. Love of life and the instinct of preservation being the highest motive for care, they will stand for proof of it, until the contrary appear: Cleveland & P. R. R. Co. *v.* Rowan, 66 id. 393.

Carriers are bound to provide reasonably safe kinds of vehicles and appliances, and to have them managed with the utmost care and skill: Chicago, etc. R. R. Co. *v.* Scates, 90 Ill. 586; Conway *v.* Illinois, etc. R. R. Co, 50 Iowa 465. It has in some cases been held that the mere happening of an injury raises the presumption of negligence against a carrier of passengers: Eagle Packet Co. *v.* Defries, 94 Ill. 598; Byrne *v.* Cal. Stage Co., 25 Cal. 460; Gal., etc. R. R. Co. *v.* Yarwood, 17 Ill. 509; Tennery *v.* Peppinger, 1 Phila. (Pa.) 543. Cf. Smith *v.* British, etc. Packet Co., 46 N. Y. Super. Ct. 86; [Chicago, etc. R. *v.* Landoner, 39 Neb. 803; Southern R. *v.* Myers, 87 F. 149, U. S. App.] But this is by no means universally conceded: Delaware, etc. R. R. Co. *v.* Naphevs, 90 Pa. St. 135; Holbrook *v.* Vt. & C. R. R. Co., 12 N. Y. 236; Mitchell *v.* West R. R. Co., 30 Ga. 22; Lyndsay *v.* Conn., etc. R. R. Co., 27 Vt. 643. In Curtis *v.* Rochester & Sy. Railw., 18 N. Y. 534, it is said that no *prima facie* presumption of negligence in the carrier results from the injury merely, but only when it appears that it resulted from some defect in the road or equipment: [Fleming *v.* Pittsburg, etc. R., 158 Pa. 130.] When this is proved, it throws the burden of evidence on the railroad company to prove that the defect was not caused by its negligence: Baltimore, etc. R. R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Yerkes *v.* Keokuk, etc. Packet Co., 7 Mo. App. 265; [Louisville, etc. Ferry Co. *v.* Nolan, 135 Ind. 60. There is no presumption of negligence unless it is shown that the cause of the accident was in some way within the carrier's control: Chicago City R. *v.* Rood, 163 Ill. 477.] The nature of the accident, *e. g.* running off the track, may, in some instances, be such as to give rise to the presumption of negligence: Festal *v.* Middlesex R. R. Co., 109 Mass. 398. Cf. Carpue *v.* Lon., etc. Ry. Co., 5 Q. B. 474; Curtis *v.* Roch., etc. R. R. Co., 18 N. Y. 534; George *v.* St. Louis, etc. R. R. Co., 34 Ark. 613; Dougherty *v.* Missouri, etc. R. R. Co., 9 Mo. App. 478; Iron R. R. Co. *v.* Mowery, 36 Ohio St. 418; [Spellman *v.* Lincoln R. T. Co., 36 Neb. 890; Electric R. *v.* Carson, 98 Ga. 652; Albion Lumber Co. *v.* De Nobra, 44 U. S. App. 347; Atchison R. *v.* Elder, 57 Kans. 312; Bush *v.* Barnett, 96 Cal. 202; Frederick *v.* Northern C. R., 157 Pa. 103; North Baltimore Pass. R. *v.* Kaskell, 78 Md. 517.] See also *post*, § 230. The cases on this much-vexed question as to the plaintiff's burden of proof are fully collected in Shearman & Redfield on Negligence (3d ed.), §§ 43, 44, and notes. The fact of an animal being upon the track is *prima facie* evidence of negligence in the company, they being bound, as between themselves and their passengers, to keep the road free from all obstructions of that character: Sullivan *v.* Philadelphia, etc. R. R. Co., 30 Pa. St. 234.

Many courts hold that negligence is always a question of fact to be found by the

the breaking down of the carriage was occasioned by an original defect in the iron axle, which though concealed by the wooden part of the axle, might have been discovered by unscrewing and separating them, the proprietor has been held chargeable with negligence, in not causing such examination to be made, previously to any use of the vehicle.[4] But that he is liable for such an accident where the fracture was caused by an original internal defect in the forging of the bar, undiscoverable by the closest inspection, and unavoidable by human care, skill, and foresight, is a point which no decision has yet sustained. On the contrary, in a recent action to recover damages occasioned by precisely such a defect, where the defendant moved the court below to instruct the jury that if he had used all possible care, and the accident happened without any fault on his part, but by reason of a defect, which he could not discover, the plaintiff was not entitled to recover, but the court refused to do so, and instructed the jury that the defendant was answerable at all events; it was held by the court above, that this instruction was erroneous, the law being stated, in conclusion, in these words: "The result to which we have arrived, from the examination of the case before us, is this, that carriers of passengers for hire are bound to use the utmost care and diligence in the

jury, as an inference from the other facts proved. Others, equally numerous and respectable, hold that, where the facts are undisputed, or clear or free from doubt, out of which the negligence arises, it is a question of law for the court. In O'Neil *v.* Chicago, etc. R. R. Co., 1 McCrary C. Ct. 505, the rule is said to be that, where the facts are undisputed, and such that only one conclusion can be drawn from them, it is a question of law. But the different courts and different judges of the same court, differ as to whether a given undisputed fact or state of facts warrants the inference of negligence. Whether, for instance, allowing the arm to protrude from a car-window constitutes negligence, is not agreed by the authorities. *Pro:* Todd *v.* Old Col. R. R. Co., 3 Allen (Mass.) 18; Pittsburg, etc. R. R. Co. *v.* McClurg, 56 Pa. St. 294; Holbrook *v.* Utica & S. R. R. Co., 12 N. Y. 236; Indianapolis, etc. R. R. Co. *v.* Rutherford, 29 Ind. 82; Louisville & N. R. R. Co. *v.* Sickings, 5 Bush (Ky.) 1; Pittsburg, etc. R. R. Co. *v.* Andrews, 39 Md. 329; Telfer *v.* North. R. R. Co., 30 N. J. L. 190. *Contra:* Spencer *v.* Milwaukee & P. R. R. Co., 17 Wis. 487; Ch. & A. R. R. Co. *v.* Pondrom, 51 Ill. 333; N. J. R. R. Co. *v.* Kennard, 21 Pa. St. 203; Barton *v.* St. Louis R. R. Co., 52 Mo. 253. See the above cases also for a discussion of the right of the court to order a verdict for the defendant. To escape from this difficulty, in Bridges *v.* North London R. R. Co., 30 L. T. N. S. 844, the House of Lords suggested the rule that where the judges differ on the question of negligence, the division is conclusive that the case is a proper one for the jury. This at least will, to some extent, save us from the contradictory decisions of different courts as to what constitutes negligence. But the contradiction will not be entirely obviated until the courts agree upon a definition (which seems to be their proper province), and leave the jury, in all cases, by the aid of the definition, to find the fact. No legal principle is violated by this course. On the contrary, as negligence by defendant, and in its absence on the part of the plaintiff, whether deducible from disputed or undisputed facts, are, in actions on the case for negligence, the principal facts to be found, it would seem to be contrary to all legal principle that they should be found by the court. It has always been understood that the effect of evidence was for the jury. If the evidence is irrelevant, it is to be excluded; if relevant, to be admitted, — the jury to determine its force and effect. Such is the theory of the law, and any deviation in practice will be found not only difficult but dangerous.]

[4] Sharp *v.* Gray, 9 Bing. 457.

providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against, and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested." [5]

§ 222 *a*. **Carrier may refuse to take Passenger.** Where the action is against a common carrier of passengers, for refusing to receive and convey the plaintiff, the carrier may prove, as a good defence, that the plaintiff was a person of bad or doubtful character, or of bad habits; or, that his object was to interfere with the defendant's interests, or to disturb his line of patronage; or, that he refused to obey the reasonable regulations made for the government of passengers in that line or mode of conveyance.[1] And such carrier may rightfully inquire into the habits or motives of persons who offer themselves as passengers.[2] But if the plaintiff has been received as a passenger and conveyed a part of the way, it seems he cannot be turned out on the ground that he is not a person of good character, so long as he was not guilty of any impropriety during the passage.[3]

[5] Ingalls *v.* Bills, 9 Met. 1, 15.

[1] [But not that he was a blind man: Zackery *v.* Mobile, etc. R., 74 Miss. 520.]

[2] Jenks *v.* Coleman, 2 Sumn. 221.

[3] Coppin *v.* Braithwaite, 8 Jur. 875. {*Carriers of cattle.* — It is now held in most of the United States that these *are* common carriers: Agnew *v.* Contra Costa, 27 Cal. 425; McCoy *v.* Keokuk, etc. Ry. Co., 44 Iowa 424; St. Louis, etc. R. R. Co. *v.* Dorman, 72 Ill. 504; Cragin *v.* New York Cent. R. R. Co., 51 N. Y. 61; [Union Pac. R. *v.* Rainey, 19 Col. 225;] with the modification that they are not liable for losses caused by the fault or vicious qualities of the animals transported: Indianapolis, etc. R. R. Co. *v.* Jurey, 8 Ill. App. 160; The Saragossa, 3 Woods C. Ct. 380; Penn. *v.* Buf. & Erie R. R. Co., 49 N. Y. 204; Evans *v.* Fitchburg R. R. Co., 111 Mass. 142; Kan. P. R. R. *v.* Nichols, 9 Kan. 235; [Selby *v.* Wilmington, etc. R., 113 N. C. 588.] In England, and in a few of the United States, however, they are held not to be strictly common carriers, and may therefore stipulate against their own negligence: McManus *v.* Lancashire, etc. R. R. Co., 4 H. & N. 328; Lake Shore, etc. R. R. Co. *v.* Perkins, 25 Mich. 329; Mich., etc. R. R. Co. *v.* McDonough, 21 id. 165; Bankard *v.* B. & Oh. R.R. Co., 34 Md. 197. The carrier is liable for the deterioration of cattle,

between the time they are received by him and the time of actual shipment: Chicago etc. R. R. Co. *v.* Erickson, 91 Ill. 613.

When animals are killed by a train, the rule of damages seems to be the value of the animal when killed, and not that value less what the owner may get for it from the butcher or other person. He may abandon it to the company: Ohio & Miss. R. R. Co. *v.* Hays, 35 Ind. 173. Though, in Illinois, under a statute which, however, does not specify the rule of damages, it is held that the owner must make the best use of the carcass possible, in order to lighten the damages: Toledo R. R. Co. *v.* Parker, 49 Ill. 385. See also *post*, title Damages.

Telegraph companies. [See also *ante*, § 211, n. 1.] Although it has been intimated (McAndrews *v.* Electric Tel. Co., 17 C. B. 3), and even expressly held, that telegraph companies are liable to the same extent as common carriers (Parks *v.* At. & Cal. Tel. Co., 13 Cal. 422), it seems to be now generally agreed that such is not the law (Schwartz *v.* Atlantic, etc. Tel. Co., 18 Hun (N. Y.) 157), some cases holding them liable only for reasonable diligence and skill (Leonard *v.* N. Y. A. & B. Tel. Co., 41 N. Y. 544; Ellis *v.* Am. Tel. Co., 13 Allen (Mass.) 226; West. Un. Tel. Co. *v.* Carew, 15 Mich. 525); and others holding them liable for the greatest diligence and skill: Rittenhouse *v.* Tel. Co., 44 N. Y. 263; N. Y. & Mob. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Stevenson *v.* Montreal Tel. Co., 16 U. C. 530. And they may limit their responsibility by any reasonable conditions: Wolf *v.* West. Un. Tel. Co., 62 Pa. St. 83; [Kirby *v.* Western Union T. Co., 7 S. D. 623; Albers *v.* Western Union T. Co., 98 Ia. 51; Russell *v.* Western Union T. Co., 57 Kans. 230.]

A condition that the company shall not be held liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message, beyond the amount received by said company for sending the same, was held unreasonable in True *v.* Int. Tel. Co., 60 Me. 9; Camden *v.* West. Union Tel. Co., 34 Wis. 471; Tyler *v.* Same, 60 Ill. 421; Hibbard *v.* West. Un. Tel. Co., 33 Wis. 558; Bartlett *v.* Same, 62 Me. 209; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744; [Sherrill *v.* Western Union Tel. Co., 116 N. C. 655; Brown *v.* Postal Tel. Co., 111 id. 187; Reed *v.* Western Union T. Co., 135 Mo. 661; Western Union T. Co. *v.* Crawford, 110 Ala. 460; Western Union T. Co. *v.* Kemp, Neb. 62 N. W. 541; Western Union T. Co. *v.* Lewis, Tex. 26 S. W. 490. The same rule is applied to telephone companies in Central Union Teleph. Co. *v.* Swoveland, 14 Ind. App. 341.]

But where a message is sent subject to the condition that the company shall not be liable beyond a certain amount for an unrepeated message, the terms of repeating and of insuring the accuracy of the despatch being set forth in the condition, it was held that the company was no further liable, if not guilty of gross negligence or fraud (Becker *v.* Western Un. Tel. Co., 11 Neb. 87; Redpath *v.* West. Un. Tel. Co., 112 Mass. 71); [Primrose *v.* Western Union T. Co., 154 U. S. 1; Briskett *v.* Western Union T. Co., Mich., 61 N. W. 645.] And the mere fact of an error in the message as delivered is not proof of gross negligence: ib.; Schwartz *v.* Atlantic, etc. Tel. Co., 18 Hun (N. Y.) 157. See also Passmore *v.* Same, 9 Phila. 90; McAndrews *v.* Tel. Co., 17 C. B. 3. But see Bartlett *v.* West. Un. Tel. Co., *ubi supra*; West. Un. Tel. Co. *v.* Meeks, 49 Ind. 53; Harris *v.* West. Un. Tel. Co., 9 Phila. 88; Tyler *v.* Same, 60 Ill. 321; West. Un. Tel. Co. *v.* Graham, 1 Col. 230; s. c. 11 Am. Rep. 136 and n. A mistake in the transmission of a telegram is *prima facie* negligence: Rittenhouse *v.* Ind. Telegraph Co., 44 N. Y. 263; *post*, § 230; [Reed *v.* Western Union T. Co., 135 Mo. 661. Limitations of the telegraph company's liability, whether valid or not as against the sender, do not affect the receiver: Webb *v.* Western Union Tel. Co., 169 Ill. 610.]

CASE.

§ 223. **Scope of this Chapter.** Under this head it is proposed only to mention some general principles of evidence, applicable to the action of Trespass on the Case, in any of its forms: referring to the appropriate titles of Adultery, Carriers, Libel, Malicious Prosecution, Nuisance, Trespass, Trover, etc., for the particular rules relating to each of these heads.

§ 224. **Trespass, and Trespass on the Case.** The distinction between the actions of trespass *vi et armis*, and trespass on the case, is clear, though somewhat refined and subtle. By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force. The criterion of trespass *vi et armis* is force directly applied, or *vis proxima*. If the proximate cause of the injury is but a continuation of the original force, or *vis impressa*, the effect is immediate, and the appropriate remedy is trespass *vi et armis*. But if the original force, or *vis impressa*, had ceased to act, before the injury commenced, the effect is mediate, and the appropriate remedy is trespass on the case. Thus, if a log, thrown over a fence, were to fall on a person in the street, he might sue in trespass; but if, after it had fallen to the ground, it caused him to stumble and fall, the remedy could be only by trespass on the case.[1] The intent of the wrong-doer is not material to the form of the action;[2] neither is it generally important, whether the original act was or was not legal. Thus, though the act of sending up a balloon was legal, yet trespass *vi et armis* was held maintainable, for damage done by the accidental alighting of the balloon in the plaintiff's garden.[3]

[1] Chitty on Plead. 115–120; Smith *v.* Ruthford, 2 S. & R. 358.

[2] {Thus trespass *vi et armis* will lie for an unintentional injury caused by the glancing of a pistol-ball shot at a mark: Welch *v.* Durand, 36 Conn. 182.}

[3] Guille *v.* Swan, 19 Johns. 381. {Where the act is that of the servant in performing his duty to his master, case is the only remedy against the master, and is only maintainable when the act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master are placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master, it is the voluntary act of the servant: Sharrod *v.* London, etc. R. Co., 4 Eng. Law & Eq. 401. Cf. *post*, § 627. And this, even though such acts were acts of force, and such that trespass would have been the only proper remedy against the servant: Havens *v.* Hartford & N. H. R. Co., 28 Conn. 69. It seems that there is no right of action for loss of services of a servant who is not a menial. Wounding and causing the loss of the services of a laborer who is working for a

§ 225. **Relative Rights.** For injuries to *relative rights*, the action on the case is the appropriate remedy.[1] If the injury was without force, as, for example, enticing away a servant, case is the only proper remedy; but if it be done with force, such as the battery of one's servant, or the like, the action may be in case, or in trespass *vi et armis*, at the plaintiff's election; and in the latter form he may join a count for a battery of himself.[2]

§ 226. **Absolute Rights.** Where the injury is not to relative, but to *absolute rights*, the question whether the party may waive the force, and sue in trespass on the case, for the mere consequential damages, has been much discussed, with no little conflict of opinion. Where the tortious act was done to the property of the plaintiff, and the defendant has derived a direct pecuniary benefit therefrom, as, if he seized the plaintiff's goods and sold them as his own, it is clear that the plaintiff may waive the tort entirely, and sue in *assumpsit* for the price of the goods. So, though the property was forcibly taken, the force may be waived, and *trover*, which is an action on the case, may be sustained, for the value of the goods. It is also agreed that, where an injury was caused by the negligence of the defendant, but not wilfully, as by driving his cart against the plaintiff's carriage, trespass on the case may be maintained, notwithstanding the injury was occasioned by force, directly applied.[1] And it has also been laid down, upon consideration, as a general principle, that where an injury has been done partly by an act of trespass, and partly by that which is not an act of trespass, but the proper subject of an action on the case, both acts being done at the same time, and causing a common injury, the party may sue in either form of action, at his election.[2] This rule has been illustrated by the case of a weir, or dam, erected partly on the plaintiff's ground, and partly on that of another riparian proprietor.[3] It has

share of the crop gives no cause of action to the employer (Burgess *v.* Carpenter, 2 S. C. 7.); nor does an action lie by a prisoner confined in the house of correction against the master for neglecting to provide him with sufficient food, unless it be shown that the negligence was malicious: Williams *v.* Adams, 3 Allen (Mass.) 171.}

[1] [Cockrell *v.* Butler, 78 F. 679; Taylor *v.* Granger, 37 A. 13, R. I.; Canadian Pac. R. *v.* Clark, 38 U. S. App. 573; Alabama, etc. R. *v.* Martin, 100 Ala. 511; Drake *v.* Lady Ensley Coal Co., 102 id. 501; Knight *v.* Dunbar, 83 Me. 359; Taylor *v.* Smith, 104 Ala. 537.]

[2] Chitty on Plead. 128 [153], 181 [229]; Ditcham *v.* Bond, 2 M. & S. 436; Woodward *v.* Walton, 3 New Rep. 476. {When a right is violated the law gives a remedy: Ashby *v.* White, 1 S. L. C. 105. If the remedy is not obvious, the law will take pains to find one: Peabody *v.* Peters, 5 Pick. (Mass.) 1. Trespass *vi et armis* will lie for an unintentional injury caused by the glancing of a pistol-ball shot at a mark: Welch *v.* Durand, 36 Conn. 182.}

[1] Williams *v.* Holland, 10 Bing. 112; Rogers *v.* Imbleton, 3 New Rep. 117; Moreton *v.* Hardern, 4 B. & C. 223; Blin *v.* Campbell, 14 Johns. 432; McAllister *v.* Hammond, 6 Cow. 342; Dalton *v.* Favour, 3 N. H. 465.

[2] [Trafford *v.* Hubbard, 15 R. I. 326; Vogel *v.* McAuliffe, 18 id. 791; Hobbs *v.* Ray, ib. 84.]

[3] Wells *v.* Ody, 1 M. & W. 459, per Ld. Abinger; ib. 462, per Parke, B; Moore *v.* Robinson, 2 B. & Ad. 817; Knott *v.* Digges, 6 H. & J. 230.

also been held that case would lie for a distress, illegally made, after tender of the rent due;[4] and for a tortious taking, under pretence of a distress for rent, where there was no right to distrain.[5] In this last case, Lord Denman, C. J., proceeded upon the general ground that, though the taking of the goods was a trespass, the owner was at liberty to waive it, and bring case for the consequential injury arising from the unlawful detention. Indeed, it is difficult to discern any reason why the party may not, in all cases, waive his claim to vindictive damages, and proceed in case for those only actually sustained; or why he may not as well waive his claim for a part of the injury, and go for the residue, as to forgive the whole.[6] There are, however, several decisions, both English and American, to the effect that, where the injury is caused by force, directly applied, the remedy can be pursued only in trespass.[7]

§ 227. **Several Plaintiffs.** In this action, as in others, if there are *several plaintiffs*, they must prove a joint cause of action, such as damage to their joint property, slander of both in their joint trade or employment, and the like, or they will be nonsuited.[1] If their interests are several, but the damage is joint, it has been held sufficient.[2]

§ 228. **Several Defendants in Tort.** If the action is founded *in tort*, it is not necessary to prove all the defendants guilty; for as torts are several in their nature, judgment may well be rendered against one alone, and the others acquitted.[1] But if the action is founded on a breach of an express contract, it seems that the plaintiff must prove the contract against all the defendants.[2]

[4] Branscom *v.* Bridges, 1 B. & C. 145; 3 Stark. 171; Holland *v.* Bird, 10 Bing. 15.

[5] Smith *v.* Goodwin, 4 B. & Ad. 413.

[6] See Scott *v.* Sheppard, 2 W. Bl. 897; Pitts *v.* Gaince, 1 Salk. 10; Chamberlain *v.* Hazlewood, 5 M. & W. 515; 3 Jur. 1079; Muskett *v.* Hill, 5 Bing. N. C. 694; Parker *v.* Elliot, 6 Munf. 587; Van Horn *v.* Freeman, 1 Halst. 322; Haney *v.* Townsend, 1 McCord, 207; Ream *v.* Rank, 3 S. & R. 215; Parker *v.* Bailey, 4 D. & R. 215; Moran *v.* Dawes, 4 Cowen, 412.

[7] These decisions are referred to in 1 Met. & Perk. Dig. pp. 69, 70; 1 Harrison's Dig. 42–47. But in some of the United States, the distinction between the two forms of action has been abolished by statute. Thus, in Maine, it is enacted "that the declaration shall be equally good and valid, to all intents and purposes, whether the same shall be in form a declaration in trespass, or trepass on the case:" Rev. Stat. c. 115, § 13. So, in effect, in Indiana: Hines *v.* Kinnison, 8 Blackf. 119. And in Connecticut: Rev. Stat. 1849, tit. 1, § 274; Iowa: Rev. Stat. 1851, § 1733.

[1] Cook *v.* Batchellor, 2 B. & P. 150; 2 Saund. 116 *a*, n. (2); Solomons *v.* Medex, 1 Stark. 191. [But see Fairbanks *v.* San Francisco, etc. R., 115 Cal. 579.]

[2] Coryton *v.* Lithebye, 2 Saund. 115; Weller *v.* Baker, 2 Wils. 414; [United Coal Co. *v.* Canon City Coal Co., 48 P. 1045, Col.; McClurg *v.* Ingleheart, 33 S. W. 80, Ky.; Hays *v.* Farwell, 53 Kan. 78; Perkins *v.* Tilton, 53 Neb. 440.]

[1] {In Turner *v.* Hitchcock, 20 Iowa 310, it is held that where the plaintiff in an action of trespass intermarries with one of the joint trespassers after the trespass is committed, it operates to discharge all the wrong-doers: Wright and Cole, JJ., dissenting.} [The dismissal of the action against one defendant does not release the others: West Chicago, etc. R. *v.* Piper, 165 Ill. 325.]

[2] Ireland *v* Johnson, 1 Bing. N. C. 162; Bretherton *v.* Wood, 3 B. & B. 54; Max *v.* Roberts, 12 East 89; *supra*, § 214.

§ 229. **Time.** The *particular day* on which the injury is alleged to have been committed is not material to be proved. Originally, every declaration in trespass seems to have been confined to a single act of trespass; and if it was continuous in its nature, it might be so laid; in which case it was considered as one act of trespass. Subsequently, to save the inconvenience of distinct counts for each tortious act, the plaintiff was permitted to consolidate into one count the charge of trespasses done on divers days between two days specifically mentioned; in which case it is considered as if it were a distinct count for every different trespass. In the proof of such a declaration, the plaintiff may give evidence of any number of trespasses within the time specified. But he is not obliged to avail himself of this privilege; for he may still consider his declaration as containing only one count, and for a single trespass. When it is considered in this light, the time is immaterial; and he may prove a trespass done at any time before the commencement of the action, and within the time prescribed by the statute of limitations. But the plaintiff is not permitted to avail himself of the declaration in both these forms at the same time. He is therefore bound to make his election, before he begins to introduce his evidence; and will not be permitted to give evidence of one or more trespasses within the time alleged, and of another at another time.[1]

§ 230. **Malice; Negligence.** If the plaintiff charges both *malice and negligence* upon the defendant, in doing the act complained of, the count will be supported by evidence of the *negligence only*.[1] And where the action is against a *carrier*, or an *innkeeper*, for the *negligent* keeping of the goods in his care, whereby they were lost, proof of the loss affords presumptive evidence of negligence on the part of the carrier or innkeeper or his servants.[2] So, where the action is against a railway corporation, for the destruction of property by sparks emitted from their engine, the fact of the premises having been fired by sparks from the passing engine is *prima facie* evidence of negligence on the part of the company.[3]

[1] Pierce *v.* Pickins, 16 Mass. 472, per Jackson, J.; Brook *v.* Bishop, 2 Ld. Raym. 823; 7 Mod. 152; 2 Salk. 639; Monckton *v.* Pashley, 2 Ld. Raym. 974, 976; Hume *v.* Oldacre, 1 Stark. 351; 1 Saund. 24 n. (1), by Williams. See *post*, § 624.

[1] Panton *v.* Holland, 17 Johns. 92. {And see *ante*, § 208, note (1); 218, note 6; [Bigelow on Torts, 300.] Where the declaration charges that the defendant wrongfully kept a horse accustomed to bite mankind, and that the defendant knew it, it need not aver that the injury complained of was received through the defendant's negligence in keeping the horse: Popplewell *v.* Pierce, 10 Cush. 509; May *v.* Burdett, 9 Ad. & El. N. S. 101; Jackson *v.* Smithson, 15 M. & W. 563; Card *v.* Case, 5 M. G. & S. 622; Kerwhacker *v.* C. C., etc. R. R. Co., 3 Ohio, N. S. 172.}

[2] Dawson *v.* Chamney, 5 Ad. & El. N. S. 164; Story on Bailments, §§ 472, 529. See *supra*, §§ 219, 222.

[3] Piggot *v.* Eastern Railroad Co., 3 M. Gr. & Sc. 229. And see McCready *v.* S. Car. Railroad Co., 2 Strobh. 356. See also *ante*, § 222, n. {It has already been seen that it is not necessary to allege negligence in an action against a common carrier of goods, where the action is based on his common-law liability as insurer, but if the carrier proves that the loss happened from a cause excepted in his contract, or that his liability

§ 230 *a*. **Deceit.**[1] Where the damage for which the action is brought has resulted from the *misrepresentation of a fact* by the

is restricted by special stipulations in the contract, then it is necessary to prove negligence on his part, and the burden of proof of this is on the plaintiff: *ante*, §§ 218, 219, 220, and notes.

It has also been seen that it is necessary to allege and prove negligence against a carrier of passengers, and due care in the plaintiff, in order to charge him with an injury received by the passenger. § 222, and notes.

The principles of all the actions which are based on negligence, whether of common carriers or others, are the same, and the points to be proved are: 1. The injury to the plaintiff; 2. That it was proximately caused by the negligence of the defendant; 3. That the plaintiff's own negligence did not contribute to produce it: Chicago City Ry. Co. *v.* Freeman, 6 Ill. App. 608.

The first is proved by any relevant evidence, just as any other material fact in the plaintiff's case is proved.

The second involves several points on which great diversity of opinion appears in the decisions of the courts. It is unquestionable that the burden of proof is on the plaintiff, and mere proof of an injury to the plaintiff, without connecting it with the defendant in any way, is not enough to make a *prima facie* case of negligence; but if, in proving the injury, it is also proved that the injury was caused by the defendant's property, *e. g.* when one is injured by the derailing of defendant's cars, or similar accidents, the question arises whether this is *prima facie* evidence of negligence. It has been held that the mere showing that the injury was caused by such an accident, without showing further the negligence or carelessness of the defendant or some defect in the machinery or property in question is not enough to prove negligence: Kendall *v.* Boston, 118 Mass. 234; Ward *v.* Andrews, 3 Mo. App. 275; Hutchinson *v.* Boston Gas Light Co., 122 Mass. 219; Ruffner *v.* Cincinnati, etc. R. R. Co., 34 Ohio St. 96. But it is not often that this special question arises, for generally, in proving the accident, circumstances are proved which have a logical tendency to show the negligence of the defendant, and this is held in most courts to be enough to throw the onus of rebutting this evidence on the defendant: Shearman & Redfield, Negligence, § 5; Baltimore, etc. R. R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Peoria, etc. R. R. Co. *v.* Reynolds, 88 Ill. 418; Tuttle *v.* Chicago, etc. R. R. Co., 48 Iowa 236; Yerkes *v.* Keokuk, etc. Packet Co., 7 Mo. App. 265; Feital *v.* Middlesex R. R. Co., 109 Mass. 398; Carpue *v.* London, etc. Ry. Co., 5 Q. B. 747; [Hogan *v.* Manhattan R., 149 N. Y. 23.] Proof that a person or corporation has failed to comply with city ordinances is generally held to be proof of negligence: Koster *v.* Noonan, 8 Daly (N. Y.), 231; Hanlon *v.* South Boston R. R. Co., 129 Mass. 310; Siemers *v.* Eisen, 54 Cal. 418; Willy *v.* Mulledy, 6 Abb. (N. Y.) N. Cas. 97; Devlin *v.* Gallagher, 6 Daly (N. Y.) 494. As to what is evidence of negligence in carriers, see *ante*, §§ 218, 219, 222, notes. Proof of the negligence of the defendant's servants, while acting within the scope of their employment and for the benefit of the master, is sufficient proof of the negligence of the defendant, though he is not liable for their acts which in no way relate to the service, although such acts may have been done during the service (Bryant *v.* Rich, 106 Mass. 180; Palmer *v.* Railroad, 3 S. C. 580; Jackson *v.* Sec. Av. R. R. Co., 47 N. Y. 274; Hanson *v.* E. & N. A. R. R. Co., 62 Me. 84; Garretzen *v.* Duenkel, 50 Mo. 104), unless the act is wanton and wilful, and in no sense incidental to the discharge of the servant's duty: Isaacs *v.* Third Av. R. R. Co., 47 N. Y. 122. See also *ante*, § 68. A passenger injured by a quarrel between others on the cars may recover damages of the carrier. It is his duty to see that passengers are not injured by disorderly conduct on his cars: Pitts. & Con. R. R. Co. *v.* Pillow, Pa., Jan. 1875, 7 Leg. Gaz. 13. As to the measure of damages, see *post*, § 253.

It must also be shown that the negligence is the proximate cause of the injury complained of: Barringer *v.* New York, etc. R. R. Co., 18 Hun (N. Y.) 398; Pennsylvania, etc. R. R. Co. *v.* Lacey, 89 Pa. St. 458; Pennsylvania, etc. *v.* Hensil, 70 Ind. 569; Kennedy *v.* New York, 73 N. Y. 365. [As to what is proximate cause, see Farmers' Canal Co. *v.* Westlake, 23 Col. 26; Wood *v.* Pennsylvania R., 177 Pa. 306; Texas, etc. R. *v.* Bigham, 38 S. W. 162, Tex.; Kingsley *v.* Bloomingdale, 109 Mich. 340; Grimmer *v.* Pennsylvania R., 175 Pa. 1; The Gester, 70 L. T. N. S. 703; Halestrop *v.* Gregory, 1895, 1 Q. B. 561; Pollard *v.* Maine Central R., 87 Me. 51; Wolff Mfg. Co. *v.*

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[1] [On the whole subject of Deceit see Bigelow on Fraud, vol. i.]

defendant, it is necessary to prove not only that the statement was false in fact, but that it was made fraudulently, or without probable cause; for if it was not known to be false by the party making it, but, on the contrary, was made honestly, and in full belief that it was true, he is not liable at law. Thus, where the allegation was,

Wilson, 152 Ill. 9; Franke *v.* Hart, 42 S. W. 913, Ky.; Mossman *v.* Rockland, 39 A. 995, Me.; Stone *v.* Boston, etc. R., 51 N. E. 1, Mass.; Berg *v.* Great Northern R., 73 N. W. 648, Minn.; Willis *v.* Armstrong Co., 183 Pa. 184; Cochran *v.* Philadelphia, etc. R., 184 id. 565.] But the interposition of a natural force, such as the law of gravitation, a running stream, wind, etc., by which the results of the defendant's careless act are communicated to the plaintiff or his property, does not render such act any the less the proximate cause, as where burning oil is carried on running water, from place to place: Kuhn *v.* Jewett, 32 N. J. Eq. 647. Cf. Wooley *v.* Grand Street, etc. Ry. Co., 83 N. Y. 121; [Chicago, etc. R. *v.* McBride, 54 Kan. 172.]

The third point to be proved is that the injury complained of was not caused by the plaintiff's *own negligence*, either solely, or in connection with the negligence of the defendant. For a general discussion of this point and the question of comparative negligence, see *post*, § 232 *a*, note 1. As to the interposition of the negligence of third parties, concurrently with the negligence of the defendant, and acting with it to produce the injury, the rule seems to be that if the defendant, by using such diligence as he was bound to use, could have averted the mishap, then the intervention of the negligence of third parties will not be a defence to him: Slater *v.* Mersereau, 64 N. Y. 138; Shearman & Redfield, Negligence, § 10. Cf. Ring *v.* Cohoes, 77 N. Y. 83. It has been a vexed question whether the court or jury should decide what is negligence in each case. If, on undisputed facts, or on the plaintiff's own showing in putting in his case, the irresistible conclusion is that no evidence of negligence has been put in, the court may withdraw the case from the jury; and so if negligence appears irresistibly proven, so that no reasonable jury could find against it: Chicago, etc. R. R. Co. *v.* Scates, 90 Ill. 586; Buckley *v.* New York, etc. R. R. Co., 43 N. Y. Super. Ct. 187; Delaware, etc. R. R. Co. *v.* Toffey, 38 N. J. L. 525; Hoyt *v.* City of Hudson, 41 Wisc. 105; Palinsky *v.* New York, etc. R. R. Co., 82 N. Y. 424; International, etc. R. R. Co. *v.* Halloran, 53 Tex. 46; Zimmerman *v.* Hannibal, etc. R. R. Co., 71 Mo. 476; Brennan *v.* Fair Haven, etc. R. R. Co., 45 Conn. 284; [Pyle *v.* Clark, 79 F. 744, U. S. App.; Klinkler *v.* Wheeling, etc. Co., 27 S. E. 237, W. Va.; Guthrie *v.* Missouri, etc. R., 51 Neb. 746; Wardlaw *v.* California R., 42 P. 1075, Cal.; Russell *v.* Carolina, etc. R., 118 N. C. 1098; Cincinnati Street R. *v.* Murray, 53 Ohio St. 570; Elliott *v.* Chicago, etc. R., 150 U. S. 245; Union Pacific R. *v.* McDonald, 152 id. 262.] But where, though the facts are undisputed, they are such as might or might not justify an inference of negligence, it has been said that the court should decide whether there is negligence (Fletcher *v.* Atlantic, etc. R. R. Co., 64 Mo. 484); and also that it is for the jury (Mississippi, etc. R. R. Co. *v.* Mason, 51 Miss. 234; Central Branch, etc. R. R. Co. *v.* Hotham, 22 Kan. 41): [New York, etc. R. *v.* Blumenthal, 160 Ill. 40.] It is certain that the courts have very much restricted the limits of the facts which are conclusive evidence of negligence. Memphis, etc. R. R. Co. *v.* Lyon, 62 Ala. 71; Cottrell *v.* Chicago, etc. R. R. Co., 47 Wisc. 634; Fairbury *v.* Rogers, 2 Ill. App. 96; Cincinnati, etc. R. R. Co. *v.* Ducharme, 4 Ill. App. 178; Sheehy *v.* Burger, 62 N. Y. 558. But in cases where the *existence* of the facts which are relied on to show negligence is disputed, or where, as is stated above, though the *existence* of such facts is clear, yet they are not of so clearly negligent a nature that a jury would be *bound* to find negligence, the majority of the decisions holds that the jury should have all the facts in the case, which have a tendency to prove negligence, submitted to them with proper instructions by the judge, and should decide whether or not the plaintiff or defendant was negligent. Linnehan *v.* Sampson, 126 Mass. 506; Williams *v.* Atchison, etc. R. R. Co., 22 Kan. 117; Cassidy *v.* Angell, 12 R. I. 447; Watkins *v.* Atlantic Ave. R. R. Co., 20 Hun (N. Y.) 237; Philadelphia, etc., R. R. Co. *v.* Killips, 88 Pa. St. 405; Ditberner *v.* Chicago, etc. R. R. Co., 47 Wisc. 138; Shafter *v.* Evans, 53 Cal. 32; Towne *v.* Nashua, etc. R. R. Co., 124 Mass. 101; Cook *v.* Union, etc. R. R. Co., 125 id. 57; Taber *v.* Delaware, etc. R. R. Co., 71 N. Y. 489; Houston, etc. R. R. Co *v.* Randall, 50 Tex. 254; Swoboda *v.* Ward, 40 Mich. 420; Grand Rapids, etc. R. R. Co. *v.* Martin, 41 Mich. 667; Erd *v.* St. Paul, 22 Minn. 443; Woodfolk *v.* Macon, etc. R. R. Co., 56 Ga. 457; Hunt *v.* Salem, 121 Mass. 294; Gilman *v.* Noyes, 57 N. H. 627.] [Guthrie *v.* Missouri, etc. R., 51 Neb. 746; Gray *v.* Moersheim, 164 Pa. 508.]

that the defendant falsely represented to the sheriff, that one J. W., then in custody, was the same J. W. against whom the sheriff (plaintiff) had another process; it was held a good defence, that the defendant believed, upon good and probable grounds, that the representation was true.[2] So, if an agent assume to act as such after the death of his principal, but in justifiable ignorance of that fact, he is not liable for such misrepresentation of his agency.[3]

§ 230 *b*. **Injuries to Land.** Whenever this action is brought for an *injury to land*, it is sufficient for the plaintiff to allege and prove his *possession* of the property, in order to entitle him to the action against a stranger. If the possession was in fact vacant, proof of his title alone will be constructive proof of his possession. The nature and value of his interest will become material, only as they affect the amount of the damages; and for this purpose an equitable title may be shown, and will be sufficient to entitle him to full damages.[1]

§ 231. **Defence ; General Issue.** Under the *general issue*, the defendant is ordinarily permitted to give evidence of any matters *ex post facto*, which show that the cause of action has been discharged, or that in equity and conscience the plaintiff ought not to recover.[1] Thus, a *release*, a *former recovery*, or a *satisfaction*, may be given in evidence.[2] So, also, in an action for enticing away a servant, the defendant may, under this issue, give evidence that the plaintiff has already recovered judgment for damages against the servant, for departing from his service, and that since the commencement of the present action, this judgment had been satisfied.[3] So, in an action

[2] Collins *v.* Evans, 8 Jur. 345 ; 5 Ad. & El. N. S. 804, 820. If the party who made the representation knew it at the time to be untrue, this is sufficient evidence to sustain the allegation of fraud and deceit, though he did not intend actually to defraud or injure the other : Watson *v.* Poulson, 15 Jur. 1111. And see Polhill *v.* Walter, 3 B. & Ad. 113. But in the sale of real estate, if the vendor make representations respecting the land which are materially erroneous, going to the basis of the contract, equity will rescind the purchase, though the vendor had no intention to deceive : Taylor *v.* Fleet, 1 Barbour, 471. And see Doggett *v.* Everson, 3 Story, 733 ; 1 Story, Eq. Jur. § 193. As to goods, see Johnson *v.* Peck, 1 Woodb. & Minot, 334. [Reasonable ground for belief is not necessary in order to exonerate the defendant from liability for a false statement : Derry *v.* Peek, 14 A. C. 237 ; Le Lievre *v.* Gould, 1893, 1 Q. B. 491. For the conflicting American authorities on this point see Bigelow on Torts, 63.] {A false statement of value is not actionable. Ellis *v.* Andrews, 56 N. Y. 83. But see Simar *v.* Canaday, 53 N. Y. 306, that it is, if it is an affirmation of a fact rather than expression of an opinion.} [See Bigelow on Torts, 58.]

[3] Smout *v.* Ilbery, 10 M. & W. 1. And see Story on Agency, § 265 *a* ; Pasley *v.* Freeman, 3 T. R. 57 ; Haycraft *v.* Creasy, 2 East 92 ; Wilson *v.* Fuller, 3 G. & D. 570 ; [Farmers', etc. Co. *v.* Wilson, 139 N. Y. 284.]

[1] Gardner *v.* Heartt, 1 Comst. 528 ; 2 Barb. S. C. 165 ; Schenck *v.* Cuttrell, 1 N. J. 5. {The diversion, by digging a well on one's own premises, of an unknown subterranean current of water from the well of an adjoining proprietor gives to the latter no cause of action against the former : Chase *v.* Silverstone, 62 Me. 175 ; Chasemore *v.* Richards, 7 H. L. Cas. 349 ; Hanson *v.* M'Cue, 42 Cal. 303. But see Sweet *v.* Cutts, 50 N. H. 439, and note to S. C. 11 Am. L. Reg. N. S. 14 ; Bussell *v.* Salisbury Manuf. Co., 43 N. H. 569.} [Bigelow on Torts, 286.]

[1] Bird *v.* Randall, 3 Burr. 1353, per Ld. Mansfield.

[2] Ibid. ; Yelv. 174 *a*, n. (1), by Metcalf ; Stephen on Plead. 182, 183 (Am. ed. 1824) ; Stafford *v.* Clark, 2 Bing. 377 ; Anon., 1 Com. 273.

[3] Bird *v.* Randall, 3 Burr. 1345.

on the case for beating the plaintiff's horse, the defendant may show that it was done to drive the horse from his own door, which he obstructed.[4] And in an action for obstructing ancient lights, by the erection of a house, a customary right so to do may be given in evidence.[5] So, in an action for hindering the plaintiff in the exercise of his trade, it may be shown, under this issue, that the trade was unlawful;[6] and in an action for destroying a rookery, it may be shown that it was a nuisance.[7] And, in general, wherever an act is charged in this form of action to have been fraudulently done, the plea of not guilty puts in issue both the doing of the act, and the motive with which it was done.[8]

§ 232. **Special Pleas.** But to this rule there are some *exceptions;* such as the *statutes of limitations;* justification, in slander, by alleging the *truth* of the words; *retaking* on fresh pursuit of a prisoner escaped; which cannot be given in evidence, unless specially pleaded.[1]

§ 232 *a*. **Negligence on Part of Plaintiff.** The defendant may also prove, in defence, that the injury might have been avoided by the use of *due care on the part of the plaintiff;* for the question is, not only whether the defendant did an improper act, but whether the injury to the plaintiff may legally be deemed the consequence of it. But it will not be sufficient, as a complete defence to the action, to show merely that the plaintiff is chargeable with want of due care, unless the injury was entirely caused by such omission; for if it only contributed to it in part, the plaintiff may recover; and his own misconduct in that case, if available to the defendant, will go in reduction of damages.[1] And if the plaintiff was at the time a

[4] Slater *v.* Swann, 2 Stra. 872.

[5] Anon., 1 Com. 273.

[6] Tarleton *v.* McGawley, Peake's Cas. 207, per Ld. Kenyon.

[7] Hannam *v.* Mockett, 2 B. & C. 934. But if it be a public nuisance, not specially injurious to the party, he has no right to abate it: Dimes *v.* Petley, 15 Ad. & El. N. S. 276.

[8] Mummery *v.* Paul, 8 Jur. 986. So, in an action on the case for wrongfully keeping a ferocious dog, knowing him to be of such a disposition, the plea of not guilty is held to put in issue the *scienter*. Card *v.* Case, 12 Jur. 247.

[1] 1 Chitty on Pl. pp. 433, 434.

[1] Butterfield *v.* Forrester, 11 East 60; Marriott *v.* Stanley, 1 M. & G. 568; Bridge *v.* Grand Junction Railw. Co., 3 M. & W. 244; Clayards *v.* Dethick, 12 Ad. & El. N. S. 439; Perkins *v.* Eastern R. R. Co., 30 Me. 307; Greenland *v.* Chaplin, 19 Law J. Exch. 273. See Moore *v.* Abbot, 32 Me. 46. [One who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury if he, by his own or his agent's ordinary negligence or wilful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence: Shearman & Redfield on Negligence, § 25; St. Louis, etc. R. R. Co. *v.* Mathias, 50 Ind. 65; Richmond, etc. R. R. Co. *v.* Morris, 31 Gratt. (Va.) 200; South, etc. R. R. Co. *v.* Thompson, 62 Ala. 494; Lake Shore, etc. R. R. Co. *v.* Clemens, 5 Ill. App. 77. But if the plaintiff's negligence, though accompanying the injury, is not the cause of it, and the defendant's negligence does cause it, the plaintiff can recover; Gould *v.* McKenna, 86 Pa. St. 297; Frick *v.* St. Louis, etc. R. R. Co., 5 Mo.

passenger in the vehicle of another, he becomes so far identified with

App. 435; [Chicago, etc. R. *v.* Chambers, 68 F. 148, U. S. App.; Rome R. *v.* Thompson, 101 Ga. 26; Thompson *v.* Salt Lake, etc. Co., 16 Utah 281.] Where a party injured so that death must follow if relief is not had employs a competent physician, the fact that a mistake may have been made in the treatment which contributed to the death does not release the defendants from liability: Santer *v.* N. Y. C. R. R. Co., N. Y. Ct. of App., 14 Alb. L. J. 38; Collins *v.* Council Bluffs, 32 Iowa 324. The neglect of a patient to follow the directions of his surgeon is *prima facie* evidence of contributory negligence, and, unless rebutted, releases the latter from liability from injuries alleged to be due to his negligence: Geiselman *v.* Scott, 25 Ohio St. 86; Hubbard *v.* Thompson, 109 Mass. 286; McCandless *v.* McWha, 22 Penn. St. 272. The care which the plaintiff is obliged to use is that which is reasonable, according to his situation; he is not held to the utmost possible exertion of care: Chicago etc. R. R. Co. *v.* Donahue, 75 Ill. 106; Thurber *v.* Harlem Bridge, etc. Ry. Co., 60 N. Y. 326. Whether, if one be engaged in an unlawful act, — travelling on Sunday for instance, for pleasure or on business, in violation of the statute, — he may maintain an action for an injury by negligence, the authorities differ. That he cannot, see Jones *v.* Andover, 10 Allen (Mass.), 18; Cratty *v.* Bangor, 57 Me. 423; Johnson *v.* Irasburg, 47 Vt. 28; Smith *v.* B. & M. R. R. Co., 120 Mass. 490; McGrath *v.* Merain, 112 Mass. 467. That he can, see Sutton *v.* Wauwatosa, 29 Wis. 21; Carroll *v.* Staten Is. R. R. Co., 58 N. Y. 126; Phila., etc. R. R. Co. *v.* Phila., etc. Towboat Co., 23 How. (U. S.) 209. See also *ante* § 199. In Baker *v.* Portland, 58 Me. 199, the rule is said to be that the plaintiff in such cases may recover unless the unlawful act *contributed to produce* the injury: cf. Steele *v.* Burkhardt, 104 Mass. 59. In some States, the rule that the plaintiff cannot recover if his own negligence contributes to cause the injury, has been modified by introducing a comparison between the negligence of the parties, and if, by such comparison, it appears that the negligence of the plaintiff was slight and that of the defendant was gross, then the plaintiff is still entitled to recover: Chicago, etc. R. R. Co. *v.* Harwood, 90 Ill. 425; Toledo, etc. R. R. Co. *v.* O'Connor, 77 Ill. 391. In such cases it is incumbent on the *plaintiff* to show this comparison, and to prove that his negligence is slight compared with that of the defendant: Chicago, etc. R. R. Co. *v.* Harwood, *ut sup.*; Rockford, etc. R. R. Co. *v.* Delaney, 82 Ill. 198; Schmidt *v.* Chicago, etc. R. R. Co., 83 Ill. 405; Hughes *v.* Muscatine County, 44 Iowa 672; Quinn *v.* Donovan, 85 Ill. 194. This rule of *comparative negligence* is [no longer law in Illinois, and is generally repudiated as unsound: Culbertson *v.* Holliday, 69 N. W. 853, Neb.; Cicero, etc. R. *v.* Meixner, 160 Ill. 320; Atchison, etc. R. *v.* Henry, 57 Kan. 154; Missouri, etc. R. *v.* Rodgers, 91 Tex. 52;] Marble *v.* Ross, 124 Mass. 44; Pennsylvania Ry. Co. *v.* Righter, 42 N. J. L. 180; Potter *v.* Warner, 91 Pa. St. 362. [In some States, however, evidence of the plaintiff's negligence is admissible in mitigation of damages: Florida Central R. *v.* Williams, 37 Fla. 406; Southern R. *v.* Pugh, 97 Tenn. 624; Miller *v.* Smythe, 95 Ga. 288.] In Massachusetts, by statute, contributory negligence, *unless gross*, is not a defence to an action against a railroad company for negligence at a *crossing*: Pub. Stat. c. 112, § 213. This statute is based on the policy of keeping the railroad companies vigilant at such places, and is a departure from the common-law rule on this subject. As to the burden of proof, the generally received rule seems to be that the burden of showing contributory negligence of the plaintiff is on the defendant: Indianapolis, etc. R. R. Co. *v.* Horst, 93 U. S. 291; Sanders *v.* Reister, 1 Dak. Terr. 151; Hoyt *v.* City of Hudson, 41 Wis. 105; Snyder *v.* Pittsburgh, etc. R. R. Co., 11 W. Va. 14; Holt *v.* Whatley, 51 Ala. 569; Texas, etc. R. R. Co. *v.* Murphy, 46 Tex. 356; Hocum *v.* Weitherick, 22 Minn. 152; [Canal Traction Co. *v.* Behr, 37 A. 142, N. J. L.; Sofferstein *v.* Bertels, 178 Pa. 401; Daly *v.* Hinz, 113 Cal. 366; Prosser *v.* Montana, etc. R., 17 Mont. 372; Omaha Street R. *v.* Martin, 48 Neb. 65; Stewart *v.* Nashville, 96 Tenn. 50; Lee *v.* International, etc. R., 89 Tex. 583; Card *v.* Eddy, 129 Mo. 510; Texas, etc. R. *v.* Volk, 151 U. S. 73; Wood *v.* Bartholamew, 29 S. E. 959, N. C.; Rhyner *v.* Menasha, 73 N. W. 41 Neb.; *contra*, Whalen *v.* Citizens' Gaslight Co., 151 N. Y. 70; Chicago, etc. R. *v.* Levy, 160 Ill. 385; Rabe *v.* Sonnerbeck, 94 Ia. 656; Ryan *v.* Bristol, 63 Conn. 26.] Lane *v.* Crombie, 12 Pick. (Mass.) 177; Murphy *v.* Deane, 101 Mass. 455; Shearman & Redfield, Negligence, § 112; Louisville, etc. R. R. Co. *v.* Boland, 53 Ind. 398; Benton *v.* Central R. R. Co., 42 Iowa 192; Chicago City Ry. Co. *v.* Freeman, 6 Ill. App. 608. Perhaps the apparent conflict of the decisions may be explained by the fact that in cases where it is held that the defendant must show contributory negligence, the plaintiff, in putting in his case, has shown facts which make out a *prima facie* case of due care; and

the owner and his servants as that their want of due care may be shown in defence of the action.[2]

§ 232 *b*. **Co-servants.** Where the injury complained of was occasioned by the negligence of a person in the defendant's employment, it has often been found extremely difficult to determine whether the relation of master and servant existed, so as to charge the defendant or not. But by comparing the adjudged cases, the principle to be deduced from them seems to be this, — that where the person employed is in the exercise of a distinct and independent employment, the owner parting, for the time, with all control over that which is the subject of the bailment or contract, and having no control over the conduct of the person employed, or his servants, such person stands in the relation of a sub-contractor only, and the persons whom he employs are his own servants, and not those of the principal party; and therefore the latter is not liable for their negligence or misdoing. It is to this point, therefore, that the evidence on each side should be directed.[1] Thus, the trustees under a public road act were held not responsible for the negligence of the men employed in making the road, the work being carried on by a regular surveyor in their absence, whom they had no right to turn out of employment.[2] So, where a licensed drover undertook to drive an ox to the slaughter-house, and sent him by his own servant, through whose negligence the ox did damage, it was held that the drover, and not the owner of the ox, was liable for the damage, as he was in the exercise of an independent employment, and had the exclusive control of the subject of the contract.[3]

when the courts say the burden of proof of contributory negligence is on the defendant, they mean that it is incumbent on the defendant to meet this *prima facie* case of due care.

In addition to the remedies which the *injured party* has against those by whose negligence he is injured, there is also, in most States, a statutory remedy given, if the injured person dies, to his next of kin or personal representatives. In some States this remedy is given only when the injury is caused by the negligence of a railroad or steamboat company, or some common carrier. In others, it is good against any one. The negligence must be proved just as if the action were brought by the injured party, and contributory negligence by the *nominal* plaintiff will not defeat the action: Shearman & Redfield, Negligence, §§ 290–302. This remedy is purely statutory and does not exist at common law: Sullivan *v.* Union Pacific R. R. Co., 1 McCrary, Cir. Ct. 301. Cf. Edgar *v.* Castello, 14 S. C. 20; Armstrong *v.* Beadle, 5 Sawyer, Cir. Ct. 484.]

[2] Thorogood *v.* Bryan, 8 M. G. & S. 115; Cattlin *v.* Hills, ib. 123. [This is no longer law: Mills *v.* Armstrong, 13 A. C. 1; Pyle *v.* Clark, 79 F. 744, U. S. App.; Reading Township *v.* Telfer, 57 Kan. 798; Missouri, etc. R. *v.* Rogers, 91 Tex. 52; Robinson *v.* Detroit, etc., Co. 73 F. 883, U. S. App.; Ouverson *v.* Grafton, 5 N. D. 281; Roach *v.* Western, etc. R., 93 Ga. 785; Lake Shore R. *v.* McIntosh, 140 Ind. 261; Whittaker *v.* Helena, 35 P. 904, Mont.; Alabama, etc. R. *v.* Davis, 69 Miss. 444; Little Rock, etc. R. *v.* Harrell, 58 Ark. 454; Baltimore, etc. R. *v.* State, 79 Md. 335; Finley *v.* Chicago, etc. R., 74 N. W. 174, Minn.; but see, Omaha, etc. R. *v.* Talbot, 67 N. W. 599, Neb.; Ritger *v.* Milwaukee, 99 Wis. 190.]

[1] Story on Agency, § 454 *a* (2d ed.), 228–233; Powell *v.* Deveney, 3 Cush. 300; Lynch *v.* Nardin, 1 Ad. & El. N. S. 29.

[2] Duncan *v.* Findlater, 6 Cl. & Fin. 894, 910.

[3] Milligan *v.* Wedge, 12 Ad. & El. 737. And see Burgess *v.* Gray, 14 Law Journ. N. S. 184; Quarman *v.* Burnett, 6 M. & W. 499; Rapson *v.* Cubitt, 9 M. & W. 710;

White *v.* Hague, 2 Dowl. & Ry. 33; Earl *v.* Hall, 2 Met. 353. These, and other cases cited in them, devolve the liability on the person who was the master of the enterprise. Other cases, apparently nearly similar in their facts have held the general owner liable; but it will be found, on examination, that in those cases the general owner of the subject was also the master of the work, retaining the management and control, and rendering the contract in essence but a case of mere day labor or ordinary service. See Littledale *v.* Lord Lonsdale, 2 H. Bl. 267, 299; Stone *v.* Codman, 15 Pick. 297; Wanstall *v.* Pooley, 6 Cl. & Fin. 910, n.; Randleson *v.* Murray, 8 Ad. & El. 109; Sly *v.* Edgely, 6 Esp. 6; Matthews *v.* W. Lond. Waterw. Co., 4 Campb. 403; Leslie *v.* Rounds, 4 Taunt. 649. The case of Bush *v.* Steinman, 1 B. & P. 404, in which the owner of a house was held liable for the negligence of laborers employed by a contractor, who had undertaken to repair the house *by the job* was disapproved as an extreme case, by the Ld. Chancellor, in Duncan *v.* Findlater, 6 Cl. & Fin. 903, and by Ld. Brougham, ib. 909; and was doubted by Ld. Denman, in Milligan *v.* Wedge, *supra*, and it has since been overruled in Reedie *v.* N. West Railw. Co., 13 Jur. 659. {The case of Bush *v.* Steinman was examined at considerable length by Thomas, J., in Hilliard *v.* Richardson, 3 Gray (Mass.), 349, and its authority was denied. That case decides that the owner of land who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair; and in accord with this decision is McCarthy *v.* Portland Second Parish, 71 Me. 318; cf. Killea *v.* Faxon, 125 Mass. 485.} By the Assizes Act of 11 Geo. IV. and 1 W. IV., c. 68, § 8, common carriers are rendered liable for the felonious acts of *servants in their employment*. Under this statutory provision, a railway corporation is held liable for the acts of the servants of those who had undertaken, by special contract, to do this part of the business. Machu *v.* London & Southwestern Railw. Co., 12 Jur. 501.

Where several persons are employed in the same service, and one of them is injured by the carelessness of another, the master or employer is not liable: Winterbottom *v.* Wright, 10 M. & W. 109; Strange *v.* McCormick, 3 Am. Law Jour. N. S. 398; Farwell *v.* Boston & Worcester R. R. Corp., 4 Met. 49; Priestley *v.* Fowler, 3 M. & W. 1; Murray *v.* S. Car. R. R. Co., 1 McMull. 385; Hayes *v.* Western R. R. Corp., 3 Cush. 270. [On the whole subject of fellow-servants see Bigelow on Torts, 357–367.] {The general rule is, that the master is not liable to a servant for injuries caused by the negligence of a fellow-servant. This negligence is one of the risks which the servant takes into account in entering the employment: Kelley *v.* Boston Lead Co., 128 Mass. 456; Quincy Mining Co. *v.* Kitts, 42 Mich. 34; Gormley *v.* Ohio, etc. R. R. 72 Ind. 31, and cases *passim*; Summerhays *v.* Kansas, etc. R. R. Co., 2 Col. T. 484; Mullan *v.* Philadelphia S. S. Co., 78 Pa. St. 25; Mansfield Coal & Coke Co. *v.* McEnery, 91 Pa. St. 185. [Baltimore, etc. R. *v.* Baugh, 149 U. S. 368.]

The hardships which this rule has brought about in cases where a large number of persons are employed in dangerous occupations, as railroad and other corporation employees, have caused very general dissatisfaction, and in many States the rule is entirely abrogated, either by the decisions of the court or by express statute. There is a general tendency in the American decisions to hold that one to whom the master entrusts the whole supervision of the employment, or possibly any separate department of the employment, is not a fellow-servant with other servants of the same master, but is a substituted master, and so renders the master liable: Crispin *v.* Babbitt, 81 N. Y. 516; Lake Shore, etc. R. R. Co. *v.* Lavelley, 36 Ohio St. 221; Heiner *v.* Heuvelman, 45 N. Y. Super. Ct. 88; Lake Superior Iron Co. *v.* Erickson, 39 Mich. 492; Devany *v.* Vulcan Iron Works, 4 Mo. App. 236; Brabbets *v.* Chicago, etc. R. R. Co., 38 Wis. 289; Louisville, etc. R. R. Co. *v.* Blair, 1 Tenn. Ch. 351; Lalor *v.* Chicago, etc. R. R. Co., 52 Ill. 401; Speed *v.* Atlantic, etc. R. R. Co., 71 Mo. 303; Brothers *v.* Carter, 52 Mo. 373; Meara *v.* Holbrook, 20 Ohio St. 137.

While, however, this general tendency has been acknowledged in most of the United States, the various decisions of the courts in which they have either stated the principles by which such cases of "substituted master" should be regulated, or have decided in particular instances whether a particular servant occupies such a relation to his master and to the other servants as to constitute him, with regard to them, the representative of the master, in such a way as to render the master liable for the negligence of such servants, if another servant is injured by it, show the greatest variance, and make it impossible in every case to say what the law of that case will be except by comparing the various decisions of the State in which that particular case arises. To follow out the decisions on these points with such minuteness would

evidently be foreign to the plan of a work like this treatise on Evidence. The general principle, so far as it has taken any distinct form, has been described above. To illustrate this principle, the following cases may be of use, and especially if they are compared with the cases cited under the next exception to the general rule, which is closely connected with this exception, by which servants who are employed in distinct departments of the same employment are allowed to sue the master for the negligence of each other.

The captain of a ship is not a fellow-servant of the sailors, but is the agent of the owners of the vessel; and the owners are responsible for injuries resulting to a sailor through the negligence of the captain: Ramsay *v.* Quinn, 8 Irish Rep. (C. L.) 322, declining to follow Wilson *v.* Merry, 1 L. R. (1 Sc. App.) 326, which did not recognize any grade of service. A common laborer and a section "boss" on a railroad are not fellow-servants (Lou. & Nash. R. R. *v.* Blair, 1 Tenn. Ch. 351); nor such a laborer and a depot superintendent (Lalor *v.* Ch., B., & Q. R. R., 52 Ill. 401. Cf. Speed *v.* Atlantic, etc. R. R. Co., 71 Mo. 303); nor the receiver of a railroad and an employee of the road (Meara Adm. *v.* Holbrook, 20 Ohio St. 137). This distinction has been denied in Massachusetts: Albro *v.* Agawam Canal Co., 6 Cush. 75; Zeigler *v.* Day, 123 Mass. 152. In a North Carolina case, it was held that a railroad company is liable to an employee injured by the negligence of a superior fellow-servant, whose directions he is bound to obey: Cowles *v.* Richmond, etc. R. R. Co., 84 N. C. 309. This is undoubtedly too broad a statement of the rule.

There has also been a limitation to the rule established, that, if the two servants are employed in totally distinct departments of the employment, they are not fellow-servants in such a sense as to exculpate the master (Ryan *v.* Chicago, etc. R. R. Co., 60 Ill. 171); *e. g.* those who supply machinery are not fellow-servants with those who use it (Ford *v.* Fitchburg R. R. Co., 110 Mass. 240; Flike *v.* Boston, etc. R. R. Co., 53 N. Y. 549; Vautrain *v.* St. Louis, etc. Ry. Co., 8 Mo. App. 538). But the decisions are very conflicting, and the best ones seem to limit the cases where a liability is imposed on the master so strictly as to render the distinction of not much value. Thus it has been held that a laborer and engineman engaged together in the depot grounds (Chicago, etc. R. R. Co. *v.* Murphy, 53 Ill. 336), were fellow-servants. So of a milesman and general traffic manager (Carney *v.* Belfast, etc. Ry. Co., Ir. Law T. 217, 1875); and a workman in the colliery and the manager (Harrell *v.* Landen Steel Co., 31 L. T. N. S. 433) are. So are a road-master and a laborer employed by him to work in repairing the road (Lawler *v.* Androscoggin R. R. Co., 62 Me. 463); or a road-master and an engineer or a fireman (Walker *v.* Boston, etc. R. R. Co., 128 Mass. 8); and a telegraph operator at a railroad station and an engineer (Dana *v.* New York, etc. R. R. Co., 23 Hun (N. Y.) 473); so a switchman and the engineer of a switch-engine (Chicago, etc. R. R. Co. *v.* Henry, 7 Ill. App. 322). Cf. Albro *v.* Agawam Canal Co., 6 Cush. 75; Brown *v.* Maxwell, 6 Hill 592; Coon *v.* Syracuse, etc. R. R. Co., 6 Barb. 231; Ryan *v.* Cumberland, etc. R. R. Co., 23 Pa. St. 389; Hutchinson *v.* York, etc. Ry. Co., 5 W. H. & G. 343; Wigmore *v.* Jay, ib. 354; Seymour *v.* Maddox, 16 Ad. & El. N. S. 326. And some cases go so far as to hold that all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence: Wonder *v.* B. & Oh. R. R. Co., 32 Md. 411; Hard *v.* Vt., etc. R. R., 32 Vt. 473.

Another attempt (less legitimate than the two former ones) has been made to avoid the hardships of this rule, by submitting the question of whether the servants are in a a common employment to the jury: Hass *v.* Philadelphia S. S. Co., 88 Pa. St. 269; Holton *v.* Daly, 4 Ill. App. 25; Devine *v.* Tarrytown, etc. Gaslight Co., 22 Hun (N. Y.) 26.

On some points, however, the liability of the master for negligence, even towards his servant, is unquestioned; for instance, that the master must provide suitable servants, machinery, and materials, is universally conceded: McMahon *v.* Henning, 1 McCrary C. C. 516; Painton *v.* Northern Cent. R. R. Co., 83 N. Y. 7; Kain *v.* Smith, 80 id. 458; Holden *v.* Fitchburg R. R. Co., 129 Mass. 268; Stetler *v.* Chicago, etc. R. R. Co., 49 Wis. 609; Fuller *v.* Jewett, 80 N. Y. 46; Brann *v.* Chicago, etc. R. R. Co., 53 Iowa 595; Ford *v.* Fitchburg R. R. Co., 110 Mass. 241; Albro *v.* Agawam Canal Co., 6 Cush. 75. (It has been held that this does not include supplying the rooms in mills and large buildings with fire-escapes: Keith *v.* Granite Mills, 126 Mass. 90; Jones *v.* Same, 126 id. 84); though it is held that reasonable diligence in selection is all that is required (Little Rock, etc. R. R. Co. *v.* Duffey, 35 Ark. 602; Chicago, etc. R. R. Co. *v.* Mahoney, 4 Ill. App. 262; Cowles *v.* Richmond, etc. R. R. Co., 84 N. C. 309; Kranz *v.* White, 8 Ill. App. 583.

Cf. Porter *v.* Hannibal, etc. R. R. Co., 71 Mo. 66; Mansfield Coal & Coke Co. *v.* McEnery, 91 Pa. St. 185). The burden of proving lack of ordinary care is on the plaintiff, as in all cases where negligence is the gist of the action: Kranz *v.* White, *sup.;* Porter *v.* Hannibal, etc. R. R. Co., *sup.;* De Graff *v.* New York Central, etc. R. R. Co., 76 N. Y. 125; Crandall *v.* McIlrath, 24 Minn. 127; Nolan *v.* Schickle, 3 Mo. App. 300. The master is also bound to notify the servant of any special danger known to him, and not open to the observation of the servant as well: Smith *v.* Oxford Iron Co., 42 N. J. L. 467; Dowling *v.* Allen, 6 Mo. App. 195; Baxter *v.* Roberts, 44 Cal. 187; Perry *v.* Marsh, 25 Ala. 659; Williams *v.* Clough, 3 H. & N. 258; Murphy *v.* Phillips' Ex. 24 W. R. 647.

But the servant cannot recover damages of his master for injuries resulting from the risks attendant upon the employment, if he knows of their existence: Deforest *v.* Jewett, 23 Hun (N. Y.) 490; Cowles *v.* Richmond, etc. Ry. Co., 84 N. C. 309; Chicago, etc. R. R. Co. *v.* Abend, 7 Ill. App. 130; Sowden *v.* Idaho Quartz Mining Co., 55 Cal. 443; Kelley *v.* Silver Spring Bleaching Co., 12 R. I. 112; Holmes *v.* Clark, 7 H. & N. 937; Coombs *v.* N. B. Cordage Co., 102 Mass. 572; Hayden *v.* Smithville Manuf. Co., 29 Conn. 548; Rose *v.* B. & A. R. R. Co., 58 N. Y. 217. But if the servant notifies the master of a probable danger against which the master in good faith ought to provide, but neglects so to do, and the servant, by request, continuing his services as before, is injured, he may recover: Hough *v.* Texas, etc. R. R. Co., 100 U. S. 213; Conroy *v.* Vulcan Iron Works, 6 Mo. App. 102; Patterson *v.* Pitts. & Conn. R. R. Co., 76 Pa. St. 389. See also, upon the general question of the liability of the master to his servant, a valuable paper prepared by Judge Cooley, with his usual accuracy and fulness, which contains this summary: "Perhaps this whole subject may be summed up in a single sentence as follows: The rule that the master is responsible to persons who are injured by the negligence of those in his service is subject to this general exception, that he is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty there resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence, as for a personal fault:" Southern Law Review, vol. ii. N. S. No. 1, April, 1876.]

COVENANT.[1]

§ 233. **No general Issue.** In this action, by the common law, there is *no general issue* or plea, which amounts to a general traverse of the whole declaration, and of course obliges the plaintiff to prove the whole;[2] but the evidence is strictly confined to the particular issue raised by a special plea, such as *non est factum*, which will be treated under the head of Deed; and Duress, Infancy, Release, etc., which will be considered under those titles. The liability of an heir, on the covenant of his ancestor, will be treated under the head of Heir.

§ 234. **Non est Factum.** If the deed is not put in issue by the plea of *non est factum*, the defendant, by the rules of the common law, is understood to *admit so much of the deed* as is spread upon the record. If the plaintiff would avail himself of any other part of the deed, he must prove the instrument, by the attesting witnesses, or by secondary evidence in the usual way.[1]

§ 235. **Conditions Precedent.** If the plaintiff's right of action depends on the performance of a *condition precedent*, which is put in issue, he must prove a performance according to the terms of the covenant. It will not suffice, in an action on a specialty, to show that other terms have been substituted by parol, although the substituted agreement has been fully performed.[1] Thus, where the plaintiff sued in covenant for the agreed price for building two houses, which he bound himself to finish by a certain day, and averred performance in the terms of the covenant, proof of a parol enlargement of the time, and of performance accordingly, was held inadmissible.[2]

§ 236. **Breach of Covenant.** The *breach*, also, must be proved as laid in the declaration. And here it is a general principle, that

[1] For a full and an elaborate discussion of the doctrine of Covenants for Title, the student is referred to the recent work of Mr. Rawle on that subject.

[2] 1 Chitty on Pl. 428. In some of the United States, under statutes for the abolishment of special pleading, the plea of *non est factum* has been adopted in practice, as being in effect a general traverse of the declaration: Granger *v.* Granger, 6 Ohio 41; Provost *v.* Calder, 2 Wend. 517.

[1] Williams *v.* Sills, 2 Campb. 519; *ante*, Vol. I. §§ 569–582.

[1] Chitty on Pl. 280; 3 T. R. 592. But if the original agreement was not under seal, evidence of a parol enlargement of the time, with performance accordingly, is admissible: *ante*, Vol. I. § 304.

[2] Littler *v.* Holland, 3 T. R. 590. And see Maryon *v.* Carter, 4 C. & P. 295; Paradine *v.* Jane, Aleyn 26; Campbell *v.* Jones, 6 T. R. 571.

where the party destroys that which was a subject of his agreement, or voluntarily puts it out of his power to perform that which he engaged to perform, it is a breach of his covenant.[1] Thus, if he covenant to deliver the grains, made in his brewery, and before delivery he renders them unfit for use by mixing hops with them;[2] or, to deliver up a certain obligation of the covenantee, and before delivery he recovers judgment upon it;[3] or, to permit the covenantee to sue in his name, agreeing to assign to him the judgment when recovered, and before assignment he releases the judgment debtor;[4] or, that certain goods of a debtor shall be forthcoming to the officer, and in the meantime he causes them to be seized on process in his own favor,[5] — the covenant is broken. And in regard to covenants of *indemnity*, this distinction has been taken, — that where the covenant is to indemnify against a liability already incurred, it is not broken till the covenantee is sued upon that liability; but where the debt or duty may accrue in future, the covenant is broken whenever the liability to a suit arises.[6]

§ 237. **Same Subject.** It will be sufficient, as we have already seen,[1] to prove the breach *substantially* as laid; but it must also appear that the covenant is *substantially broken*. If the allegation is of a total loss or destruction, it will be supported by proof of a

[1] Hopkins *v.* Young, 11 Mass. 302; {Greenwood *v.* Wilton Railw., 23 N. H. 261.} But if the covenantor involuntarily becomes unable to perform, but the disability is removed before the day of performance arrives, it is no breach: Heard *v.* Bowers, 23 Pick. 455. Where the performance of a duty is rendered impossible, by the act of God, if the duty was created by the law alone, he is excused; but if the duty was created by his own contract, he is still answerable for the non-performance. See Platt on Covenants, p. 582, and cases there cited: Regina *v.* Justices of Leicestershire, 15 Ad. & El. N. S. 88. A covenant to *keep* in repair is broken if the lessee pull down the buildings; but a covenant to *leave* the premises in repair is not, provided he rebuilds them within the term: Shep. Touchst. p. 173.

[2] Griffith *v.* Goodhand, T. Raym. 464. And see Mayne's Case, 5 Co. 21.

[3] Teat's Case, Cro. El. 7.

[4] Hopkins *v.* Young, 11 Mass. 302.

[5] Whitman *v.* Slack, 1 Harringt. 144. The neglect of an officer to return an execution, under which he has sold an equity of redemption, has been held a breach of the covenant in his deed of sale, that he had obeyed all the requisitions of law in the proceeding: Wade *v.* Merwin, 11 Pick. 280. {When the covenant is in the alternative, the covenantor has an election which to perform, and if he does either there is no breach: Stewart *v.* Bedell, 79 Pa. St. 336. It is sufficient proof of the breach of a covenant against incumbrances if it is proved that there was an existing incumbrance at the time the covenant was made: Chapman *v.* Kimball, 7 Neb. 399. Where there was a covenant prohibiting the erection of a forge or furnace for the manufacturing of iron, proof of the erection of buildings in which were forges for heating, moulding, and working iron was held not to amount to proof of a breach thereof: Rogers *v.* Danforth, 1 Stockt. (N. J.) 289. A covenanted to convey to B certain land, "being the same land which was purchased from government by C & D, and by said C & D sold to A." It was held that parol evidence was inadmissible to show that the land intended to be embraced in the covenant was land conveyed to A by C alone, or D alone, for the covenant was not silent or ambiguous on that subject: Marshall *v.* Haney, 4 Md. 498. A covenant for payment of a sum certain, although the duty does not accrue until after notice given, cannot be discharged by parol before breach: Spence *v.* Healey, 20 Eng. L. & Eq. 337.}

[6] 3 Com. Dig. 110, Condition I.; Lewis *v.* Crockett, 3 Bibb 196.

[1] *Ante*, Vol. I. §§ 56–74

partial loss; for it is the loss or damage, and not the extent of it, which is the substance of the allegation.[2] So, where the tenant covenanted to keep the trees in an orchard whole and undefaced, reasonable use and wear only excepted, the cutting down of trees past bearing was held to be no breach; for the preservation of the trees for fruit was the substance of the covenant.[3] But where the breach assigned was, that the tenant had not used the farm in a husband-like manner, but, on the contrary, had committed waste, evidence of acts not amounting to waste was held inadmissible; for the waste was the substance of the allegation.[4]

§ 238. **Notice of Breach.** In regard to the averment of proof of *notice* to the defendant, a distinction is taken between things lying more properly in the knowledge of the plaintiff, and things lying in the knowledge of the defendant, or common to them both. In the former case, the plaintiff must aver and prove notice to the defendant. But where the party bound has the same means of ascertaining the event on which his duty arises, as the party to whom he is bound, neither notice nor request is necessary to be proved.[1]

§ 239. **Where Defendant is Assignee.** Where the *defendant is sued as assignee of the original covenantor,* and the issue is on the assignment, it will be sufficient for the plaintiff to give evidence of any facts from which the assignment may be inferred; such as possession of the premises leased, or payment of rent to the plaintiff.[1]

[2] *Ante*, Vol. I. § 61.

[3] 2 Stark. Ev. 248, cites Good *v.* Hill, 2 Esp. 690.

[4] Harris *v.* Mantle, 3 T. R. 307. And see *ante*, Vol. I. § 52.

[1] Chitty on Plead. 286; Keys *v.* Powell, 2 A. K. Marsh. 253; Peck *v.* McMurtry, ib. 358; Muldrow *v.* McCleland, 1 Littell 1.

[1] Williams *v.* Woodward, 2 Wend. 487; ib. 563; Derisley *v.* Custance, 4 T. R. 75; Platt on Cov. 64; Holford *v.* Hatch, Doug. 178; Hare *v.* Cator, Cowp. 766. On the liability of an assignee, see Platt on Cov. 400–465. In the declaration against an assignee, the assignment is alleged, as in the following precedent of a declaration *by a lessor, against the assignee of his lessee,* for non-payment of rent.

"In a plea of covenant. For that whereas heretofore to wit, on the —— day of ——, by a certain indenture then made between the plaintiff of the one part and one C. D. of the other part, one part whereof, sealed with the seal of the said C. D., the plaintiff now brings here into court, the plaintiff demised and leased to the said C. D. a certain messuage, lands, and premises situated in ——, to have and to hold the same to the said C. D. and his assigns from the —— day of ——, for the full term of —— years then next ensuing; yielding and paying therefor to the plaintiff the clear yearly rent of ——, payable [*here describe the mode and times of payment*], which rent the said C. D. did thereby for himself and his assigns covenant to pay to the plaintiff accordingly. By virtue of which demise, the said C. D. on the —— day of —— entered into the same premises, and was possessed thereof for the term aforesaid.(*) And after the making of said indenture, and during the term aforesaid, to wit, on the —— day of —— [*naming any day before the breach*], all the estate and interest of the said C. D. in said term, then unexpired, by an assignment thereof then made, came to and was vested in the defendant, who thereupon entered into the said demised premises and became possessed thereof, and continued so possessed from thence hitherto [*or,* 'until the —— day of ——']. Now, the plaintiff in fact says, that after the making of said assignment, and during the said term, and before the commencement of this suit, to wit, on the —— day of ——, the sum of —— of the rent aforesaid became due and was owing to the plaintiff from the said defendant, and still is in arrear and unpaid, contrary to the covenant aforesaid."

For it is never necessary either to allege or prove the title of the adverse party with as much precision as in stating one's own. Yet if the plaintiff does allege the particulars of the defendant's title, he must prove them as laid.[2] Under an issue on the assignment, the defendant may show that he holds as an under-tenant, and not as an assignee;[3] or, that he is an assignee, not of all, but only of a part of the premises.[4] He may also show in defence, under a proper plea, that the covenant was broken, not by himself, but by another person, to whom he had previously assigned all his interest in the premises; and in such case it is not necessary for him to prove either the assent of the assignee, or notice to his own lessor of the assignment.[5] It has been held, that where the lessee of a term of years assigns his interest by way of mortgage, the mortgagee is not liable to the landlord, as assignee, until he has entered upon the demised premises;[6] but this doctrine has since been overruled, and the mortgagee held liable as assignee, before entry.[7] But an executor is not liable as assignee, without proof of an actual entry.[8]

§ 240. **Where Plaintiff is Assignee.** But where the *plaintiff claims as assignee*, he must precisely allege and prove the conveyances, or other mediums of title, by which he is authorized to sue.[1] If he

[2] Stephen on Pleading, pp. 337, 338; Turner *v.* Eyles, 3 B. & P. 456, 461; 2 Phil. Ev. 151 (7th ed.); *ante*, Vol. I. § 60.

[3] Holford *v.* Hatch, 1 Doug. 182; Earl of Derby *v.* Taylor, 1 East 502.

[4] Hare *v.* Cator, Cowp. 766.

[5] Pitcher *v.* Tovey, 1 Salk. 81; Taylor *v.* Shum, 1 B. & P. 21.

[6] Eaton *v.* Jaques, 2 Doug. 455. It is still held, that the mortgagee of a ship is not liable as owner, until he takes possession: Brooks *v.* Bondsey, 17 Pick. 441; Colson *v.* Bonzey, 6 Greenl. 474; Abbott on Shipping, p. 19; Briggs *v.* Wilkinson, 7 B. & C. 30.

[7] Williams *v.* Bosanquet, 1 B. & Bing. 238; 4 Kent Comm. 145; Woodfall's Law of Landl. & Ten. p. 183 (5th ed. by Wollaston). *Sed quære;* and see Astor *v.* Hoyt, 5 Wend. 603; Astor *v.* Miller, 2 Paige 68; Bourdillon *v.* Dalton, 1 Esp. 234; Cook *v.* Harris, 1 Ld. Raym. 367; Co. Lit. 46 *b*; R. *v.* St. Michaels, 2 Doug. 630, 632; Blaney *v.* Bearce, 2 Greenl. 132; McIver *v.* Humble, 16 East 199.

[8] Buckley *v.* Pirk, 1 Salk. 316; Jevans *v.* Harridge, 1 Saund. 1 n. (1), by Williams.

[1] Steph. on Plead. p. 338. In an action by an assignee, his title is set forth as in the following precedent of a declaration by a *grantee of the reversion, against the lessee of his grantor*, for non-payment of rent: —

"In a plea of covenant. For that whereas heretofore, to wit, on the —— day of ——, one J. S. was seised in his demesne as of fee of and in the following described messuage, land, and tenements, situated in —— [*here describe the premises*]. And being so seised, on the same day, by a certain indenture made between him of the one part and the defendant of the other part, one part whereof, sealed with the seal of the said defendant, the plaintiff now here brings into court [*or*, which indenture being in neither part in the possession, custody, or control of the plaintiff, he cannot produce in court], the said J. S. demised the same premises to the defendant [*here proceed, mutatis mutandis, as far as this mark* (*) *in the preceding form*]. And after the making of said indenture, to wit, on the —— day of —— the said J. S., being seised of the reversion of said estate, by his deed of bargain and sale [*or, if in any other form of conveyance, state it*], duly executed, acknowledged, and recorded, and now here by the plaintiff produced in court, for a valuable consideration therein mentioned [bargained, sold], and conveyed the said reversion of and in the said premises to the plaintiff, to have and to hold the same with the appurtenances to the plaintiff and his heirs and assigns for ever; by virtue of which deed the plaintiff thereupon became seised of the said reversion according to the tenor of the same, and has ever since continued to be so seised thereof. Now the plaintiff in fact says that after the making of said deed [of bargain and sale] and during the said term [*conclude as in the preceding form*]."

claims as assignee of a covenant real, he must show himself grantee of the land, by a regular legal conveyance, from a person having capacity to convey.[2] And in regard to *covenants real*, on which any grantee of the land may sue the grantor in his own name, or may be sued, it may not be improper here to observe, (1) that they are always such as have real estate for their subject-matter; and (2) that they run with the land, that is, that they accompany the lawful seisin, and are prospective in their operation. If there is no seisin, the covenant remains merely personal.[3] The object of these covenants is threefold: (1.) To preserve the inheritance, such as covenants to keep in repair;[4] and covenants to keep the building insured against fire, and, if they are burned, to reinstate them with the insurance-money.[5] (2.) To continue the relation of landlord and tenant, &c., such as to pay rent;[6] to do suit to the lessor's mill,[7] or to grind the tenant's corn;[8] and for renewal of leases.[9] (3.) To protect the tenant in the enjoyment of the land. Of this class are, the covenant to warrant and defend the premises, to him and his heirs and assigns, against all lawful claims and demands;[10] to make further assurance;[11] to remove incumbrances;[12] to release suit and service;[13] to produce title-deeds in any action, in support or defence

[2] Milnes *v.* Branch, 5 M. & S. 411; Roach *v.* Wadham, 6 East 289; 2 Sugd. Vend. 479, 489–491; Randolph *v.* Kinney, 3 Rand. 394; Beardsley *v.* Knight, 4 Vt. 471. [A quit-claim deed is sufficient: Walton *v.* Campbell, 51 Neb. 788. A covenant by the reversioner does not run with the life estate: Rochester Lodge *v.* Graham, 65 Minn. 457.] The action for breach of a covenant real lies only for him who held the land at the time of the breach. A mesne covenantee or owner has no right of action for damages, until he has paid them to those who have come in under himself: Chase *v.* Weston, 12 N. H. 413.

[3] Platt on Covenants, p. 63; Shep. Touchst. 171; Spencer's Case, 5 Co. 16; Norman *v.* Wells, 17 Wend. 136; Nesbit *v.* Nesbit, Cam. & Nor. 324; Slater *v.* Rawson, 1 Met. 450. The nature of covenants real is discussed in 4 Cruise's Dig. tit. 32, c. 26, § 23, n. (Greenleaf's ed.).

[4] Platt on Cov. 65, 267; Lougher *v.* Williams, 3 Lev. 92; Demarest *v.* Willard, 8 Cow. 206; Norman *v.* Wells, 17 Wend. 148; Pollard *v.* Shaaffer, 1 Dall. 210; Shelby *v.* Hearne, 6 Yerg. 512; Kellogg *v.* Robinson, 6 Vt. 276; Sampson *v.* Easterby, 9 B. & C. 505.

[5] Vernon *v.* Smith, 5 B. & Ad. 1, per Best, J.; Platt on Cov. 185; Thomas *v.* Von Kapff, 6 G. & J. 372; [Northern Trust Co. *v.* Snyder, 46 U. S. App. 179, 587.]

[6] Stevenson *v.* Lambard, 5 East 575; Holford *v.* Hatch, 1 Doug. 183; Hurst *v.* Rodney, 1 Wash. C. C. 375.

[7] This is a real covenant as long as the lessor owns both the mill and the reversion: Vivyan *v.* Arthur, 1 B. & C. 410; 42 E. III. 3; 5 Co. 18. [A covenant by a lessee not to sell or permit to be sold upon the premises any spirits not furnished by the lessor runs with the land, though the lessee's assigns are not named; and the lessor may enforce it though he has parted with the reversion: White *v.* Southend Hotel Co., 1897, 1 Ch. 767. But see Bragdon *v.* Blaisdell, 91 Me. 326.]

[8] Dunbar *v.* Jumper, 2 Yeates 74; Kimpton *v.* Walker, 9 Vt. 191.

[9] Spencer's Case, Moore 159; Platt on Cov. 470; 12 East 469, per Ld. Ellenborough; Isteed *v.* Stonely, 1 And. 82.

[10] Shep. Touchst. 161; Marston *v.* Hobbs, 2 Mass. 433; Withy *v.* Mumford, 5 Cow. 137; Van Horn *v.* Crain, 1 Paige 455.

[11] Middlemore *v.* Goodale, Cro. Car. 503.

[12] Sprague *v.* Baker, 17 Mass. 586. {Or a covenant against incumbrances: Cole *v.* Kimball, 52 Vt. 639.} But a covenant that the land is not incumbered, is personal only: Clark *v.* Swift, 3 Met. 390.

[13] Co. Lit. 384 *b*.

of the grantee;[14] for quiet enjoyment;[15] never to claim or assert title to the premises;[16] to supply the premises with water;[17] to open a street on which the land granted is bounded;[18] not to establish or permit another mill on the same stream which propels the mill granted;[19] not to erect a building on grounds dedicated by the covenantor to the public, in front of lands conveyed by the covenantor to the assignor of the plaintiff;[20] or to use the land in a particular manner, for the advantage of the grantor;[21] and the like.[22] When any of these covenants are broken, after the land has been conveyed to the assignee, the general rule is, that he alone has the right to sue for the damages;[23] but if, by the nature and terms of the assignment, the assignor is bound to indemnify the assignee against the breach of such covenants, it seems that the assignor may sue in his own name.[24]

§ 241. **Covenant of Seisin.** To prove a breach of the *covenant of seisin* it is necessary to show, that the covenantor was not seised in fact; for this covenant is satisfied by any seisin in fact, though it were by wrong, and defeasible.[1] But though the covenantor was in possession of the land at the time of the conveyance, yet if he did

[14] 4 Cruise, Dig. 393, tit. 32, c. 25, § 99 (Greenleaf's ed.); Barclay *v.* Raine, 1 Sim. & Stu. 449; Platt on Cov. 227; 10 Law Mag. 353–357.

[15] Noke *v.* Awder, Cro. El. 373, 436; Campbell *v.* Lewis, 3 B. & Ald. 392; Platt on Cov. 470; Markland *v.* Crump, 1 Dev. & Bat. 94; Heath *v.* Whidden, 11 Shepl. 383; Williams *v.* Burrell, 1 M. G. & S. 402.

[16] Fairbanks *v.* Williamson, 7 Greenl. 97. And if the subject of the conveyance be an estate in expectancy, by an heir or devisee, and the conveyance is lawful, it attaches to the estate when it comes to the grantor, in whose hands it instantly enures to the benefit of the grantee, and thereupon the covenant becomes a covenant real: Trull *v.* Eastman, 3 Met. 121; Somers *v.* Skinner, 3 Pick. 52.

[17] Jordain *v.* Wilson, 4 B. & Ald. 266. So a covenant by the grantor of a mill-pond and land, to draw off the water six days in a year, upon request, is a covenant real: Morse *v.* Aldrich, 19 Pick. 449.

[18] Dailey *v.* Beck, 6 Penn. Law Jour. 383.

[19] Norman *v.* Wells, 17 Wend. 136.

[20] Watertown *v.* Cowen, 4 Paige 510. And see s. P. Mann *v.* Stephens, 10 Jur. 650. {Or to erect a building on certain lands: Georgia Southern Ry. Co. *v.* Reeves, 64 Ga. 492. Cf. Gawtry *v.* Leland, 31 N. J. Eq. 385.}

[21] Hemminway *v.* Fernandez, 13 Sim. 228.

[22] {In National Union Bank *v.* Segur, 39 N. J. L. 173, it is said that a covenant which confers an immediate, permanent, and beneficial effect on the uses to which real estate is put will run with the land.}

[23] [McGuckin *v.* Milbank, 152 N. Y. 297. The right of action for breach of covenant does not run with the land: Provident Life Co. *v.* Seidel, 127 Pa. 232; Smith *v.* Richards, 155 Mass. 79; Woodward *v.* Brown, 119 Cal. 283.]

[24] Griffin *v.* Fairbrother, 1 Fairf. 81; Bickford *v.* Paige, 2 Mass. 460; Kane *v.* Sanger, 14 Johns. 89; Niles *v.* Sawtel, 7 Mass. 444.

[1] Marston *v.* Hobbs, 2 Mass. 433; Bearce *v.* Jackson, 4 id. 408; Twombly *v.* Henley, ib. 441; Prescott *v.* Trueman, ib. 627; Chapel *v.* Bull, 17 id. 213; Wait *v.* Maxwell, 5 Pick. 217; Wheaton *v.* East, 5 Yerg. 41; Willard *v.* Twitchell, 1 N. H. 177; Backus *v.* McCoy, 3 Ohio 220. [*Contra*, Allen *v.* Allen, 48 Minn. 462.] But see Richardson *v.* Dorr, 5 Vt. 21; Lackwood *v.* Sturdevant, 6 Conn. 385. And see, as to this covenant, 4 Cruise's Dig. tit. 32, c. 26, § 48, n. (Greenleaf's ed.). If the grantor's seisin is alleged to have been defeated by an official sale for the non-payment of taxes, the plaintiff must prove the validity of the assessment and sale, with the same strictness as if he were the purchaser under the sale, enforcing his title in an ejectment: Kennedy *v.* Newman, 1 Sandf. 187.

not exclusively claim it as his own, the covenant is broken.[2] So, if there was a concurrent seisin by another, as tenant in common;[3] or, if there was an adverse seisin of a part of the land, within the boundaries described in the deed.[4] But if the possession by a stranger was not adverse, it is no breach.[5]

§ 242. **Freedom from Incumbrances.** The covenant of *freedom from incumbrances* is proved to have been broken, by any evidence, showing that a third person has a right to, or an interest in, the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance.[1] Therefore a public highway over the land;[2] a claim of dower;[3] a private right of way;[4] a lien by judgment,[5] or by mortgage, made by the grantor to the grantee,[6] or any mortgagee, unless it be one which the covenantee is bound to pay;[7] or any other outstanding elder and better title,[8] — is an incumbrance, the existence of which

[2] Wheeler *v.* Hatch, 3 Fairf. 389. {Where a grantor covenants against incumbrances for his heirs, but not for himself, as the covenant is broken as soon as made, he must be taken to have covenanted for himself. Otherwise, perhaps, as to warranty: Smith *v.* Lloyd, 29 Mich. 382.}

[3] Sedgwick *v.* Hollenback, 7 Johns. 376.

[4] Wilson *v.* Forbes, 2 Dev. 30. But it is not necessary to prove an eviction: Bird *v.* Smith, 3 Eng. 368.

[5] Commonwealth *v.* Dudley, 10 Mass. 403. {A deed of land reciting a pecuniary consideration, and to take effect after the death of the grantor, upon condition of certain services to be rendered him, amounts to a covenant to stand seised to the grantor's use, though there is no relationship of blood or marriage between the parties: Trafton *v.* Hawes, 102 Mass. 530.}

[1] Prescott *v.* Trueman, 4 Mass. 627, 629, per Parsons, C. J. See, as to this covenant, 4 Cruise's Dig. tit. 32, c. 26, § 59, n. (Greenleaf's ed.).

[2] Kellogg *v.* Ingersoll, 2 Mass. 97, 101; Pritchard *v.* Atkinson, 3 N. H. 335; Hubbard *v.* Norton, 10 Conn. 431; {Beach *v.* Miller, 51 Ill. 206; Burk *v.* Hill, 48 Ind. 52; [Copeland *v.* McAdam, 100 Ala. 553.] *Contra*, Jordan *v.* Eve, 31 Gratt. (Va.) 1; [Harrison *v.* Des Moines, etc. R., 91 Ia. 114.] Cf. Cincinnati *v.* Brachman, 35 Ohio St. 289. [The right of a city to open a street without paying damages is an incumbrance: Evans *v.* Taylor, 177 Pa. 286.] And so is an assessment for betterments on account of the widening of a street, although at the time of the conveyance the grantee had only constructive notice of the widening: Blackie *v.* Hudson, 117 Mass. 181.} [An assessment for a sewer is an incumbrance: Smith *v.* Abington Bank, 165 Mass. 285.]

[3] 4 Mass. 630. Even though inchoate only: Porter *v.* Noyes, 2 Greenl. 22; Shearer *v.* Ranger, 22 Pick. 447.

[4] Harlow *v.* Thomas, 15 Pick. 68; Mitchell *v.* Warner, 5 Conn. 497. {And this is so, although the existence of the way was well known to the grantee at the time of the purchase: Butler *v.* Gale, 27 Vt. 739. So a right to flow the land: Patterson *v.* Sweet, 3 Ill. App. 550.}

[5] Jenkins *v.* Hopkins, 8 Pick. 346; Smith *v.* M'Campbell, 1 Blackf. 100; Hall *v.* Dean, 13 Johns. 105.

[6] Bean *v.* Mayo, 5 Greenl. 94.

[7] Watts *v.* Welman, 2 N. H. 458; Tufts *v.* Adams, 8 Pick. 547; Funk *v.* Voneida, 11 S. & R. 109; Stewart *v.* Drake, 4 Halst. 139; Wyman *v.* Ballard, 12 Mass. 304.

[8] Prescott *v.* Trueman, 4 Mass. 627; Chapel *v.* Bull, 17 id. 213; Porter *v.* Taylor, 6 Vt. 676; Garrison *v.* Sandford, 7 Halst. 261; {Sheetz *v.* Longlois, 69 Ind. 401. If land partly occupied by a railroad is conveyed with the usual covenants, the covenant against incumbrances may be broken, but not that against seisin: Kellogg *v.* Mabin, 50 Mo. 496. In Smith *v.* Hughes, 50 Wis. 620, it is held that the grantee in such a case is presumed to know of the incumbrance, and there is no breach of the usual covenants. Cf. Desvergers *v.* Willis, 56 Ga. 515. An attachment or an assessment for

is a breach of this covenant. In these and the like cases, it is the existence of the incumbrance which constitutes the right of action; irrespective of any knowledge on the part of the grantee,[9] or of any eviction of him, or of any actual injury it has occasioned to him. If he has not paid it off, nor bought it in, he will still be entitled to nominal damages, but to nothing more;[10] unless it has ripened into an indefeasible estate; in which case he may recover full damages.[11] It is not competent for the plaintiff to enhance the damages by proof of the diminished value of the estate, in consequence of the existence of the incumbrance, as, for example, a prior lease of the premises, unless he purchased the estate for the purpose of a resale, and this was known to the grantor at the time of the purchase.[12]

§ 243. **Quiet Enjoyment.** The covenant for *quiet enjoyment* goes to the possession and not to the title; and, therefore, to prove a breach, it is ordinarily necessary to give evidence of an entry upon

betterments, or a tax, if a lien on land, is within the covenant against incumbrances: Kelsey *v.* Remer, 43 Conn. 129; Barlow *v.* St. Nichols Nat. Bank, 63 N. Y. 399; Briggs *v.* Morse, 42 Conn. 258; Carr *v.* Dooley, 119 Mass. 294; Blackie *v.* Hudson, 117 id. 181. A stipulation in a deed-poll that the grantee, his heirs and assigns, shall erect and perpetually maintain a fence between the granted premises and the land adjoining, does not create an incumbrance on the granted premises. Parish *v.* Whitney, 3 Gray (Mass.) 516; Plymouth *v.* Carver, 16 Pick. (Mass.) 183.} [The following are incumbrances: An unpaid tax, Maddocks *v.* Stevens, 89 Me. 336; an outstanding lease, Clark *v.* Fisher, 54 Kans. 403; a lien for improvements, Lafferty *v.* Milligan, 165 Pa. 534.]

The declaration *by a grantee*, by a deed of bargain and sale, *against his grantor* for breach of the *covenant of freedom from incumbrance*, by the existence of a paramount title, is in this form: —

" —— in a plea of covenant; for that the said defendant, on the —— day of ——, by his deed [*if by indenture it should be so set forth*], duly executed, acknowledged, and recorded, and by the plaintiff now here produced in court, for a valuable consideration therein mentioned, bargained, sold, and conveyed to the plaintiff [*here describe the premises*], to have and to hold the same with the appurtenances to the plaintiff and his heirs and assigns for ever; and therein, among other things, did covenant with the plaintiff (*) that the said premises were then free from all incumbrance whatsoever. Now the plaintiff in fact says that, at the time of making the said deed, the premises aforesaid were not free from all incumbrance; but, on the contrary, the plaintiff avers that at the time of making said deed one E. F. had the paramount and lawful right and title to the same premises; by reason whereof the plaintiff has been obliged to expend, and has expended, a great sum of money, to wit, the sum of ——, in extinguishing the said paramount and lawful right and title of the said E. F. to said premises."

[9] [Evans *v.* Taylor, 177 Pa. 286; Yancey *v.* Tatlock, 93 Ia. 386; Page *v.* Midland R., 1894, 1 Ch. 11.]

[10] Ibid.; Delavergne *v.* Norris, 7 Johns. 358; Stanard *v.* Eldridge, 16 id. 254; Bean *v.* Mayo, 5 Greenl. 94; Wyman *v.* Ballard, 12 Mass. 304; [O'Meara *v.* McDaniel, 49 Kans. 685;] {Norton *v.* Colgrove, 41 Mich. 544; Bundy *v.* Ridenour, 63 Ind. 406. The amount recovered cannot in any case exceed the consideration of the deed, or the amount paid to buy in the incumbrance: Andrews *v.* Appel, 22 Hun (N. Y.) 429; Lowrance *v.* Robertson, 10 S. C. 8. The covenant against incumbrances is broken at the time it is made, if an incumbrance exists at that time, and the statute of limitations begins to run from that date: Chapman *v.* Kimball, 7 Neb. 399;} [Bellamy *v.* Chambers, 50 id. 146; Corbett *v.* Wrenn, 25 Or. 305.]

[11] Chapel *v.* Bull, 17 Mass. 213.

[12] Batchelder *v.* Sturgis, 3 Cush. 201. [The purchaser under such a covenant may recover damages due to the fact that the incumbrance causes the land to bring less at sale under foreclosure of mortgage given by him: McGuckin *v.* Milbank, 152 N. Y. 297.]

the grantee, or of expulsion from, or some actual disturbance in, the possession;[1] and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired.[2] But it will not suffice to prove a demand of possession, by one having title;[3] nor a recovery in ejectment,[4] or in trespass;[5] unless there has also been an actual ouster. If, however, the covenantor himself enters tortiously, claiming title, it is a breach.[6]

§ 244. **Warranty.** The covenant of *warranty* extends only to lawful claims and acts, and not to those which are tortious;[1] and it is

[1] Fraunce's Case, 8 Co. 89; Anon., 1 Conn. 228; Waldron *v.* McCarty, 3 Johns. 471; Kortz *v.* Carpenter, 5 id. 120; Webb *v.* Alexander, 7 Wend. 281; Coble *v.* Welborn, 2 Dev. 388. And see Safford *v.* Annis, 7 Greenl. 168; 2 Sugd. Vend. 514–522 (10th ed.); 4 Cruise's Dig. tit. 32, c. 26, § 51, n. (Greenleaf's ed.); [Cheney *v.* Straube, 35 Neb. 521;] {Moore *v.* Frankenfeld, 25 Minn. 540; Ware *v.* Lithgow, 71 Me. 62. Proof that the city authorities tore down as unsafe the house on land conveyed with this covenant will not support this action: Connor *v.* Bernheimer, 6 Daly (N. Y.) 295. But if the grantee is kept out of possession by a superior title, and fails in legal measures to obtain possession, it is enough: Shattuck *v.* Lamb, 65 N. Y. 499. It is sufficient proof of a breach if there is a dispossession by one having superior title, although the entry is not made under process: Parker *v.* Dunn, 2 Jones Law (N. C.) 203; McGary *v.* Hastings, 39 Cal. 360. But proof of a molestation caused by wrongful acts of strangers to the title will not support an action for the breach of this covenant: Moore *v.* Weber, 71 Pa. St. 429. Entry by mortgagee to foreclose and notice to tenant to quit is sufficient molestation of a tenant to be a breach of this covenant in a lease: Duncklee *v.* Webber, 151 Mass. 411.} [Where the foundation of the grantor's title is an entry in the U. S. land office, this covenant is broken when such entry is cancelled by the government: Giddings *v.* Holter, 19 Mont. 263. As to the effect of a public highway on this covenant, see Hymes *v.* Esty, 133 N. Y. 342.]

[2] Ellis *v.* Welch, 6 Mass. 246; Tisdale *v.* Essex, Hob. 34; Hurd *v.* Fletcher, 1 Doug. 43; Evans *v.* Vaughan, 4 B. & C. 261; Spencer *v.* Marriott, 1 id. 457; [Chestnut *v.* Tyson, 105 Ala. 149; holding that notice of pendency of action brought against covenantee is not essential to sustain a recovery for deprivation of the premises, but must be given in order to recover special damages for defending the action. The notice need not be in writing; but mere knowledge of the pendency of the action is insufficient to charge the covenantor for special damages.]

The declaration by a grantee against his grantor, for breach of the general *covenant for quiet enjoyment*, recites the conveyances, as in the preceding form, as far as this mark (*), and proceeds as follows: —

" — that the plaintiff, his heirs and assigns, should and might at all times for ever thereafter, peaceably and quietly have, hold, possess, and enjoy said premises, without let, suit, denial, hindrance, molestation, or interruption by any person lawfully claiming any right, title, or interest in the same. Now the plaintiff in fact says, that he has not been permitted so to possess and enjoy the said premises; but, on the contrary, he avers that, after the making of said deed, to wit, on the —— day of ——, one E. F., who, at the time of making said deed, had, and ever since, until the molestation of the plaintiff hereinafter mentioned, has continued to have, lawful right and title to said premises, did enter into the same, and did thence eject, expel, and remove the plaintiff, and hold him out of possession of the same, contrary to the form and effect of the covenant aforesaid," etc.

[3] Cowan *v.* Silliman, 2 Dev. 46. Nor a mere forbidding to pay rent: Witchcot *v.* Nine, 1 Brownl. 81. And see Hodgskin *v.* Queensborough, Willes 129.

[4] Kerr *v.* Shaw, 13 Johns. 236.

[5] Webb *v.* Alexander, 7 Wend. 281. And see Cushman *v.* Blanchard, 2 Greenl. 266.

[6] Sedgwick *v.* Hollenback, 7 Johns. 376; 2 Sugd. Vend. 512 (10th ed.). But not if the entry was without claim of title: Seddon *v.* Senate, 13 East 72; Penn *v.* Glover, Cro. El. 142.

[1] 4 Cruise's Dig. tit. 32, c. 26, § 51, n. (Greenleaf's ed.); Vaugh. 122; 2 Sugd. Vend. 510, 511 (10th ed.); Dudley *v.* Follett, 3 T. R. 587; [Horton *v.* Bauer, 129 N. Y. 148; Norton *v.* Schmucker, 83 Tex. 212.]

restricted to evictions under titles existing at the date of the covenant.[2] A breach of this covenant is proved only by evidence of an actual ouster or eviction;[3] but it need not be with force; for if it

[2] Ellis *v.* Welch, 6 Mass. 246; [Norton *v.* Schmucker, 83 Tex. 212.] {And this does not warrant against the exercise of the right of eminent domain by the government after the conveyance: Lewis *v.* Woodfolk, 58 Tenn. 25.}

Where the *assignee of the grantee* sues *the grantor* for a breach of the covenant of warranty, by an eviction, the declaration will be in this form: "In a plea of covenant; for that the said defendant heretofore, to wit, on the —— day of ——, by his deed, by him duly executed, acknowledged, and recorded, which deed, not being in the possession, custody, or control of the plaintiff, he is unable to produce in court, for a valuable consideration therein mentioned, bargained, sold, and conveyed to one J. S. a certain parcel of land [*describing it*], to hold the same with the appurtenances, to him the said J. S., and his heirs and assigns for ever; and in and by said deed the said defendant, among other things, covenanted with the said J. S., and his heirs and assigns, to warrant and defend the same premises to the said J. S. and his heirs and assigns for ever, against the lawful claims and demands of all persons. And the said J. S. afterwards, on the same day, lawfully entered into said premises, and by virtue of said deed became lawfully seised of the same; and being so seised, the said J. S. afterwards, to wit, on the —— day of ——, by his deed, by him duly executed, acknowledged, and recorded, and now here by the plaintiff produced in court, for a valuable consideration therein mentioned, bargained, sold, and conveyed the same premises to the plaintiff, to hold the same, with the appurtenances, to the plaintiff, and his heirs and assigns for ever; by force of which deed the plaintiff, afterwards and the same day, lawfully entered into the same premises and became lawfully seised thereof accordingly. But the plaintiff in fact says, that the said defendant has not warranted and defended the said premises to the plaintiff, as by his said covenant he was bound to do; but, on the contrary, the plaintiff avers that one E. F., lawfully claiming the same premises by an elder and better title, afterwards, by the consideration of the justices of the —— court, begun and holden [*here describe the term, etc.*], recovered judgment against the plaintiff for his seisin and possession of said premises, and for his costs; and afterwards, to wit, on the —— day of ——, under and by virtue of a writ of execution duly issued upon said judgment, the said E. F. lawfully entered into said premises, and thereof evicted the plaintiff, and still lawfully holds him out of the same."

The breach may be assigned more generally, as an ouster, in the following form: "But, on the contrary, the plaintiff avers that one E. F., lawfully claiming the same premises by an elder and better title, afterwards, to wit, on the —— day of ——, lawfully entered into the same premises, and ousted the plaintiff thereof, and still lawfully holds him out of the same." [Notice of the existence of the incumbrance does not affect the right of recovery: Comstock *v.* Son, 154 Mass. 389; Osborn *v.* Pritchard, 30 S. E. 656, Ga.; but see Demars *v.* Koehler, 60 N. J. L. 314.]

[3] {Scott *v.* Kirkendall, 88 Ill. 465; Green *v.* Irving, 54 Miss. 450; Anshutz *v.* Miller, 81 Pa. St. 212; Jones *v.* Warner, 81 Ill. 343; [Cheney *v.* Straube, 35 Neb. 521; Price *v.* Hubbard, 8 S. D. 92; Northern Pacific R. *v.* Montgomery, 56 U. S. App. 579; Thompson *v.* Brazile, 47 S. W. 299, Ark.] So it is held that a grantee in a deed cannot maintain an action upon a covenant of warranty therein, unless there has been an actual eviction, or what is, in law, equivalent thereto. Thus, where a grantee in a deed containing a covenant of warranty immediately mortgages back the estate to his grantor and afterwards gives him possession under the mortgage, becoming his tenant, he cannot maintain an action on the covenant of warranty in the deed to himself, on account of an entry and ouster by one having an older and better title than his grantor, because such entry and ouster are not against his possession, but against that of his grantor: Gilman *v.* Haven, 11 Cush. (Mass.) 330. The right of action accrues when substantial damage is suffered: Post *v.* Campau, 42 Mich. 90.} [A covenant of warranty is broken when the grantor's entry of public land is cancelled (Meservey *v.* Snell, 94 Ia. 222); or where land belonging to the United States is included in the deed (Pevey *v.* Jones, 71 Miss. 647; *contra*, Northern Pacific R. *v.* Montgomery, 56 U. S. App. 579); or where the title is still in the United States subject to entry (Herrington *v.* Clark, 56 Kans. 644); or where the premises at the time of conveyance are held adversely under a paramount title (Ilsley *v.* Wilson, 42 W. Va. 757). A judgment merely establishing title to occupied property is not a constructive eviction: Wagner *v.* Finnegan, 54 Minn. 251. In Texas, proof of superior title without notice of which the purchase is made is said to establish a breach: Groesbeck *v.* Harris, 82 Tex. 411.]

appears that the covenantee has quietly yielded to a paramount title, whether derived from a stranger or from the same grantor, either by giving up the possession, or by becoming the tenant of the rightful claimant, or has purchased the better title,[4] it is sufficient.[5] So, if he has been held out of possession, by one in actual possession under a paramount title, at the time of sale it is said to be a breach.[6] So, a formal entry by a mortgagee, for foreclosure, though made under a statute, which does not require that the possession of the mortgagee should be continued, is a breach.[7] And if the grantor covenants against all incumbrances, except a certain mortgage, which he engages to discharge, and also covenants generally to warrant the premises against the lawful claims of all persons, he is liable on the latter covenant, if the grantee is obliged himself to remove this incumbrance.[8] A judgment in ejectment, recovered by a stranger, against the covenantee, and an entry under it, with proof that the covenantor had due notice of the pendency of the action, and was requested by the covenantee to defend it, is also sufficient evidence of a breach of this covenant.[9] So, if the grantor subsequently con-

[4] Emerson *v.* Prop's of Minot, 1 Mass. 464; Kelly *v.* Dutch Church of Schenectady, 2 Hill (N. Y.) 105; Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 id. 586; Clarke *v.* McAnulty, 3 S. & R. 364; Mitchel *v.* Warner, 5 Conn. 497; Stewart *v.* Drake, 4 Halst. 139; Rickert *v.* Snyder, 9 Wend. 416; Tufts *v.* Adams, 8 Pick. 547; Bigelow *v.* Jones, 4 Mass. 512. See further, 4 Kent Comm. 471; 10 Ohio R., by Wilcox, pp. 330–332, n.; [Security Bank *v.* Holmes, 65 Minn. 531.] If the covenantee yields peaceably to a dispossession, the burden of proof is on him to show that the dispossession was by one having a better title: 4 Mass. 349; [McGrew *v.* Harmon, 164 Pa. 115.]

[5] {Allis *v.* Nininger, 25 Minn. 525; Hauck *v.* Single, 10 Phila. (Pa.) 551; Kenney *v.* Norton, 10 Heisk. (Tenn.) 384; [Cheney *v.* Straube, 43 Neb. 879; McGrew *v.* Harmon, 164 Pa. 115; Copeland *v.* McAdory, 100 Ala. 553.] It is held in some States that proof that the covenantee has been obliged to pay off a superior claim or buy in the title is not enough to support an action on the warranty: Dyer *v.* Britton, 53 Miss. 270. When one yields to paramount title, without judicial proceedings, the title must be paramount not only to his grantor, but also paramount to the title of any other person: Crum *v.* Collenbaugh, 47 Ind. 256.} [The surrender of possession in consequence of a paramount title need not be to the holder of such title to sustain a recovery by the covenantee: Wagner *v.* Finnegan, 65 Minn. 115.]

[6] Witty *v.* Hightower, 12 S. & M. 478.

[7] White *v.* Whitney, 3 Met. 81. See also Burrage *v.* Smith, 16 Pick. 56; Norton *v.* Babcock, 2 Met. 510; Ingersoll *v.* Jackson, 9 Mass. 495; {Furnas *v.* Durgin, 119 id. 500.}

[8] Bemis *v.* Smith, 10 Met. 194.

[9] Hamilton *v.* Cutts, 4 Mass. 349; Prescott *v.* Trueman, ib. 627; Ferrell *v.* Alder, 8 Humph. 44. In such case, an actual ouster by writ of possession has been held immaterial: Williams *v.* Weatherbee, 1 Aiken 233. The notice of the suit may be verbal: Collingwood *v.* Irwin, 3 Watts 306; Miner *v.* Clark, 15 Wend. 425. After which, it seems the covenantee is not bound to defend: Jackson *v.* Marsh, 5 id. 44. {To have the effect of depriving the warrantor of the right to show title, the notice should be from the warrantee, should be unequivocal, should request the warrantor to defend, and should be given in time to enable him to prepare for defence. Knowledge of the action and a notice to attend the trial are not enough: Somers *v.* Schmidt, 24 Wis. 417; Collins *v.* Baker, 6 Mo. App. 588. But if such notice is not given, the burden of proof is on the plaintiff to show that the title of the recovering party is superior, that the actions were reasonably defended, and that the costs were fairly incurred: Ryerson *v.* Chapman, 66 Me. 557; Tiernay *v.* Whiting, 2 Col. T. 620. [The attorney's fees must have been paid to be recovered: Cullity *v.* Derfel, 18 Wash. 122.] It has been

veys to a stranger, who enters without notice of the prior deed, it is a breach.[10]

§ 245. **Covenant not to assign.** A covenant by a lessee, against *assigning and underletting*, is not broken by any involuntary transfer of the possession; as, if it be sold by a sheriff, on execution, or by assignees in bankruptcy, or by an executor;[1] unless the assignment is effected by fraud of the lessee, as, by confessing judgment, to the intent that the creditor may seize the premises in execution.[2] Ordinarily, therefore, the plaintiff must prove a transfer of the possession by some voluntary act of the defendant. Evidence of the mere fact, that a stranger is in possession of the land, is not alone sufficient proof of a breach of this covenant;[3] but if the stranger claims to hold as under-tenant of the defendant, it has been held sufficient, *prima facie*, to maintain the allegation on the part of the plaintiff.[4]

§ 245 *a*. **Covenant to repair.** Upon a *covenant to repair*, and issue joined on a general traverse of the breach, the plaintiff must prove the actual state of the premises, so as to show that they were substantially out of repair; and in doing this, he will be confined to the matters expressly alleged as constituting the breach. If the covenant is general, to repair and keep in repair, the tenant is not obliged to put in new floors, or the like, but only to repair the old; and it is sufficient if, by a timely expenditure of money, he keep the premises in substantial repair, and, as nearly as may be, in the same state in which they were at the time of the demise.[1] He is bound, however, under a general covenant, "to repair, uphold, and maintain" a house, to keep up the painting of inside doors, shutters, etc.;[2] and also to rebuild it if destroyed by fire, unless such casualty is excepted in the covenant, either expressly or by implication.[3]

held, that where by statute, if a plaintiff gets a verdict in an action of ejectment, he may elect whether he will take the premises sued for, or the valuation of them which is stated in the verdict, proof of such an election to take the valuation will not support an allegation in an action by the person compelled to pay the valuation against his coveuantor, that he had been by due process of law ejected by a person lawfully entitled to the premises: Long *v.* Sinclair, 38 Mich. 90.} [The costs of defence cannot be recovered when the warrantor notifies the covenantee not to defend: Matheny *v.* Stewart, 108 Mo. 73.]

[10] Curtis *v.* Deering, 3 Fairf. 499. The covenantee is not bound to buy in an outstanding paramount title or incumbrance, though it is offered to him on moderate terms: Miller *v.* Halsey, 2 Green (N. J.) 48; Clarke *v.* McAnulty, 3 S. & R. 364.

[1] Doe *v.* Carter, 8 T. R. 57; Doe *v.* Beavan, 3 M. & S. 353; Seers *v.* Hind, 1 Ves. 295; Great Pond Co. *v.* Buzzell, 39 Me. 173.

[2] Doe *v.* Carter, 8 T. R. 57. And see, on this covenant, Platt on Cov. c. 12, pp. 404–443.

[3] Doe *v.* Payne, 1 Stark. 86.

[4] Doe *v.* Ricarby, 5 Esp. 4.

[1] Soward *v.* Leggatt, 7 C. & P. 613; Harris *v.* Jones, 1 M. & Rob. 173; Stanley *v.* Towgood, 3 Bing. N. C. 4; Gutteridge *v.* Munyard, 7 C. & P. 129; 1 M. & Rob. 334; [St. Joseph & St. Louis R. *v.* St. Louis, etc. R., 135 Mo. 173.]

[2] Monk *v.* Noyes, 1 C. & P. 265.

[3] Bullock *v.* Dommitt, 6 T. R. 650; Digby *v.* Atkinson, 4 Campb. 265; Phillips *v.* Stephens, 16 Mass. 238; Fowler *v.* Bott, 6 id. 63; Weigall *v.* Waters, 6 T. R. 488; Loader *v.* Kemp, 2 C. & P. 375. [For a case of excepted casualty, see Waite *v.* O'Neil, 47 U. S. App. 19.]

Besides proving the want of repair, the plaintiff should also prove the damages thereby sustained; which is usually done by the evidence of surveyors, carpenters, etc., who have examined the premises, and estimated the cost of putting them into the state in which the tenant ought to have left them.[4] And the jury may also allow the owner some compensation for the actual loss of use or profit of the premises, while they were undergoing such repairs.[5]

§ 246. **Proof under Plea of Non est Factum.** The plea of *non est factum*, to a declaration on an indenture of lease, is an admission of the plaintiff's title to demise.[1] And generally under this plea the defendant may prove that the deed was fraudulent;[2] or, that it was delivered as an escrow;[3] or, may show any personal incapacity, such as lunacy,[4] or coverture;[5] and after production of a counterpart, executed by all the plaintiffs, he may produce the demising part, to prove that it was not executed by them all.[6]

§ 247. **Under Plea of Performance.** Where issue is joined on a plea of *performance*, the defendant assumes the burden of proof, and therefore is ordinarily entitled to open and close the case.[1]

[4] Penley *v.* Watts, 7 M. & W. 601.
[5] Wood *v.* Pope, 1 Bing. N. C. 467.
[1] Friend *v.* Eastabrook, 2 W. Bl. 1152.
[2] Anon., Lofft 457.
[3] Stoytes *v.* Pearson, 4 Esp. 255.
[4] Faulder *v.* Silk, 3 Campb. 126.
[5] Lambart *v.* Atkins, 2 Campb. 272.
[6] Wilson *v.* Woolfryes, 6 M. & W. 341.
[1] Scott *v.* Hull, 8 Conn. 296. And see *ante*, Vol. I. § 74.

CUSTOM AND USAGE.

§ 248. **Definition.** Custom is unwritten law, established by common consent and uniform practice from time immemorial; and it is local, having respect to the inhabitants of a particular place or district. It differs from *Prescription*, in this, that prescription is a personal right, belonging to one or a few persons, by particular designation, as, for example, the owners of a certain parcel of land. The term *Usage*, in its broadest sense, includes them both; but is ordinarily applied to trade; designating the habits, modes, and course of dealing, which are generally observed, either in any particular branch of trade, or in all mercantile transactions.

§ 249. **How proved.** We have already seen[1] that, in general, when a local custom, of a public or general nature, is once established by a judgment, the judgment is competent evidence of the existence of the custom, in all other cases, though the parties may be different. Hence no person is a competent witness to prove a local custom, stated on the record, who would derive a benefit from its establishment.[2] But in regard to the proof of usages in any particular trade, persons employed in the particular trade are held competent witnesses as standing indifferent; the usage in question generally affecting alike both their rights and their liabilities. These usages, also, when once put in issue and found by a jury, are afterwards recognized on production of the record; and after having been frequently proved, in the course of successive legal investigations, they are taken notice of by the courts, without further proof.[3] They are not, however, permitted to have effect, when they contravene any established general rule of the law; and therefore evidence, in proof of any such usage, is ordinarily inadmissible.[4] The

[1] *Ante*, Vol. I. § 405.

[2] Ibid. {Since the statutes of the various States have taken away the incompetency of witnesses by reason of interest, such customs can be proved by these persons. See *ante*, Vol. I. § 386 *et seq.* and notes to Chapter II. Pt. III.}

[3] *Ante*, Vol. I. § 5; Smith *v.* Wright, 1 Caines 43; Consequa *v.* Willing, 1 Pet. C. C. 230; Thomas *v.* Graves, 1 Const. 150 [308].

[4] Edie *v.* East India Co., 2 Burr. 1216, 1222; Homer *v.* Dorr, 10 Mass. 26, 29; Lewis *v.* Thacher, 15 id. 431; Higgins *v.* Livermore, 14 id. 106; Randall *v.* Rotch, 12 Pick. 107; Eager *v.* Atlas Ins. Co., 14 id. 141; Perkins *v.* Franklin Bank, 21 id. 483; Bryant *v.* Commonwealth Ins. Co., 6 id. 131; The Reeside, 2 Sumn. 568; Bolton *v.* Colder, 1 Watts 360; Newbold *v.* Wright, 4 Rawle 195; Stoever *v.* Whitman, 6 Binn. 417; Brown *v.* Jackson, 2 Wash. C. C. 24; Prescott *v.* Hubbell, 1 McCord 94.

general law merchant, being part of the common law, is recognized by the courts without proof.[5]

§ 250. **Local Custom.** In proof of a local *custom,* it must be shown to have existed from time immemorial; to have continued without any interruption of the right, though the possession may have been suspended; to have been peaceably acquiesced in; and to be reasonable, certain, consistent with law and with other acknowledged customs, and compulsory on all.[1] The existence of a custom in one place is not admissible in proof of its existence in another; unless where the custom has respect to some general subject common to them both, to which it is merely an incident, such as a general tenure, and the like.[2] But where the question is upon the manner of conducting a particular branch of trade at one place, evidence of the manner of conducting the same branch at another place is admissible; being deemed to fall within the exception to the rule, as it concerns a matter, in its nature common to both places.[3] So, evidence as to the profits of mines, or the right to dig turf in fenny lands, in one manor, has been admitted in proof of the same right claimed in another, the subject being the same.[4]

§ 251. **Usage of Trade.** But in regard to the *usage of trade,* it is not necessary that it should have existed immemorially; it is sufficient if it be established, known, certain, uniform, reasonable, and not contrary to law.[1] These usages, many judges are of opinion,

[5] 2 Burr. 1216, 1222.

[1] 1 Bl. Comm. 76–78. And see Freary *v.* Cook, 14 Mass. 488; Clayton *v.* Corby, 8 Jur. 212; 2 Ad. & El. N. S. 813; Carr *v.* Foster, 3 Ad. & El. N. S. 581; Hilton *v.* E. of Granville, Dav. & Mer. 614; 5 Ad. & El. N. S. 701; Elwood *v.* Bullock, 6 Ad. & El. N. S. 383.

[2] Furneaux *v.* Hutchins, Cowp. 808; D. of Somerset *v.* France, 1 Stra. 654, 661, 662.

[3] Noble *v.* Kennoway, 2 Doug. 510.

[4] Dean, etc. of Ely *v.* Warren, 2 Atk. 189, per Ld. Hardwicke.

[1] 1 Bl. Comm. 75; Todd *v.* Reid, 4 B. & Ald. 210; Collings *v.* Hope, 3 Wash. 150; Rapp *v.* Palmer, 3 Watts 178; Trott *v.* Wood, 1 Gall. 443; Stultz *v.* Dickey, 5 Binn. 287; Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7; United States *v.* McDaniel, 7 Pet. 1; Lowry *v.* Russell, 8 Pick. 360; Parrott *v.* Thacher, 9 id. 426; Stevens *v.* Reeves, ib. 198; Thomas *v.* Graves, 1 Const. 150 [308]; Desha *v.* Holland, 12 Ala. 513; [Commonwealth *v.* Doane, 1 Cush. 511. [There are no comparative degrees of certainty: Nelson *v.* Southern Pacific R., 15 Utah 325.] The rule that parol evidence may be given of a uniform, continuous, and well-settled usage and custom pertaining to matters embraced in a contract, unless such custom or usage contravenes a rule of law, or limits or contradicts the express or implied terms of the contract, free from ambiguity, was asserted in Atkinson *v.* Truesdell, 127 N. Y. 234. In this case the contract was for the purchase of a certain amount of glass goods, the phrase of the contract was that the goods were to be "taken by January 1st, 1883, on dock in New York." Evidence was given that, on account of the expense of the storage in New York City, there was a custom that goods ordered should be taken from the manufacturer from time to time as needed by the purchaser. The evidence of this custom was admitted on the ground that it rendered intelligible the phrase above quoted as to the time when goods were to be taken. As the admissibility of evidence of a custom in actions of contract is justified on the supposition that the parties contracted with reference thereto, the evidence must show a custom of trade so certain, uniform and notorious as probably to be known to and understood by the parties entering into the contract: Ambler *v.* Phillips, 132 Pa. St. 174; [Laver *v.* Hotaling, 115 Cal. 613; Hansbrough *v.* Neal, 94 Va.

should be sparingly adopted by the courts as rules of law, as they are often founded in mere mistake, or in the want of enlarged and comprehensive views of the full bearing of principles.[2] Their true

722; Union Stock Yards Co. *v.* Westcott, 47 Neb. 300; Fitzgerald *v.* Hanson, 16 Mont. 474.] For this reason the law will not write into the contract a mere usage of trade, recent in date and not general in its application, since the parties cannot be presumed to have known of such a usage; but if it is shown that the parties had actual or constructive knowledge thereof, and acquiesced in it, it necessarily becomes a part of their contract: Corcoran *v.* Chess, 131 Pa. St. 358. Among the instances where evidence of customs has been admitted may be cited the following: The usage of commission merchants as to charges may be shown in evidence when the other facts in evidence are such as to render it probable that both parties contracted with reference to such custom: Talcott *v.* Smith, 142 Mass. 542. In the case of Hecht *v.* Batcheller, 147 id. 340, there was introduced evidence of a custom among note brokers not to sell commercial paper of any person who the brokers had reason to believe had failed and made an assignment. This evidence was held inadmissible as not sufficient to warrant a finding of the custom among brokers to guarantee the responsibility of the makers of notes sold by them, but would probably have been also inadmissible on general grounds. Moreover, besides the rule allowing evidence of custom and usage, when it is so far established and presumably known to the parties as to probably have been taken by them into account in making a contract, provided the evidence shows a custom reasonable, uniform and well settled, and not in opposition to fixed rules of law, nor the express terms of the contract, evidence of usage is also competent to explain the meaning of words in any particular trade or business: Newhall *v.* Appleton, 114 N. Y. 144; Smith *v.* Clews, ib. 193. But, although evidence of custom and usage may be introduced in a case to show what the meaning of the parties was in regard to the subject-matter of the contract, or to explain the meaning given in particular trades or occupations to certain words, yet evidence cannot be introduced of the custom when the same contradicts the plain and unambiguous meaning of the words of the contract, or violates a settled legal rule of construction: Bigelow *v.* Legg, 102 N. Y. 652. It has been held that a custom among brokers to settle their transactions before a certain time of day does not apply to a contract or dealings between a broker and customer in the absence of evidence showing that the parties contracted with reference to such custom · Greeley *v.* Doran-Wright Co., 148 Mass. 116. Evidence of custom is sometimes relevant and admissible in actions other than those of contract. Thus, in an action for damages occasioned by negligence in not guarding a passage way in an unfinished building, evidence of custom and usage of builders with reference to openings in floors of buildings while in process of construction is admissible on the question of due care on the part of the plaintiff, if it is shown that he was a carpenter and as such might be supposed to know of the usages of buildings: Murphy *v.* Greeley, 146 id. 200. So, it has been held that in an action against a railroad company for injuries received while repairing one of its cars, evidence is admissible of rules of other railroads, to place flags or lights upon the cars while they are being repaired, to prevent the car from being moved until the repairs are finished. This evidence is admissible on the question of whether or not the defendant was negligent in not adopting similar rules for the protection of its employees while repairing cars: Abel *v.* Delaware & Hudson Canal Co., 103 N. Y. 586. Evidence of a local custom that notice of the cancellation of a policy of insurance may be given by the company to the broker who procures the insurance cannot affect the insured unless it is proved that he was acquainted with the custom, and made the broker his agent to receive such notice of cancellation: Hermann *v.* Niagara Fire Ins. Co., 100 id. 416. A custom or a practice in a town to allow the highway surveyor to contract for labor on the highway is sufficient evidence of his authority so to contract: Blanchard *v.* Ayer, 148 Mass. 178. It is not possible to acquire by custom a right to maintain a building or permanent structure upon the land of another: Atty.-Gen. *v.* Tarr, ib. 318. Evidence of practice throughout a State to locate and conduct large piggeries in populous localities, and that such practice was tolerated by the usage and customs and habits of society in the present day in that State, is inadmissible: Com. *v.* Perry, 139 id. 200. Evidence that stock certificates issued in the name of one as trustee, and by him transferred in blank, are constantly sold in the market, is inadmissible, as contrary to a rule of law: Shaw *v.* Spencer, 100 id. 382.]

[2] 2 Sumn. 377, Story, J.; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. S. C. 137.

office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses.[3] On this principle, the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them.[4]

[3] The Reeside, 2 Sumn. 569; Macomber *v.* Parker, 13 Pick. 182; Shaw *v.* Mitchell, 2 Met. 65; Coit *v.* Commercial Ins. Co., 7 Johns. 385; Harris *v.* Nicholas, 5 Munf. 483; Allegre *v.* Maryland Ins. Co., 2 G. & J. 136. See also *ante*, Vol. I., § 292; Powley *v.* Walker, 5 T. R. 373; Roe *v.* Charnock, Peake's Cas. 5; Rex *v.* Navestock, 6 Burr. 719 (Set. Cas.). Evidence of usage is also admissible to establish a right above and beyond the contract, even though the contract is by deed: Wigglesworth *v.* Dallison, 1 Doug. 201.

[4] Loring *v.* Gurney, 5 Pick. 15; Naylor *v.* Semmes, 4 G. & J. 274; Noble *v.* Kennoway, 2 Doug. 510; {Turner *v.* Yates, 16 How. (U. S.) 14; Barrett *v.* Williamson, 4 McLean 597; Baxter *v.* Leland, 1 Blatchf. Ct. Ct. 526; Hunt *v.* Carlisle, 1 Gray 257; Fisher *v.* Sargent, 10 Cush. 250; Warren Bank *v.* Suffolk Bank, ib. 586; Potter *v.* Morland, 3 id. 384; Clark *v.* Baker, 11 Met. 188; Mixer *v.* Coburn, ib. 559; Putnam *v.* Tillotson, 13 id. 517; Macy *v.* Whaling Ins. Co., 9 ib. 354; Baker *v.* Atlas Bank, ib. 182; Mussey *v.* Eagle Bank, ib. 306; Chicopee Bank *v.* Eager, ib. 583; Bradford *v.* Drew, 5 ib. 188; Perkins *v.* Jordan, 35 Me. 23; Farnsworth *v.* Chase, 19 N. H. 534; Knowles *v.* Dow, 22 id. 387; ib. 71; Nichols *v.* DeWolf, 1 R. I. 277; Leach *v.* Beardslee, 22 Conn. 404; Outwater *v.* Nelson, 20 Barb. 29; Wall *v.* East River Ins. Co., 3 Duer (N. Y.) 264; Steward *v.* Scudder, 4 Zabr. 96; Meighen *v.* Bank, 25 Pa. St. 288; ib. 411; Foley *v.* Mason, 6 Md. 37; Merchants', etc. Ins. Co. *v.* Wilson, 2 id. 217; Fulton Ins. Co. *v.* Milner, 23 Ala. 420; Inglebright *v.* Hammond, 19 Ohio 337; Campbell *v.* Hewlitt, 12 Eng. Law & Eq. 375; Moore *v.* Campbell, 26 id. 522; Cuthbert *v.* Cumming, 30 id. 604; Wigglesworth *v.* Dallison, 1 Smith's Leading Cases (ed. 1844), 405 (*300), and notes. The usages of any particular trade, such as are uniform or general, are presumed to be familiar to all persons having transactions in that trade or business; and all parties making contracts upon any subject leave such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding, to implication merely. But where the usage or custom is resorted to for the purpose of controlling the general principles and obligation of the law of contract, there is no doubt of the necessity of showing its notoriety, as well as its reasonableness and justice. The latter qualities are generally supposed to be sufficiently shown by the general acquiescence of the public in the usage: 2 Redfield on Railways, 118–121. Though plasterers may show that it is customary to include windows and other blank spaces in their measurements, the defendant may show that he did not know it: Walls *v.* Bailey, 49 N. Y. 464. See also *In re* Matthews, L. R. 1 Ch. D. 501. A usage among manufacturing corporations to give an honorable discharge to an operative who has worked faithfully with them for twelve months, and has given a fortnight's notice of an intention to leave, whereby such operative may obtain employment in other mills at the same place, does not oblige those corporations to give such discharge in all cases where such conditions are complied with. The giving of such a discharge is a matter of judgment and discretion with the corporation: Thornton *v.* Suffolk Man. Co., 10 Cush. 376.

A policy of insurance which describes the risk as a "machine-shop, a watchman kept on the premises," does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises; and the usage of similar establishments, in this respect, may be shown to explain what is ordinary care and skill: Crocker *v.* People's, etc. Ins. Co., 8 Cush. 79.

A usage at an inn for the guests to leave their money and valuables at the bar or with the keeper of the house, as a condition precedent to the liability of the innkeeper for the loss thereof, is not binding upon a guest, unless he has actual knowledge or

§ 252. **Opinion not Evidence.** Both customs and usages must be *proved by evidence of facts*, not of mere speculative opinions; and by witnesses who have had frequent and actual experience of the custom or usage, and do not speak from report alone.[1] The witnesses must speak as to the course of the particular trade; they cannot be examined to show what is the law of that trade.[2] And though a usage is founded on the laws or edicts of the government of the country where it prevails, yet still it may be proved by parol.[3] It

notice of it; and whether he has such knowledge or notice, is a question of fact for the jury: Berkshire Woolen Co. *v.* Procter, 7 Cush. 417.

A usage which shows when a voyage is terminated so far as relates to the payment of premium notes is not applicable to show when a voyage terminates with reference to the payment of losses: Meigs *v.* Mutual, etc. Ins. Co., 2 Cush. 439. Nor can a usage among the owners of vessels at particular ports to pay bills, drawn by masters for supplies furnished to their vessels in foreign ports, bind them as acceptors of such bills: Bowen *v.* Stoddard, 10 Met. 375. Nor can a general usage, and not the usage of any particular place, or trade, or class of dealers, or course of dealing, be given in evidence to control the rules of law: Strong *v.* Bliss, 6 Met. 393. No usage and no agreement, tacit or express, of the parties to a promissory note, as to presentment, demand, and notice, will accelerate the time of payment, and bind the maker to pay it at an earlier day than that which is fixed by the law that applies to the note: Mechanics' Bank, etc. *v.* Merchants' Bank, etc., 6 Metc. 13; Adams *v.* Otterback, 15 How. (U. S.) 539; Bowen *v.* Newell, 4 Selden (N. Y.) 190; 2 Duer 584. Nor can custom or usage ever be given in evidence, to vary or control an express contract: Evans *v.* Myers, 25 Pa. St. 114; Linsley *v.* Lovely, 26 Vt. 123; Swampscott Machine Co. *v.* Partridge, 25 N. H. 369; Wadsworth *v.* Allcott, 2 Selden (N. Y.) 64; Dixon *v.* Dunham, 14 Ill. 324; [Thomason Grocery Co. *v.* Mitchell, 114 Ala. 315; Ah Tong *v.* Earl Fruit Co., 112 Cal. 679; Meloche *v.* Chicago, etc. R., 74 N. W. 301, Mich.; Burnham *v.* Milwaukee, 75 N. W. 1014, Wis.] In the case of Humfrey *v.* Dale, 7 El. & Bl. 266, in regard to the necessity of relaxing the rule of the admissibility of oral evidence to explain the import of commercial terms and memoranda in written contracts between merchants and business men, Lord Campbell, C. J., said: "The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now neither collateral evidence, nor the evidence of a usage of trade, is receivable to prove anything which contradicts the terms of a written contract; but subject to this condition, both may be received for certain purposes. Here the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imports; namely, that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this. But the plaintiff seeks to show that, according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more; namely, that if the buying broker did not disclose the name of his principal, it might become a contract with him if the seller pleased. The principle on which evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. It is the business of courts reasonably to shape these rules of evidence so as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them:" See 1 Redfield on Railways, 127–129.] [See vol. I, §§ 292–294.]

[1] Edie *v.* E. Ind. Co., 2 Burr 1228, per Wilmot, J.; Savill *v.* Barchard, 4 Esp. 54, per Ld. Kenyon; Austin *v.* Taylor, 2 Ohio 282.

[2] Ruan *v* Gardiner, 1 Wash. C. C. 145; Winthrop *v.* Union Ins. Co., 2 id. 7; Austin *v.* Taylor, 2 Ohio 282.

[3] Livingston *v.* Maryland Ins. Co., 7 Cranch 500, 539; Drake *v.* Hudson, 7 H. & J. 399.

has also been held that the testimony of one witness alone is not sufficient to establish a usage of trade, of which all dealers in that line of trade are bound to take notice.[4]

[4] Wood *v.* Hickok, 2 Wend. 501; Parrott *v.* Thacher, 9 Pick. 426; Thomas *v.* Graves, 1 Const. 150 [308]. The testimony of one witness is proof of commercial usage, if he has full means of knowledge, and his testimony is explicit and satisfactory. By Foot, J. Vail *v.* Rice, 1 Selden (N. Y.) 155. The testimony of one of the directors of an insurance company as to the practice of the company in regard to giving consent to second insurances, so far as his knowledge went, is not sufficient to bind the insured who has no knowledge thereof: Goodall *v.* New Eng. Fire Ins. Co., 25 N. H. 169. In Bissell *v.* Ryan, 23 Ill. 566, it was held that a custom or usage cannot be established by the testimony of a single witness. {The law is now settled in Massachusetts that one witness is competent to testify to a custom or usage, and that the fact that only one witness testifies is only matter of comment to the jury: Jones *v.* Hoey, 128 Mass. 585. Cf. Vail *v.* Rice, 1 Seld. (N. Y.) 155; Robinson *v.* United States, 13 Wall. (U. S.) 363. See 1 Sm. L. Cas. (7th ed.) 782.} [But the witness must be uncontradicted: Southwest Va. Co. *v.* Chase, 95 Va. 50.] See vol. I, §§ 260 *a*, 260 *b*.

DAMAGES.

§ 253. **Definition.** Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less;[1] and this whether it be to his person or estate.[2] Damages are never given in real actions;

[1] Co. Lit. 257 *a*; 2 Bl. Comm. 438; Rockwood *v.* Allen, 7 Mass. 256, per Sedgwick, J.; Bussy *v.* Donaldson, 4 Dall. 207, per Shippen, C. J.; 3 Amer. Jur. 257.

[2] Since the first edition of this volume, Mr. Sedgwick has given to the profession a valuable treatise on the Law of Damages, in which he denies the soundness of the general rule here stated; and lays down the broad proposition, that, "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, *not only to recompense the sufferer, but to punish the offender.*" Sedgwick on Damages, p. 39. However this view may appear to be justified by the general language of some judges, and by remarks gratuitously made in delivering judgment on other questions, it does not seem supported to that extent by any *express decision on the point*, and is deemed at variance not only with adjudged cases, but with settled principles of law. This will be apparent from an examination of the authorities on which the learned author relies.

In the first case cited in support of his position, that of Huckle *v.* Money, 2 Wils. 205, which was an action to try the legality of an arrest under a general warrant issued by the Secretary of State, the jury found a verdict for £300, which the defendant moved the court to set aside as excessive. But the motion was denied, on the ground that the damages were properly left at large to the jury, with instructions that they were not bound to any certain rule, but were at liberty to consider all the circumstances of oppression and arbitrary power by which the great constitutional right of the plaintiff was violated, in this attempt to destroy the liberty of the kingdom. All which the jury were thus permitted to consider were circumstances going in aggravation of the injury itself which the plaintiff had received, and so were admissible under the rule as stated in §§ 266, 272, of the text. The case of Tullidge *v.* Wade, 3 Wils. 18, was of the same class. It was trespass for breaking and entering the plaintiff's house and debauching his daughter; and the jury were instructed to take into consideration the plaintiff's loss of her service, and the expenses of her confinement in his house. The verdict, which was for £50, was complained of as excessive; but the court thought otherwise, "*the plaintiff having received the insult in his own house*, where he had civilly received the defendant, and permitted him to make his addresses to his daughter." And it was observed by Bathurst, J., that, "in actions of this nature, and of assaults, *the circumstances* of time and place, when and where *the insult* is given, require different damages, as it is a *greater insult* to be beaten upon the Royal Exchange than in a private room." It thus appears that in this case the damages were limited to the extent of the *injury received by the plaintiff*; and that the remark of Wilmot, C. J., relied on by the learned author, was altogether *gratis dictum*. In Doe *v.* Filliter, 13 M. & W. 47, which was trespass for mesne profits, the only question was, whether in estimating the costs of the ejectment, as part of the plaintiff's damages, the plaintiff was confined to the costs taxed, or might be allowed the costs as between attorney and client. The remark of Pollock, C. B., respecting what are *called* "vindictive damages," though wholly gratuitous, is explained by himself to mean only that the jury

may "take *all the circumstances* into their consideration," namely, the circumstances of *the injury inflicted*, so far as they affected the plaintiff. The like may be observed of what Mr. Justice Washington said in Walker *v.* Smith, 1 Wash. C. C. 152, which was an action against the plaintiff's factor, to recover the balance due to the plaintiff for goods which the factor had sold without taking collateral security, in violation of orders, the purchaser proving insolvent, and partial payment only having been obtained. The question was, whether the jury might assess damages in their discretion, for less than the plaintiff's actual loss, taking into consideration all the favorable circumstances on the defendant's part; or whether they were bound to give the plaintiff the precise sum which he had lost by the violation of his orders. And the judge instructed them that the latter was the sole measure of damages; remarking, passingly, that in suits for vindictive damages the jury acted without control, because there was no legal rule by which to measure them. His meaning apparently was, that in actions "sounding in damages," the court had *no control* over the sound discretion of the jury; but that where the damages were susceptible of a fixed and certain rule, the jury were bound by the instructions of the court. The case of Tillotson *v.* Cheetham, 3 Johns. 56, is also relied upon. This was case for libel; in which the jury were instructed by Kent, C. J., "that the charge contained in the libel was calculated not only to *injure the feelings* of the plaintiff, but to *destroy all confidence in him* as a public officer; and in his opinion demanded from the jury exemplary damages, as well *on account of the nature of the offence charged* against the plaintiff, as for the *protection of his character as a public officer*, which he stated as a strong circumstance for the increase of damages;" adding, "that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious effects which a publication of this kind was calculated to produce in society." Here the grounds of damages positively stated to the jury were expressly limited to the degree of *injury to the plaintiff*, either in his feelings or in his character as a public officer. The rest is mere negation. The jury were not instructed to consider any other circumstances than those which affected the plaintiff himself; though *these*, they were told, demanded exemplary damages. In this view, all damages, in actions *ex delicto*, may be said to be *exemplary*, as having a tendency to deter others from committing the like injuries. These instructions, therefore, were in accordance with the rule already stated. In support of them, the Chief Justice relies on Huckle *v.* Money and Tullidge *v.* Wade. He also refers to Pritchard *v.* Papillon, 3 Harg. St. Tr. 1071; s. c. 10 Howell St. Tr. 319, 370, which was essentially a controversy between the crown and the people, before "the infamous Jeffries," who told the jury that "the government is a thing that is infinitely concerned in the case that makes it so *popular* a cause;" and pressed them, with disgraceful zeal, to find large damages for that reason; and for their compliance in finding £10,000, which was the amount of the *ad damnum*, he praised them as men of sense, to be greatly commended for it. The ruling of that judge, in favor of the crown, will hardly be relied upon at this day as good authority. But in Tillotson *v.* Cheetham, the learned Chief Justice, in saying that the actual pecuniary damages in actions for tort are never the sole rule of assessment, probably meant no more than this, that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which are susceptible of arithmetical computation. The remark of Spencer, J., beyond this was extra-judicial. In Woert *v.* Jenkins, 14 Johns. 352, which was trespass for beating the plaintiff's horse to death, with circumstances of great barbarity, the jury were told that they "had a right to give *smart-money*;" by which nothing more seems to have been meant than that they might take into consideration the circumstances of the cruel act, as enhancing the injury of the plaintiff by the laceration of his feelings. In Boston Manufacturing Company *v.* Fiske, 2 Mason 119, the only question was, whether, in case for infringing a patent, the plaintiff might recover, as part of his actual damages, the fees paid to his counsel for vindicating his right in that action. The observations of the learned judge, quoted by Mr. Sedgwick, were made with reference to the practice in admiralty, in cases of marine torts and prize, where a broader discretion is exercised than in courts of common law, the court frequently settling in one suit all the equities between the parties in regard to the subject-matter. The next case adduced is that of Whipple *v.* Walpole, 10 N. H. 130, which was a case against the town of Walpole to recover damages for an injury arising from the defective state of a bridge, which the defendants had grossly neglected to keep in repair. The bridge had broken down while the plaintiff's stage coach was passing over, in consequence of which his horses were destroyed. The jury were instructed, "that for ordinary neglect the plaintiff could not recover exemplary damages, but that such damages might be allowed in the discretion of the jury, in case they believe there had been gross negligence on the part of the defendants." The question seems in fact

to have been, whether the jury were confined to the value of the horses, or might take into consideration all the circumstances of the injury. The sole question before the court in bank was, whether the above instruction was correct; and they held that it was. The remark that the jury might give "damages *beyond the actual injury sustained*, for the sake of the example," though gratuitous and uncalled for, seems qualified by the subsequent observation, that the jury, in cases of gross negligence, "were not bound to be *very exact* in estimating the amount of damages;" and probably the learned judges meant to say no more than that in such cases the court would not control the discretion of the jury, but would leave them at liberty to consider all the circumstances of the injury, and award such damages as they thought proper. See, to the same effect, Kendall *v.* Stone, 2 Sandf. S. C. 269; Tifft *v.* Culver, 3 Hill 180. In Linsley *v.* Bushnell, 15 Conn. 225, which was a case for an injury to the plaintiff's person, occasioned by an obstruction left in the highway by the wanton negligence of the defendant, the question was, whether the jury, in the estimation of damages, were restricted to the loss of the plaintiff's time, and the expenses of his cure, etc., or might also allow, as part of his damages, the necessary trouble and expenses incurred in the prosecution of his remedy by action. And the court held that these latter were fair subjects for their consideration. "The circumstances of aggravation or mitigation," said the court, "the bodily pain; the mental anguish; the injury to the plaintiff's business and means of livelihood, past and prospective, — all these and many other circumstances may be taken into consideration by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges, to which the plaintiff has been necessarily subjected by the misconduct of the defendant, are equally proper subjects of consideration." And it is in express reference to the propriety of allowing the trouble and expense of the remedy, that the observation respecting vindictive damages, or smart-money, quoted by Mr. Sedgwick, seems to have been made. For the learned judge immediately cites, in support of his remark, certain authorities, which will hereafter be mentioned, not one of which warrants the broad doctrine which is now under consideration; and he concludes by quoting from one of them, with emphasis, the admission, that "where an important right is in question, in an action of trespass, the court have given damages to *indemnify the party for the expense of establishing it.*" This is conceived to be the extent to which the law goes, in civil actions for damages, beyond the circumstances of the transaction.

The learned author further observes, that the doctrine he lays down has been fully adopted by the Supreme Court of the United States; and cites Tracy *v.* Swartwout, 10 Peters 80. That was an action of trover against a collector of the revenue, for certain casks of syrup of sugar-cane, which the importer had offered to enter and bond at the rate of fifteen per cent *ad valorem*, but the collector, acting in good faith, required bond for a duty of three cents per pound. The importer refusing to do this, the goods remained in the hands of the defendant for a long time, waiting the decision of the Secretary of the Treasury; who being of opinion that the lighter duty was the legal one, they were accordingly delivered up to the importer at that rate of duty; but, in the mean time, had become deteriorated by growing acid. The judge of the Circuit Court instructed the jury, that the circumstances of the dispute ought not to subject the collector to more than nominal damages; to which exceptions were taken. The sole question on this subject was, whether the plaintiff was entitled to the damages he had *actually sustained;* and the Supreme Court held that he was so entitled. It was in reference to this question only that the terms *exemplary* and *compensatory* damages were used; the question whether, in any case, damages could be given by way of punishment alone not appearing to have crossed the minds either of the judges or the counsel.

The last case cited by the author is that of The Amiable Nancy, 3 Wheat. 546, which was a libel for a marine tort, brought by neutrals against the owners of an American privateer for illegally capturing their vessel as a prize, and for plundering the goods on board. The question was, whether the *owners* of the privateer, not having in any respect participated in the wrong, were liable for any damages beyond the prime cost or value of the property lost, and, in case of injury, for the diminution in its value, with interest thereon; and the court held, that they were not; and accordingly rejected the claim for all such damages as rested in mere discretion. To what extent the immediate wrong-doers might have been liable was a question not before the court; yet it is to be noted, that in the passing allusion which the learned judge makes to their liability, he merely says that, in a suit against them, it *might* be proper to go yet farther in the shape of exemplary damages, but does not say that it *would* be; for his attention was not necessarily drawn to that point.

The case also of Grable *v.* Margrave, 3 Scam. 372, has been elsewhere adduced in support of the rule now controverted. It was an action upon the case, for seduction of the plaintiff's daughter; in which the judge permitted the plaintiff to offer evidence both of his own poverty and of the pecuniary ability of the defendant; to which ruling the defendant took exception. And the court held the ruling right, observing, that the father was entitled to recover not only for the loss of service, and the actual expenses, but for the dishonor and disgrace *cast upon him and his family*, and for the loss of the society and comfort of his daughter. Clearly this decision was in perfect consonance with the doctrine in the text, § 269; but the remark of the learned judge who delivered the opinion of the court, that, "in vindictive actions, the jury are always permitted to give damages, for the double purpose of setting an example, and of punishing the wrong-doer," was uncalled for by the case in judgment, and therefore cannot be imputed to the court. In Cook *v.* Ellis, 6 Hill (N. Y.) 466, the question seems to have been between *actual* and *exemplary* damages, in the popular sense of those words. It was an action of trespass, for an assault and battery. The defendant had already been indicted and fined $250 for the act; and he insisted that this was a bar to all further claim of the plaintiff, "beyond *actual* damages;" but the judge told the jury, that "these proceedings did not prevent them from giving *exemplary* damages, if they chose; though the fine and payment were proper to be considered, in fixing the amount to be allowed the plaintiff." The judgment is reported in a *per curiam* opinion; but it appears that the motion of the defendant for a new trial was denied; and the court are reported as saying, among other things, that "smart-money" allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally *compensatory for damages*, and at the same time *answers the purposes* of punishment. From this and other expressions, it may well be inferred, that by *actual* damages the court meant those which were susceptible of computation; and that by *exemplary* damages, or smart-money, they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury *he had received*, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule. But *as a decision*, the case extends no further than this, that in an action for trespass to the person, the payment of a fine, upon a criminal conviction for the same offence, cannot go in mitigation of the damages to which the plaintiff is entitled. The case of Johnson *v.* Weedman, 4 Scam. 495, sometimes also cited, is still less to the point. It was trover for a horse, bailed to the defendant for agistment, and used by him without leave, but under circumstances entitling the plaintiff to no more than nominal damages. And the jury having found for the defendant, the court refused to disturb the verdict. To these may be added the case of McNamara *v.* King, 7 Ill. 432.

From this examination of the authorities, adduced in support of the position, that, in the cases alluded to, damages may be given purely by way of punishment, irrespective of the degree and circumstances of injury to the plaintiff, it is manifest that it has not the countenance of any express decision upon the point, though it has the apparent support of several *obiter dicta*, and may seem justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not unfrequently used by judges, but seldom defined. But taken in the connection in which these terms have been used, they seem to be intended to designate in general those damages only which are incapable of any fixed rule, and lie in the discretion of the jury; such as damages for mental anguish, or personal indignity and disgrace, etc., and these, so far only as the sufferer is himself affected. If more than this was intended, how is the party to be protected from a double punishment? For after the jury shall have considered the injury *to the public*, in passing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrong-doers are still liable to indictment and fine, as well as imprisonment, for the same offence. See Warren *v.* Austin, 4 Cush. 273.

This view of the true meaning of those terms was taken by Smith, J., in Churchill *v.* Watson, 5 Day 144. It was trespass *de bonis asportatis*, committed with malice, and with circumstances of peculiar aggravation, to prevent the plaintiff from completing a contract for building a vessel. And the question was, whether the jury were confined to the value of the property taken, and presumptive damages for the force only; or whether they might consider all the aggravating circumstances attending the trespass, and the plaintiff's actual damage sustained by it. The court held the latter. The learned judge remarked, that, "in actions founded in tort, the first object of a jury should be to remunerate the injured party for all the real damage he has sustained. In doing this, the value of the article taken or destroyed forms one item; there may

be others, and in this case I think there were others." He then mentions the interruption and delay which occurred in building the vessel, as of the class of damages to which he alludes, and adds, that he shall not attempt to draw the line between consequences which may properly influence a jury in assessing damages, and those which are so far remote and *dependent upon other causes*, that they *cannot* be taken into consideration. "In addition," he observes, "to the *actual* damage" (meaning, doubtless, from the connection, the direct pecuniary damage above alluded to) "which the party sustains in actions founded in *tort*, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes *exemplary*, and at other times *presumptive*, damages. These, from their nature, cannot be governed by any precise rule, but are assessed by the jury, upon a *view of all the circumstances attending the transaction*." He afterwards says: "Indeed, I know of no such thing as *presumptive* damages for *force*. It is a wrong for which the law presumes damages, and the amount will depend on the *nature, extent, and enormity of the wrong*; but force partakes not of the nature of right or wrong, in such a manner that the law can raise any presumption." A similar view of the rule of damages in *torts* had previously been taken by the court in Edwards *v.* Beach, 3 Day 447, which was trespass for destroying a tavern-keeper's sign; the plaintiff claiming damages *commensurate with the injury*, and the defendant resisting all but the value of the sign. So, in Dennison *v.* Hyde, 6 Conn. 508, which was trespass for carrying away the plaintiff's vessel, the rule was held to be, that, in tort, "not only the direct damage, but the probable or inevitable damages, and *those which result from the aggravating circumstances attending the act*, are proper to be estimated by the jury." So in Treat *v.* Barber, 7 id. 274, which was trespass, the defendant having broken open the plaintiff's chest, containing her wearing-apparel, and used language in relation to the contents of it, that wounded her feelings, it was held, that these circumstances were proper to be considered by the jury, as *aggravating the injury* and *so* increasing the damages. In Merrills *v.* Tariff Manuf. Co., 10 id. 384, which was an action on the case, the court referred to the malice, wantonness, and spirit of revenge and ill-will, with which the act was done, and observed, that "these circumstances of aggravation may, with great propriety, be considered in fixing the *remuneration to which the plaintiff is entitled*." The same view of the true meaning and limit of the term "*vindictive damages*" was taken by Lord Abinger, C. B., in Brewer *v.* Dew, 11 M. & W. 625, which was trespass for groundlessly seizing and taking the plaintiff's goods, *per quod* he was annoyed and injured in his business, and believed to be insolvent, and certain lodgers left his house, etc. The defendant pleaded the bankruptcy of the plaintiff in bar of the action; to which the plaintiff demurred; thus raising the question, whether the damages passed to the assignees. And the Lord Chief Baron said: "The substantial ground on which this case is to be decided is this, — whether, on this declaration as it stands, the judge could give *vindictive* damages *for the seizing and taking* of the goods *beyond their value*. For the *breaking and entering* it is admitted they might give damages beyond the amount of the actual injury" (evidently meaning, beyond the injury to the *property*). "Now I think that under this declaration the plaintiff might give evidence to show that the entering and the seizure of goods were made under a false and unfounded pretence of a legal claim, and that *thereby the plaintiff was greatly annoyed and disturbed* in carrying on his business, and was believed to be insolvent, and that, *in consequence*, his lodgers left him. Might not the jury then give vindictive damages *for such an injury, beyond the mere value of the goods?*" Here it is plain, that by "vindictive damages" the learned judge intended only the damages *which the plaintiff had sustained*, beyond the value of his goods; and not those, if any, for any supposed injury to the public at large. Such also was plainly the sense in which Mr. Justice Story used this term in Whittemore *v.* Cutter, 1 Gall. 483. "By the terms 'actual damage,'" said he, "in the statute (referring to the patent act), are meant such damages as the plaintiffs can actually prove, and have in *fact* sustained, as contradistinguished to mere imaginary or exemplary damages, which, in personal torts, are sometimes given. In mere personal torts, as assaults and batteries, defamation of character, etc., the law has, in proper cases, allowed the party to recover not merely for any actual injury, but for the *mental anxiety*, the *public degradation* and *wounded sensibility*, which honorable men *feel at violations of the sacredness of their persons and characters*." It seems superfluous to state at large the peculiar cases in which a similar rule has been laid down. It was emphatically but briefly stated by Williams, C. J., in Bateman *v.* Goodyear, 12 Conn. 580, which was trespass for an aggravated forcible entry, in these words: "What then is the principle upon which damages are given in an action of trespass? The *party is to be indemnified* for what he has actually suffered; and then all those circumstances *which give character to the transaction* are to be weighed and considered." He cites

the above case of Churchill *v.* Watson, and refers to Bracegirdle *v.* Orford, 2 M. & S. 77, where the circumstances of the entry into the plaintiff's house, namely, upon a false charge of concealment of stolen goods, to the injury of her reputation, were held proper for the consideration of the jury; Le Blanc, J., remarking, "that it is always the practice to give in evidence the circumstances which accompany and *give a character to the trespass.*" The party is to be *indemnified;* nothing more. But every circumstance of the transaction *tending to his injury* is to be considered. At this limit the jury are to stop, — a limit carefully marked by the court in Coppin *v.* Braithwaite, 8 Jur. 875. They may weigh every fact which goes to his injury, whether in *mind, body,* or *estate;* but are not at liberty to consider facts which do not relate to the injury itself, nor to its consequences to the plaintiff. In other words, they cannot go beyond the issue; which is the guilt of the defendant, and the damage it did to the plaintiff; for this only did the defendant come prepared to meet. Such plainly was the principle of the decision in the cases already cited; as it also was in Hall *v.* Conn. R. Steamboat Co., 13 Conn. 320, which was case for an inhuman injury to a passenger; in Southard *v.* Rexford, 6 Cow. 264, which was for breach of a promise of marriage; in Major *v.* Pulliam, 3 Dana 592, which was trespass *quare clausum fregit;* and in Rockwood *v.* Allen, 7 Mass. 254, which was case for the default of the sheriff's deputy. In all these cases there were circumstances of misconduct and gross demerit on the part of the defendant, richly deserving punishment in the shape of a pecuniary *mulct,* and fairly affording a case for damages on that ground alone; yet in none of them do the court intimate to the jury that they may assess damages for the plaintiff to any amount more than commensurate with the injury which he sustained. See also Matthews *v.* Bliss, 22 Pick. 48.

The most approved text-writers, also, justify this rule of damages. Thus Blackstone, 2 Bl. Comm. 438, defines *damages* as the money "given to a man by a jury as *a compensation or satisfaction for some injury sustained;* as for a battery, for imprisonment, for slander, or for trespass." Hammond, Law of Nisi Prius, p. 33, limits the remedy, by an action of trespass, to the recovery of "*a compensation for the injury sustained:*" id. pp. 43–48. And it is worthy of remark, that Ch. Baron Comyns, in treating expressly of damages, nowhere intimates a power to assess them beyond this: 3 Com. Dig. Damages, E. The same opinion was entertained by Lord Denman, who observed, that "the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers:" Filliter *v.* Phippard, 12 Jur. 202, 204; 11 Ad. & El. n. s. 356. Dr. Rutherforth, also, defines "damages" with equal strictness. "By damage, we understand every loss or diminution of *what is a man's own* occasioned by the fault of another:" 1 Ruth. Inst. b. 1, c. 17, § 1, p. 385 (Phila. ed.), 1799. He follows Grot. de Jur. Bel. lib. 2, c. 17, § ii. This chapter of Rutherforth is a precise and luminous statement of the principles on which damages ought to be computed; but nowhere countenances the position of Mr. Sedgwick. In the only passage which he has cited, as looking that way, viz., a paragraph in § xiv. p. 400, the author is speaking of the rule of reparation where there is no malice, and in stating the degree of fault, he thinks that the grossest faults may well deserve punishment; but he does not *there* intimate *how* the punishment should be inflicted. The whole passage is as follows: "The obligation to make reparation for damages done by our means is not confined to these actions only which are criminal enough to subject us to punishment. Though there is no degree of malice in an action by which another is injured, yet it may arise from some faulty neglect or imprudence in him who does it, or is the occasion of its being done; and when any person has suffered damage, for want of his taking such care as he ought to have taken, the same law which obliged him, as far as he was able, to avoid doing harm to any man, cannot but oblige him, when he has neglected this duty, to undo, as well as he can, what harm he has been the occasion of; that is, to make amends for the damage which another has sustained through his neglect.

"Those faults which consist in neglect are sometimes divided into three degrees: a great fault, which is such a neglect as all men may well be supposed and ought to guard against; a small fault, which is such a neglect as discreet and diligent men are not usually guilty of; and the smallest fault, which is such a neglect as the most exact and most prudent take care to avoid.

"Indeed in many instances of gross faults, it is so difficult to distinguish between the mere neglect and a malicious design, that, besides the demand of reparation for damages done, some punishment may reasonably be inflicted upon the person so offending.

"Sometimes, and especially in what may seem faults of the lower degrees, the damage which arises from our supposed neglect will be found upon inquiry to have rather been owing to the neglect of the person who suffers it; and then we are not only

clear from all guilt that may subject us to punishment, but from all blame that might oblige us to make reparation." See Sedgwick on Damages, p. 488, n.

On the contrary, Dr. Rutherforth, a little farther onward, in the same book, c. 18, expressly denies the right of the party injured to anything more than compensation for the damages he has sustained. He says: "As the heirs of the criminal have no claim to such goods as he loses in the way of punishment, so neither has the injured person any, considered merely as the injured person. He has, indeed, a right to so much of the criminal's goods as will make him amends for the damage which he has suffered; but no reason can be given why he should have a right to more; unless some positive law has given him such a right. The ends which justify punishment will by no means extend his claim any farther than this. The criminal, by suffering in his goods, may be discouraged or prevented from offending again; but a design to discourage or prevent him from offending again can be no ground for that person whom he has injured by offending once to claim property in the goods which he is deprived of. The ends of punishment may be answered by taking the criminal's goods from him; but these ends do not require that the property which he loses should be vested in the person whom he has injured." See 1 Rutherforth's Institutes, b. 1, c. 18, § xiv. p. 434.

It was solely upon this ground of compensation to the plaintiff for the injury to his feelings by the very insulting conduct of the defendant, that the verdict was held good in Merest *v.* Harvey, 5 Tannt. 442. Lord Kenyon has sometimes been quoted as having said, that though a plaintiff may not have sustained an injury by adultery, to a given amount, yet that large damages, for the sake of public example, should be given. And this supposed opinion of his was alluded to in the case of Markam *v.* Fawcett. But Mr. Erskine, who was for *the plaintiff* in that action, protested that "he never said any such thing." "He said that every plaintiff had a right to recover damages *up to the extent of the injury he had received;* and that public example stood in the way of showing *favor* to an adulterer, by reducing the damages *below* the sum which the jury would otherwise consider as the lowest *compensation for the wrong:*" 2 Erskine's Speeches, p. 9. The general rule, as thus limited, was recognized in Gunter *v.* Astor, 4 J. B. Moore, p. 12, where the defendants, who were rival manufacturers in the same trade with the plaintiff, had invited his company of servants to a dinner, got them intoxicated, and induced them to sign an agreement to leave the plaintiff's service and enter their own, which they did. The action was in case for conspiracy; and Ld. C. J. Dallas "left it to the jury to give damages *commensurate with the injury the plaintiff had sustained.*" A new trial was moved for, on the ground that as the plaintiff's men worked by the piece only, and not by a contract on time, the plaintiff was entitled to damages only for the half-day they spent at the dinner; whereas the jury had given £1,600, being the proved value of two years' profits. But the motion was denied, on the ground that the plaintiff was entitled to recover damages for the loss he actually sustained by their leaving him at that critical period, of which the jury were the proper and exclusive judges. Here was a case of gross fraud and aggravated wrong, particularly dangerous in a manufacturing community; and yet no one pretended that the plaintiff had a right to greater damages than he had himself sustained, however deserving the defendants might be of a heavy pecuniary *mulct*, by way of example. A subsequent case, parallel to this in its principles, is that of Williams *v.* Currie, 1 M. G. & S. 841, in which, though a case of aggravated and annoying trespass, the jury were restricted, in their award of damages, to *a fair compensation for the injury sustained.* See also Sears *v.* Lyons, 2 Stark. 317, which was trespass for breaking the plaintiff's close and poisoning his fowls, where the jury were cautioned to guard their feelings against the impression likely to have been made by the defendant's conduct.

The rule of damages as limited by the extent of the injury to the plaintiff, was the same in the Roman civil law. See 1 Domat's Civil Law, pp. 426, 427, b. 3, tit. 5, § 2, n. 8, and notes; Wood's Institute of the Civil Law, b. 3, c. 7, pp. 258–264, and the cases there cited.

The broad doctrine stated by Mr. Sedgwick finds more countenance from the bench of Pennsylvania than in any other quarter; and yet even there it can hardly be said to have been *adjudged* to be the law, as may be seen by the cases decided. The earliest, usually referred to is Sommer *v.* Wilt, 4 S. & R. 19, which was an action on the case to recover damages for the malicious abuse of legal process, in which the jury found for the plaintiff, assessing damages at $9,500. The case came before the court in bank, on a motion to set aside the verdict, on the ground that the damages were excessive; but the motion was refused for the express reason that "all the facts and circumstances" of the case "were fairly submitted to the jury, to draw their own conclusion;" and that "there were circumstances from which the jury might have inferred

malice, and evidence which satisfied them that *the ruin of the plaintiff* was occasioned by an act of oppression, and many *aggravating circumstances* of useless severity." This case, therefore, is in strict accordance with the rule as we have stated it, the damages being referred to the extent of the wrong done to the plaintiff. When, therefore, the learned judge, in the course of his judgment, remarked that the standard of damages in actions of that nature "was not even a matter of mere compensation to the party, but an example to deter others," the remark was not called for by the question before him, but was entirely extra-judicial. This case was cited and its principle approved in Kuhn *v.* North, 10 S. & R. 399, 411, in which the court granted a new trial because of excessive damages, in an action against the sheriff, where he honestly intended to perform his duty, and the jury were plainly mistaken.

(Of a similar character was the observation of Mr. Justice Grier, in the late case of Stimpson *v.* The Rail Roads, 1 Wallace 164, 170. It was an action on the case for violation of the plaintiff's patent-right; and the question was, whether the plaintiff's actual costs out of pocket in prosecuting the suit might be included by the jury in their estimation of damages. The learned judge, in delivering his opinion in the negative, incidentally said: "It is a well-settled doctrine of the common law, though somewhat disputed of late (10 Law Reporter, 49), that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of the defendant's conduct, rather than compensation to the plaintiff." This remark was clearly gratuitous, it being irrelevant to the point in judgment.)

The strongest case in favor of giving damages to the plaintiff beyond what he had sustained is that of McBride *v.* McLaughlin, 5 Watts, 375, which was trespass against a judgment creditor for a wilful and malicious abuse of process, in the levy of his execution against two joint debtors, "under circumstances of peculiar injustice and oppression." It appeared that the oppression was in fact meditated, not against the present plaintiff, but against the other debtor, to whom the property taken was supposed to belong; and that the present plaintiff had been joined in the judgment by mistake; and it was set aside as to him. The question was, whether the defendant's malice and misconduct in the transaction could be taken into the estimation of damages, inasmuch as it was not intended against the plaintiff. The judge ruled that it might; and his ruling was sustained by the court in bank. There was no discovery of error or mistake by the creditor, and consequent apology, during the oppressive transaction; but the whole was carried out to its final consummation, in the most insolent and cruel manner. The case therefore falls within our rule, that the jury may consider all the circumstances affecting the plaintiff, either in mind, body, or estate, and award him damages to the extent of the injury done *to him* in either of those respects. Surely, if A spits in B's face, on 'Change, it does not diminish the disgrace, nor, of course, the extent of the injury, for him afterwards to say that he mistook B for C. The crowd that saw the indignity may never come to the knowledge of this fact, nor does it lessen the pain inflicted upon his feelings at the time. In both cases, as in all others, the evidence is confined to the principal fact, with all its attending circumstances, stamping its character, and affecting the party injured. In the case we have just cited, however, the learned judge does seem to place the decision of the court on the ground that, in certain offences against morals which would otherwise pass without reprehension, "the providence of the *courts*" permits the private remedy to become an instrument of public correction. We say *seems* to place it; for he also uses expressions which equally indicate a reliance upon the rule which confines the jury to the evidence affecting the plaintiff alone. Such, for example, is the concluding sentence of his judgment: "The defendant was guilty of *wilful oppression*, and he is properly punished for *it*." Oppression of whom? Clearly the plaintiff, and no other. Our limits will not permit an extended examination of all that fell from the court on this occasion; but with the profound respect we sincerely entertain for that learned bench, we may be allowed to question the accuracy of the assertion that, in an action for seduction of a daughter, the loss of service is the only legal ground of damages to the plaintiff. It is true it was stated by Lord Ellenborough, in 1809, to be difficult to perceive the legal propriety of extending the rule beyond that; yet he confessed the practice of so extending it had become inveterate; and accordingly he instructed the jury also to consider the injury to the plaintiff's parental feelings; and the rule has for many years been well settled, that in this, as in other wrongs, the wounded feelings, the loss of comfort, and the dishonor of the plaintiff, resulting from the act of the defendant, form a legal ground of damages, as part of the transaction complained of. The grounds of the action for seduction were recently examined in England, in Grinnel *v.* Wells, 7 M. & G. 1033, and the damages explicitly admitted to be given as *compensation;* not limited, however, to the actual expenditure of the plaintiff's money, but given according to all the circumstances of aggravation in

the particular case. These are consequences of the defendant's wrongful act, done to the plaintiff, to his injury; and it is for these, and not for the outrage to the public, that damages are given. See *post*, § 579, and cases there cited. Andrews *v.* Askey, 8 C. & P. 7. The case of Benson *v.* Frederick, 3 Burr. 1845, cited in McBride *v.* McLaughlin, was not a case of damages given for the sake of example. It was an action against a colonel, for ordering a private to be whipped out of spite to his major, who had given the man a furlough. The jury gave him £150; and the court refused to set aside the verdict for excessiveness of damages, because the man, "though not much hurt, indeed, was *scandalized and disgraced* by such a punishment."

It is worthy of remark, that in Wynn *v.* Allard, 5 Watts & Serg. 524, which was trespass for a collision of vehicles on the road, the same learned court of Pennsylvania very properly held, that the drunkenness of the defendant was admissible in evidence to determine the question of negligence, where the proof was doubtful; but "not to inflame the damages." Why not, if it was "an offence against morals"? For it certainly must have been deemed such an offence. And in Rose *v.* Story, 1 Barr 190, 197, in trespass *de bonis asportatis*, where the jury had been allowed, in addition to the value of the property, to give such further damages as "*under all the circumstances of the case*, as argued by the counsel, they might think the plaintiff entitled to demand," the same court held the instruction wrong, as giving the jury "discretionary power without stint or limit, highly dangerous to the rights of the defendant," and "leaving them without any rule whatever."

The subject of vindictive damages has recently been before several other American tribunals. In the Circuit Court of the United States, in Taylor *v.* Carpenter, 10 Law Reporter, 35, 188; 2 Woodb. & Minot 1, 21, which was case for counterfeiting the plaintiff's marks on goods of the defendant, in which Sprague, J., had instructed the jury to give exemplary damages, for the sake of public example, the verdict was allowed to stand, as it appeared that the jury had not given more damages than, upon computation, the plaintiff had actually sustained. But Woodbury, J., in giving judgment, referred to the doctrine as stated in the text of this work, and in 3 Am. Jur. 287–308, without disapprobation; and Sprague, J., with great candor declared that he had become satisfied that his ruling upon this point, at the trial, was wrong. And it is worthy of note that in a similar case, namely, an action on the case for counterfeiting the plaintiff's trademarks, recently determined in England, it was held, that the proper rule of damages was the actual injury sustained by the plaintiff; and it was observed by Coltman, J., that it would not have been at all unreasonable for the jury to have found damages to the amount of the profit made by the defendant upon the transaction in question. But there was no intimation that it was in any view of the case lawful to go further: Rodgers *v.* Nowill, 11 Jur. 1039. So, in a later case, which was trespass against two, one of whom had acted from bad motives, and the other had not, it was held that the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent, but *according to the whole injury which the plaintiff had sustained* from the joint trespass: Clark *v.* Newsam, 1 Exch. 131. In the Supreme Court of New York, in Whitney *v.* Hitchcock (see 10 Law Rep. 189, since reported in 4 Denio, 461), which was case, by a father, for an atrocious assault and battery upon his young daughter, the question directly in judgment was, whether, in the case of a wrong punishable criminally, by indictment, the plaintiff, in a civil action for the wrong, was entitled to recover greater damages than he could prove himself to have sustained; and the court, having before it such of the foregoing discussions as were published in the Law Rep. vol. ix. pp. 529–542, decided that he was not. The point was also incidentally ruled in the same manner by Cushing, J., in Meads *v.* Cushing, in the Court of Common Pleas in Boston. See 10 Law Rep. 238. In Austin *v.* Wilson, 4 Cush. 273, which was an action on the case for a libel, the judge in the court below instructed the jury that this was not a case in which exemplary or punitive damages could be given; to which the plaintiff took exception. The opinion of the Supreme Judicial Court on this point was delivered by Metcalf, J., in the following terms: "We are of opinion that the jury were rightly instructed that the damages, in this case, must be limited to a compensation for the injury received. Whether exemplary, vindictive, or punitive damages — that is, damages beyond a compensation or satisfaction for the plaintiff's injury, can ever be legally awarded, as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity, or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments and the authorities on both sides of the question are to be found in 2 Greenl. on Ev., tit. Damages, and Sedgwick on Damages, 39 *et seq.* If such damages are ever recoverable, we are clearly of opinion that they cannot be

recovered in an action for an injury which is also punishable by indictment; as libel, and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. See Thorley *v.* Lord Kerry, 4 Taunt. 355; Whitney *v.* Hitchcock, 4 Denio 461; Taylor *v.* Carpenter, 2 Woodb. & Min. 132."

The obscurity in which this subject has been involved has arisen chiefly from the want of accuracy and care in the use of terms, and from a reliance on casual expressions and *obiter dicta* of judges, as deliberate expositions of the law, instead of looking only to the point in judgment. In most of the cases in which the terms "vindictive damages," "exemplary damages," and "smart-money," have been employed, they will be found to refer to the *circumstances* which *actually accompanied* the wrongful act, and were *part* of the *res gestæ* and which, therefore, though not of themselves alone constituting a substantive ground of action, were proper subjects for the consideration of the jury, because injurious to the plaintiff. When the language used by judges in this connection is laid out of the case, as it ought to be, the position, that criminal punishment may be inflicted in a civil action, by giving to the plaintiff a compensation for an injury he never received, and which he does not ask for, will prove to have little countenance from any judicial decision. The contrary is better supported, both by the principle of many decisions, and by the analogies of the law.

[See Chubb *v.* Gsell, 34 Penn. 114. It is held by a majority of the court in Taylor *v.* Church, 8 N. Y. 460, an action for libel, that instructions to the jury, that if they were satisfied that the defendant was influenced by *actual* malice, or a deliberate intention to injure the plaintiff, they may give, in addition to a full compensation, "such further damages as are suited to the aggravated character which the act assumes, and as are necessary as an example to deter from the doing of such injuries," were correct. And the principle is said to be well established in English and American courts that the jury may give damages, "not only to recompense the sufferer, but to punish the offender." In Hunt *v.* Bennett, 19 N. Y. 174, where the court below charged the jury that "the plaintiff was not only entitled to recover to the full extent of the injury done him, but a jury might go further, and, if the circumstances of the case warranted it, increase the amount of damages as a punishment to the slanderer," the counsel for the defendant was stopped by the court, and informed that the question had been settled against him in that court in unreported cases, the last of which (Keezeler *v.* Thompson) was decided in December, 1857. The whole court concurred in deeming the question at rest. In Hopkins *v.* Atlantic & St. Lawrence Railway, 36 N. H. 9, an action by the husband for an injury to the wife through the negligence of the company, it was held that the jury may give exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company in the management of their trains. See also to the same point, *ante*, §§ 89, 232 *b*; *post*, §§ 275, 575. Exemplary or punitive damages are not recoverable for a tort which may be punished criminally: Fay *v.* Parker, 53 N. H. 342, where the whole subject of exemplary damages, and especially this controversy between Professor Greenleaf and Mr. Sedgwick is very elaborately and very ably discussed by Foster, J., who favors the doctrine maintained by the author. See Brown *v.* Swineford, 44 Wis. 282; Boyer *v.* Barr, 8 Neb. 68; Kiff *v.* Youmans, 20 Hun (N. Y.) 123. There is a large class of cases, *i. e.* actions against railroad companies for injuries inflicted by them, in which the language of the courts at least seems to uphold the view of Mr. Sedgwick. The underlying principle is, perhaps, that the only way to secure safety for passengers is to mulct the companies so heavily when accidents occur, that it will be for their interest to use all possible precautions to avoid such accidents, and in this roundabout way to produce a public benefit. Thus, it has been held that exemplary damages against the company will be given when the act of the servant is wilful and malicious (Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202); or wrongful (Palmer *v.* Railroad, 3 S. C. 580); especially if the master knew of the servant's unfitness, and still retained him in his employ (Cleghorn *v.* N. Y. Cent. R. R. Co., 56 N. Y. 44). See also Kennedy *v.* N. M. R. R. Co., 36 Mo. 351; Kountz *v.* Brown, 16 B. Mon. (Ky.) 577; Wiley *v.* Keokuk, 6 Kan. 94, where the prevailing rule is well stated to be, that whenever either fraud, malice, gross negligence, or oppression is an element in the case against the defendant, the jury may find exemplary damages. The negligence should be so gross as to amount to wantonness: Leavenworth R. R. Co. *v.* Rice, 10 Kan. 426. And the employment of a drunken driver by a stage proprietor amounts to that: Sawyer *v.* Sauer, 10 Kan. 466. See also Welch *v.* Ware, 32 Mich. 77. In an action against a railroad company for the negligence of its servants, to justify punitive or exemplary damages, there must be some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference as to consequences: Milwaukee, etc. R. R. Co. *v.* Arms,

but only in personal and mixed actions. In some of the American States, the jury are authorized by statutes to assess, in real actions, the damages, which by the common law are given in an action of trespass for mesne profits; but this only converts the real into a mixed action.

§ 254. **Must result from Injury complained of.** All damages must be *the result* of the injury complained of; whether it consists in the withholding of a legal right, or the breach of a duty legally due to the plaintiff. Those which *necessarily* result are termed *general damages*, being shown under the *ad damnum*, or general allegation of damages, at the end of the declaration; for the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them. Some damages are always presumed to follow from the violation of any right or duty implied by law; and therefore the law will in such cases award *nominal* damages, if none greater are proved.[1] But where the damages, though the *natural* consequences of the act complained of, are *not* the *necessary* result of it, they are termed *special damages;* which the law does not imply; and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial.[2] But where the

91 U. S. 489.] [In spite of the elaborate argument of Mr. Greenleaf, the law is now settled in most jurisdictions that in all actions of tort, and in actions for breach of promise of marriage, "the jury may give damages beyond the strict limit of compensation, when the act complained of has been committed under circumstances of aggravation, and thus by a heavier verdict than the rule of compensation could call for, punish the defendant and hold him up as an example to others:" A. G. Sedgwick, Damages, 85. Exemplary damages may be given against the principal for the act of his agent only when the principal expressly authorized the act, or ratifies it, or is guilty of "that entire want of care which would raise the presumption of a conscious indifference to consequences:" Lake Shore R. *v.* Prentice, 147 U. S. 101. In some jurisdictions such damages are allowed against the principal whenever they could be given against the agent: Singer Mfg. Co. *v.* Holdford, 86 Ill. 455; Hanson *v.* European, etc. R., 62 Me. 84. The malice of one of two joint tort-feasors will not sustain a verdict for exemplary damages against both: Hearne *v.* De Young, 119 Cal. 670; Washington Gas Light Co. *v.* Lansden, 172 U. S. 534; *contra*, Reigenstein *v.* Clark, 73 N. W. 588, Ia. The right to award exemplary damages is not dependent upon the proof of actual pecuniary damage: Press Publishing Co. *v.* Monroe, 38 U. S. App. 410; *contra*, Giraud *v.* Moore, 86 Tex. 675; Boardman *v.* Marshalltown Co., 75 N. W. 343, Ia.]

[1] Whittemore *v.* Cutter, 1 Gall. 443, per Story, J. And see Sedgwick on Damages, c. 2; [New Jersey School Co. *v.* Board of Education, 58 N. J. L. 646; Treadwell *v.* Tillis, 108 Ala. 262.]

[2] 1 Chitty on Plead. 328, 346, 347 (4th ed.); Baker *v.* Green, 4 Bing. 317; Pindar *v.* Wadsworth, 2 East 154; Armstrong *v.* Percy, 5 Wend. 538, 539, per Marcy, J.; 2 Stark. on Slander, 55–58 [62–66], by Wendell; Dickinson *v.* Boyle, 17 Pick. 78. In an action for breach of a special agreement respecting the assignment of a certain lease and fixtures, under the allegation that the plaintiff "had been necessarily put to great expenses," he was permitted to give evidence of charges which he had become liable to pay an attorney, and a value for work done in respect to the premises in question, though the charges were not paid until after the action was commenced: Richardson *v.* Chassen, 34 Leg. Obs. 383. [Sympathetic affection of other parts of the body than those specified may be shown (Illinois Central R. *v.* Griffin, 80 F. 278, U. S. App.); but not loss of memory or impaired mental constitution: Atchison, etc. R. *v.* Willey, 57 Kan. 764. Mental suffering is the natural consequence of personal

special damage is properly alleged, and is the natural consequence of the wrongful act, the jury may infer it from the principal fact. Thus, where the injury consisted in firing guns so near the plaintiff's decoy-pond as to frighten away the wild fowls, or prevent them from coming there; or, in maliciously firing cannon at the natives on the coast of Africa, whereby they were prevented from coming to trade with the plaintiff; these consequences were held to be well inferred from the wrongful act.[3]

§ 255. **Damages Question for Jury.** In trials at common law, the jury are the proper judges of damages; and where there is no certain measure of damages, the court, ordinarily, will not disturb their verdict, unless on grounds of prejudice, passion, or corruption in the jury.[1] If they are unable to agree, and the plaintiff has evidently sustained some damages, the court will permit him to take a verdict for a nominal sum.[2] Generally, in actions upon contract, where the plaintiff fails in proving the amount due, or the precise quantity, he can recover only the lowest sum indicated by the evidence. Thus, where delivery of a bank-note was proved, but its denomination was not shown, the jury were rightly instructed to presume it to be of the lowest denomination in circulation.[3] So in *assumpsit* by a liquor merchant, where the delivery of several hampers of full bottles was proved, but their contents were not shown, the jury were directed to presume that they contained porter, that being the cheapest liquor in which the plaintiff dealt.[4]

§ 256. **Must be Natural and Proximate Consequence.** The damage to be recovered must always be the *natural and proximate consequence* of the act complained of. This rule is laid down in

injuries, and need not be pleaded: McCoy *v.* Milwaukee Street R., 59 N. W. 453, Wis. See further as to pleading special damage, Hamilton *v.* Great Falls Street R., 17 Mont. 334.] {In an action of tort against a corporation for a personal injury by their locomotive engine, the plaintiff's occupation and means of earning support are not admissible in evidence to increase the damages, if not specially averred in the declaration: Baldwin *v.* Western R. R. Corp., 4 Gray (Mass.) 333. [But see Chatsworth *v.* Rowe, 166 Ill. 114; Chicago, etc. R. *v.* Meech, 163 id. 305.] Whether such evidence would be admissible in any form of declaration, *quære:* Baldwin *v.* Western R., *supra*. In an action by a father for the seduction of his daughter, damages to the plaintiff's feelings may be recovered, though not specially alleged in the declaration: Phillips *v.* Hoyle, 4 Gray, 571.}

[3] Carrington *v.* Taylor, 11 East 571; Keeble *v.* Hickeringill, ib. 574, n.; 11 Mod. 74, 130; 3 Salk. 9; s. c. Holt 14, 17, 19; Tarleton *v.* McGawley, Peake's Cas. 205.

[1] Gilbert *v.* Birkinsham, Lofft 771; Cowp. 230; Day *v.* Holloway, 1 Jur. 794; Kendall *v.* Stone, 2 Sandf. S. C. 269. {Or unless it evinces partiality, or a mistake in principle: Treanor *v.* Donahoe, 9 Cush. (Mass.) 228. It is the practice in some courts, where the jury have given such excessive damages that the court feels bound to set aside the verdict, to allow the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and if he thus remits the excess, the court will deny a motion for a new trial: Sedgwick on Damages (7th ed.), p. 655; Diblin *v.* Murphy, 3 Sandf. (N. Y.) 19; Guerry *v.* Kerton, 2 Rich. (S. C.) 507; Young *v.* Englehard, 1 How. (Miss.) 19.}

[2] Feize *v.* Thompson, 1 Taunt. 121; {Bond *v.* Hilton, 2 Jones, Law (N. C.), 149; Owen *v*, O'Rielly, 20 Mo. 603.}

[3] Lawton *v.* Sweeny, 8 Jur. 964.

[4] Clunnes *v.* Pezzy, 1 Campb. 8.

regard to special damage; but it applies to all damage.[1] Thus, where the defendant had libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged that by reason thereof the receipts of his house were diminished, this consequence was held too remote to furnish ground for a claim of damages.[2] So, where the defendant asserted that the plaintiff had cut his master's cordage, and the plaintiff alleged that his master, believing the assertion, had thereupon dismissed him from his service, it was held, that the discharge was not a ground

[1] See Sedgwick on Damages, c. 3. {*Post* § 261; Marble *v.* Worcester, 4 Gray (Mass.), 395; Miller *v.* Butler, 6 Cush. (Mass.) 71; Watson *v.* Ambergate Railway Co., 3 Eng. Law & Eq. 497. Upon this subject, see a carefully prepared article in the Southern Law Review for January, 1876.} [See Smith *v.* Gentry, 45 S. W. 515, Ky.]

[2] Ashley *v.* Harrison, 1 Esp. 48; 2 Stark. on Slander, pp. 64, 65. And see Armstrong *v.* Percy, 5 Wend. 538, 539, per Marcy, J.; Crain *v.* Petrie, 6 Hill (N. Y.) 522; Downer *v.* Madison Co. Bank, ib. 648; [Todd *v.* Keene, 167 Mass. 157.]

{"The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract:" By Bigelow, J., in Fox *v.* Harding, 7 Cush. (Mass.) 522; Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61; Chapin *v.* Norton, 6 McLean C. C. 500. In Hadley *v.* Baxendale, 9 Exch. 341, a leading case in England, the rule was laid down as follows by Alderson, B.: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In this case the plaintiffs, the owners of a flour-mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them; and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery; and the delivery of the broken shaft to the consignee to whom it had been sent by the plaintiffs, as a pattern by which to make a new shaft, was delayed for an unreasonable time; in consequence of which the plaintiffs did not receive the new shaft until after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred a loss of profits. Held, under the circumstances, such loss could not be recovered in an action against the defendants as common carriers. Recognizing Hadley *v.* Baxendale as the leading authority, it was held in the Queen's Bench (Smeed *v.* Ford, 5 Jur. N. S. 291), where the plaintiff, a farmer, contracted with the defendant, an agent for the sale of thrashing-machines, for the purchase of a thrashing-machine, to be delivered on the 14th of August, and defendant was aware of the particular purpose for which it was ordered, and the machine was not delivered on that day, and plaintiff, being led by the promises of the defendant to expect that it would be delivered from day to day, abstained from hiring it elsewhere, that plaintiff was entitled to recover, in an action against defendant, for loss sustained by injury to his wheat by a fall of rain, and for expenses incurred in carting the wheat and thatching it, and for the cost of kiln-drying it, but not for loss by a fall in the market-price of wheat. See also *post*, § 260. As to what circumstances would lead to the inference that the parties contemplated exceptional damages, see Horn *v.* Midland R. R. Co., L. R. 7 C. P. 583.}

of action, since it was not the natural consequence of the words spoken.[3] So, also, it has been held, that, in *assumpsit* for breach of a promise to marry, evidence of seduction is not admissible, in aggravation of damages.[4] And in trespass *quare clausum fregit*, for destroying the plaintiff's fences, it was held that the measure of damages was the cost of repairing the fences, and not the injury resulting to the subsequent year's crop from the defect in the fences, long after the plaintiff had knowledge of the fact.[5]

§ 257. **In Contract.** In cases of contract, if the parties themselves have *liquidated the damages*, the jury are bound to find the amount thus agreed. But whether the sum stipulated to be paid upon breach of the agreement is to be taken as liquidated damages, or only as a penalty, will depend upon the intent of the parties, to be ascertained by a just interpretation of the contract. And here it is to be observed, that the policy of the law does not regard penalties or forfeitures with favor; and that equity relieves against them. And therefore, because, by treating the sum as a mere penalty, the case is open to relief in equity, according to the actual damages, the sum will generally be so considered; and the burden of proof will be on him who claims it as liquidated damages, to show that it was intended as such by the parties.[1] This intent is to be ascer-

[3] Vickars *v.* Wilcocks, 8 East 1. This case, however, is said to have been doubted, 8 Jur. 876; per Parke, B. See also 1 Smith's Leading Cases, pp. 203–304, and cases there cited; 1 Stark. on Slander, p. 205. [And see O'Neill *v.* Johnson, 55 N. W. 601, Minn.] {Nor, in an action for assault and battery, is the loss of a position to which the plaintiff was about to be appointed an element of damages: Brown *v.* Cummings, 7 Allen (Mass.) 507.}

[4] Weaver *v.* Bachert, 2 Pa. St. 230. And see Hay *v.* Graham, 8 W. & S. 27. {*Contra*, Sauer *v.* Schulenberg, 33 Md. 288; Kelley *v.* Riley, 106 Mass. 339; Cover *v.* Davenport, 1 Heisk. (Tenn.) 368; [Geiger *v.* Payne, 69 N.W. 554, Ia.; Liese *v.* Meyer, 45 S. W. 282, Mo.] That plaintiff, since the commencement of the action, has said she had no affection for the defendant, and would not think of marrying him but for his money, is not admissible in mitigation of damages: Miller *v.* Hays, 34 Iowa, 496. Loss of time and expenses incurred in preparations for marriage are grounds of damage directly incidental to a breach of promise of marriage; but they are strictly incidental, and are not grounds of special damage: Smith *v.* Sherman, 4 Cush. (Mass.) 408. The length of the engagement is an element of damage: Grant *v.* Willey, 101 Mass. 355.} [So is the improper motive of the defendant: Kaufman *v.* Fye, 42 S. W. 25, Tenn.]

[5] Loker *v.* Damon, 16 Pick. 284. {A person who puts a libel in circulation is liable to all the natural and probable consequences of so putting it in circulation: Miller *v.* Butler, 6 Cush. (Mass.) 71. Where a horse drawing a vehicle, and driven with due care, becomes frightened and excited by the striking of the vehicle against a defect in the highway, frees himself from the control of his driver, turns, and, at the distance of fifty rods from the defect, knocks down a person on foot in the highway, and using reasonable care, the city or town obliged by law to keep the highway in repair is not responsible for the injury so occasioned, though no other cause intervene between the defect and the injury: Marble *v.* Worcester, 4 Gray (Mass.) 395. A prize was offered for the best plan and model of a certain machine, the plans and models intended for the competition to be sent by a certain day. The plaintiff sent a plan and model by a railway company, which by negligence did not deliver the plan, etc., until after the appointed day. In such a case, the proper measure of damages would seem to be the value of the labor and materials in making the plan and model, and not the chance of obtaining the prize, this being too remote a ground for damages: Watson *v.* Ambergate, etc. Railway Co., 3 Eng. Law & Eq. 497.}

[1] Taylor *v.* Sandiford, 7 Wheat. 17, per Marshall, C. J. Mr. Evans seems to have

tained from the whole tenor and subject of that agreement; the mere use of the *words* "penalty," "forfeiture," or "liquidated damages," not being regarded as at all decisive of the question, if the instrument discloses, upon the whole, a different intent.[2]

§ 258. **Penalties.** The *cases* in which the sum has been *treated as a penalty* will be found to arrange themselves into five classes, furnishing certain *rules* by which the *intention* of the parties is *ascertained*. (1) Where the parties, in the agreement, have *expressly declared* the sum to be intended as a forfeiture, or penalty, and no other intent is to be collected from the instrument.[1] (2) Where it was *doubtful* whether it was intended as a penalty, or not; and a certain damage, or debt, less than the penalty, is made payable, on the face of the instrument.[2] (3) Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral*. This rule has been applied where the principal agreement was, not to trade on a certain coast;[3] to let the

been of the contrary opinion: 2 Poth. Obl. 71, 82, 86, by Evans. Wherever there is an agreement to do a certain thing under a penalty, the obligee may either sue in debt for the penalty, in which case he cannot recover more than the penalty and interest, but may upon a hearing in equity recover less; or he may sue in covenant, upon the agreement, for the breach thereof, disregarding the penalty; in which case he may generally recover more, if he has suffered more: Harrison *v.* Wright, 13 East 342; Bird *v.* Randall, 1 Doug. 373; Winter *v.* Trimmer, 1 Bl. Rep. 395; Astley *v.* Weldon, 2 B. & P. 346. If the sum is claimed as liquidated damages, it must be sued for in debt, or *indebitatus assumpsit*. Davies *v.* Penton, 6 B. & C. 221; Bank of Columbia *v.* Patterson, 7 Cranch 303.

[2] Davies *v.* Penton, 6 B. & C. 224, per Littledale, J.; Kemble *v.* Farren, 6 Bing. 141; 2 Story on Eq. § 1318. {The following principles are given by Mr. Sedgwick, in his work on the Measure of Damages, as governing these cases:

(1) That the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true intent of the parties, and to do justice between them.

(2) That when the agreement is in the alternative, to do some particular thing or pay a given sum of money, the Court will hold the party failing to have had his election, and compel him to pay the money.

(3) That in case of an agreement to do some act, and, upon failure, to pay a sum of money, the Court will look into the intent of the parties, that no particular phraseology will be held to govern absolutely, but that, although the term "liquidated damages" will not be conclusive, the phrase "penalty" generally is so, unless controlled by some other very strong consideration.

(4) That if the sum is evidently fixed to evade the usury laws or any other statutory provision, or to cloak oppression, the courts will relieve by treating it as a penalty. Consequently, whenever the sum stipulated is to be paid on the new payment of a less sum made payable by the same instrument, it will always be held a penalty.

(5) That when, independently of the stipulation, the damages would be wholly uncertain, or incapable or very difficult of being ascertained, except by mere conjecture, there the damages will be usually considered liquidated if they are so denominated by the instrument: Sedgwick, Measure of Damages, 7th ed., pp. 244–249. See also, on this subject, Scofield *v.* Tompkins, 95 Ill. 190; Daly *v.* Maitland, 88 Pa. St. 384; De Lavallette *v.* Wendt, 75 N. Y. 579; Williams *v.* Vance, 9 S. C. 344.}

[1] Astley *v.* Weldon, 2 B. & P. 346, 350; Smith *v.* Dickinson, ib. 630; Tayloe *v.* Sandiford, 7 Wheat. 14; Wilbeam *v.* Ashton, 1 Campb. 78; Orr *v.* Churchill, 1 H. Bl. 227; Stearns *v.* Barrett, 1 Pick. 451; Dennis *v.* Cumming, 3 Johns. Cas. 297; Brown *v.* Bellows, 4 Pick. 179.

[2] Astley *v.* Weldon, 2 B. & P. 350, per Ld. Eldon. And see the observations of Best, C. J., in Crisdee *v.* Bolton, 3 C. & P. 240.

[3] Perkins *v.* Lyman, 11 Mass. 76.

plaintiff have the use of a certain building,[4] or of certain rooms;[5] and not to sell brandy within certain limits;[6] but the difference between these and some other cases, which have been regarded as liquidated damages, is not very clear. (4) Where the agreement contains *several matters of different degrees of importance*, and yet the sum named is payable for the breach of any, even the least. Thus, where the agreement was to play at Covent Garden, and conform to *all* the rules of the establishment, and to pay one thousand pounds for *any* breach of them, as liquidated damages, and not as a penalty, it was still held as a penalty only.[7] (5) Where the contract is *not under seal*, and the *damages are capable of being certainly known* and estimated; and this, though the parties have expressly declared the sum to be as liquidated damages.[8]

§ 259. **Liquidated Damages.** On the other hand, it will be inferred that the parties intended the sum as *liquidated damages*, (1) Where the *damages* are uncertain, and are *not capable of being ascertained* by any satisfactory and known rule; whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case. This rule has been applied, where the agreement was to pay a certain sum for each week's neglect to repair a building;[1] for each year's neglect to remove a lime-kiln;[2] for not marrying the plaintiff;[3] for running a stage on a certain road, in violation of contract;[4] for breach of a contract not to trade, or practise, within certain limits;[5] and for not resigning an office, agreeably to a previous stipulation.[6] (2) Where, from the nature of the case, and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties.[7] Of this sort are agreements to pay

[4] Merrill *v.* Merrill, 15 Mass. 488.

[5] Sloman *v.* Walter, 1 Bro. C. C. 418.

[6] Hardy *v.* Martin, 1 Bro. C. C. 419.

[7] Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 5 Bing. N. C. 390; 7 Scott, 364; Carrington *v.* Laing, 6 Bing. 242; [Willson *v.* Love, 1896, 1 Q. B. 626.] There are, however, some cases in which it has been said that, where the parties expressly declare that the sum is to be taken as liquidated damages, it shall be so taken. See Hasbrouck *v.* Tappen, 15 Johns. 200; Slosson *v.* Beale, 7 Johns. 72; Reilly *v.* Jones, 1 Bing. 302; Goldsworthy *v.* Strutt, 35 Leg. Obs. 540. But this rule, it is conceived, ought to be applied only where the meaning is not otherwise discoverable; since it runs counter to the general policy of the law of equity, and to the statutes which provide for relief against forfeitures and penalties in the courts of common law.

[8] Pinkerton *v.* Caslon, 2 B. & Ald. 704; Davies *v.* Penton, 6 B. & C. 216; Randall *v.* Everest, 1 M. & Malk. 41; Barton *v.* Glover, 1 Holt, Cas. 43; Spencer *v.* Tilden, 5 Cow. 144; Graham *v.* Bickham, 4 Dall. 150.

[1] Fletcher *v.* Dyche, 2 T. R. 32.

[2] Huband *v.* Grattan, 1 Alcock & Napier, 389.

[3] Lowe *v.* Peers, 3 Burr. 2125; Cock *v.* Richards, 10 Ves. 429.

[4] Leighton *v.* Wales, 3 M. & W. 545; Pierce *v.* Fuller, 8 Mass. 223.

[5] Noble *v.* Bates, 7 Cow. 309; Smith *v.* Smith, 4 Wend. 468; Crisdee *v.* Bolton, 3 C. & P. 240. In this case, the sum was declared by the parties to be liquidated damages: Goldsworthy *v.* Strutt, 35 Leg. Obs. 540.

[6] Legh *v.* Lewis, cited 2 Poth. Obl. 85, by Evans.

[7] See observations of Best, C. J., in Crisdee *v.* Bolton, 3 C. & P. 240; 2 Story on Eq. Jurisp. § 1318; Leland *v.* Stone, 10 Mass. 459, 462.

an additional rent for every acre of land which the lessee should plough up;[8] not to permit a stone weir to be enlarged, "under the penalty of double the yearly rent, to be recovered by distress or otherwise;"[9] to convey land, or, instead thereof, to pay a certain sum;[10] to pay a higher rent, if the lessee should cease to reside on the premises;[11] that a security should become void, if put in suit before the time limited in a letter of license granted to the debtor;[12] and to pay a sum of money in goods at an agreed price.[13]

§ 260. **Precise Amount or Value need not be proved.** In the proof of damage, the plaintiff is *not confined to the precise number, sum, or value*, laid in the declaration; nor is he bound to prove the breach of a contract to the full extent alleged. Thus, though he cannot recover greater damages than he has laid in the *ad damnum* at the conclusion of his declaration, yet the jury may find damages for the value of goods tortiously taken, beyond the value alleged in the body of the count.[1] So, under a count for a total loss of property insured, it is sufficient to prove an average or partial loss.[2] And in covenant, or *assumpsit*, proof of part of the breach alleged is sufficient to entitle the plaintiff to recover.[3]

§ 261. **Measure of Damages.** The *measure of damages* will, ordinarily, be ascertained by reference to the rule already stated; namely, the natural and proximate consequences of the act complained of. Thus the drawers and indorsers of *bills of exchange*, upon the dishonor thereof, are ordinarily liable to the holder for the principal sum and the common mercantile damages, such as interest, expenses, re-exchange, etc., consequent upon the dishonor of the bill. For, having engaged that the bill shall be paid at the proper time and place, the holder is entitled to expect the money there; and if it is not paid accordingly, he is entitled to re-draw on them for such a sum as, at the market rate of exchange at the place, would put him in funds to the amount of the dishonored bill, and interest, with the necessary incidental expenses.[1] Upon a *contract*

[8] Rolfe *v.* Peterson, 6 Bro. P. C. 436; Birch *v.* Stephenson, 3 Taunt. 473; Farrant *v.* Olmius, 3 B. & Ald. 692; Jones *v.* Green, 3 Y. & J. 298; Aylet *v.* Dodd, 2 Atk. 238; Woodward *v.* Giles, 2 Vern. 119.

[9] Gerrard *v.* O'Reilly, 2 Connor & Lawson 165.

[10] Slosson *v.* Beale, 7 Johns. 72. And see Hasbrouck *v.* Tappen, 15 Johns. 200; Reilly *v.* Jones, 1 Bing. 302; Knapp *v.* Maltby, 13 Wend. 507; Tingley *v.* Cutler, 7 Conn. 291; Mead *v.* Wheeler, 13 N. H. 351.

[11] Ponsonby *v.* Adams, 6 Bro. P. C. 418.

[12] White *v.* Dingley, 4 Mass. 433. And see Wafer *v.* Mocato, 9 Mod. 113.

[13] Brooks *v.* Hubbard, 3 Conn. 58. If the agreed price is unconscionable, the court will not adopt it as the rule of damages: Cutler *v.* Hoy, 8 Mass. 237; Cutler *v.* Johnson, id. 266; Baxter *v.* Wales, 12 id. 365.

[1] Hutchins *v.* Adams, 3 Greenl. 174; Pratt *v.* Thomas, 1 Ware 147; The Jonge Bastiaan, 5 Rob. 322.

[2] Gardiner *v.* Croasdale, 2 Burr. 904; s. c. 1 W. Bl. 198; Nicholson *v.* Croft, 2 Burr. 1188, per Ld. Mansfield.

[3] 1 Chitty on Pl. 297; Sayer, Law of Dam. p. 45; Van Rensselaer *v.* Platner, 2 Johns. 18.

[1] Story on Bills, §§ 399, 400; 3 Kent Com. 115, 116.

to deliver goods, the general rule of damages for non-delivery is the market value of the goods at the time and place of the promised delivery, if no money has yet been paid by the vendee;[2] but if the vendee has already paid the price in advance, he may recover the highest price of such goods in the same place, at any time between the stipulated day of delivery and the time of trial.[3] If, in the

[2] Gainsford *v.* Carroll, 2 B. & C. 624; Boorman *v.* Nash, 9 id. 145; Shaw *v.* Nudd, 8 Pick. 9; Swift *v.* Barnes, 16 id. 194, 196; Shepperd *v.* Hampton, 3 Wheat. 200, 204; Douglas *v.* McAllister, 3 Cranch 298; Chitty on Contr. 352, n. (2), by Perkins; Dey *v.* Dox, 9 Wend. 129; Bank of Montgomery *v.* Reese, 26 Pa. St. 143; {Cahen *v.* Platt, 69 N. Y. 348. If there is *no market* for the goods at the place where they are to be delivered, and the buyer refuses to receive them, the measure of the seller's damage is the contract price agreed upon, less the expense of carrying the goods to the nearest market and the price they would sell for there: Barry *v.* Cavanagh, 127 Mass. 394; Brown *v.* Gilmore, 92 Pa. St. 40. [As to the admissibility of evidence of facts affecting value in a foreign market, see Gregg *v.* Northern R., 41 A. 271, N. H.] The measure of damages in the case of a breach of a contract to deliver goods at a specified time is the difference between the contract price and the market price at the time of the breach of the contract, or the price for which the vendee had sold; but the purchaser cannot recover, as special damage, the loss of anticipated profits to be made by his vendees: Peterson *v.* Ayre, 24 Eng. Law & Eq. 382. See Waters *v.* Towers, 20 id. 410: In an action for the price of goods, it is not competent for the plaintiff to show their value for a specific purpose, but only their market value at the time and place of delivery: Bouton *v.* Reed, 13 Gray (Mass.) 530. And what the market price is may be proved by *price lists* stating what price a manufacturer will sell for, or the statements of dealers in answer to inquiries, or by offers to sell as well as by actual sales: Cliquot's Champagne, 3 Wall. (U. S.) 143; Lush *v.* Druse, 4 Wend. (N. Y.) 313; Harrison *v.* Glover, 72 N. Y. 451.}

[3] Clark *v.* Pinney, 7 Cow. 681; Chitty on Contr. 352 n. (2), by Perkins. But in Massachusetts the damages are restricted to the value at the agreed time of delivery: Kennedy *v.* Whitwell, 4 Pick. 466; Sargent *v.* Franklin Ins. Co., 8 id. 90. Also in Pennsylvania, White *v.* Tompkins, 52 Pa. St. 363. In an action for breach of contract for the sale of goods, it has been held that the measure of damages is not merely the amount of difference between the contract price and the price at which the goods could have been bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed: Dunlop *v.* Higgins, 12 Jur. 295; 1 H. L. Ca. 381. But where the contract was for the sale of real estate, which the vendor was unable to perform, for want of a good title in himself, a distinction has been taken between the cases of good and bad faith in the vendor; it being held, that, where no fraud appears on his part, but all has been *bona fide*, the plaintiff can recover only the money paid and interest, or his actual damages out of pocket; but that, if the vendor is chargeable with *mala fides*, the plaintiff may recover for the loss of his bargain; namely, the actual value of the land, at the time when it ought to have been conveyed: Flureau *v.* Thornhill, 2 W. Bl. 1078; Bitner *v.* Brough, 1 Jones 127. *Ideo quære.* {Barbour *v.* Nichols, 3 R. I. 187. A carrier who at first wrongly refuses to deliver, but afterwards delivers, goods consigned to a manufacturer, is not liable for consequential damages arising from delay to the consignee's works caused by such refusal, or for a loss of profits from the same cause; but he is liable for the expense of sending to the carrier's office a second time for the goods: Waite *v.* Gilbert, 10 Cush. (Mass.) 177. In Hamlin *v.* Gr. North. R. R. Co., 26 L. J. Ex. 23, Mr. Baron Alderson, and in Hobbs *v.* Lon. & S. W. R. R. Co., L. R. 10 Q. B. 111, Mr. Justice Blackburn adopted as a rule, that, if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably and as near as may be, and charge him for the reasonable expense incurred in so doing. This rule was approved in the Common Pleas Division in a case where a passenger on board a train, finding that he was behind time according to the tables, hired a special train to take him through on time, and sought to recover the expense of the railroad company. But the Court of Appeal reversed the judgment. One of the conditions of the time-tables was as follows: "Every attention will be paid to insure punctuality; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or

latter case, the market price is lower at the stipulated time of delivery than at the date of the contract, the measure of damages is the money advanced, with interest.[4] So, upon a *contract to replace stock*, the measure of damages is the price or value on the day when it ought to have been replaced, or at the time of trial, at the option of the plaintiff. But if afterwards, and while the stock was rising,

detention:" Le Blanke *v.* L. & N. W. R. R. Co., 34 L. T. N. S. 25. In the case of Hamlin, etc., *supra*, the damages were held to include expense during the necessary delay, and extra fare; and in Collier *et ux. v.* D. W. & W. R. R. Co., 8 Ir. L. T. 24, where the husband sued for the detention of his wife, whereby he was deprived of her society, he was allowed to recover only nominal damages, it being shown that he was not at home, so that he could not have enjoyed her society if she had not been detained. See further, as to detaining passengers, *ante*, § 232 *a*, n. Where a party orders by telegram the purchase of a commodity, and the company neglect to forward the despatch, they are liable only in nominal damages, or such sum as may have been paid them for the transmission; but they are not liable for the expected profit on a purchase and subsequent sale, which might have been made if the despatch had been duly transmitted, Hibbard *v.* West. Un. Tel. Co., 37 Wis. 558; on the ground that the loss of such profit was not the natural result of the failure to transmit, nor could it reasonably be supposed to be within the contemplation of the contending parties; citing Hadley *v.* Baxendale, 9 Exch. 341. See also Baker *v.* Drake, 53 N. Y. 211, overruling Markham *v.* Jandon, 41 N. Y. 235; Benson *v.* M. & M. Gaslight Co., 6 Allen (Mass.) 149; *ante*, § 256. But probable future earnings, not merely speculative, have been allowed as damages in cases of death from injuries so received, to the extent of what the deceased party would probably have earned during the rest of his life in his business or profession. This rule, of course, includes the admissibility of evidence tending to show what that business is: Railroad Co. *v.* Butler, 57 Pa. St. 335; Pa. R. R. Co. *v.* Dale, 76 id. 47. So profits proved to be reasonably certain: Griffin *v.* Colver, 16 N. Y. 489; Williamson *v.* Burnett, 13 How. (U. S.) 100. But see Winslow *v.* Lane, 63 Me. 161. In U. S. Tel. Co. *v.* Wenger, 55 Pa. St. 262, where the company delayed forwarding a despatch for the purchase of stocks, they were held liable for the advance in price between the time when the message should have arrived and the time when the stock was purchased under another order. And in Tyler *v.* West. Un. Tel. Co., 60 Ill. 421, where by a mistake in the telegram, 1,000 instead of 100, shares were directed to be sold, the plaintiff was allowed to recover the advance on 900 shares, which he was obliged to purchase in order to fill the contract. As to damages in telegraph cases, see also Leonard *v.* N. Y., Al. & B. Tel. Co., 41 N. Y. 544; Squires *v.* West. Un. Tel. Co., 98 Mass. 232; Rittenhouse *v.* Ind. Tel. Co., 44 N. Y. 263; Baldwin *v.* U. S. Tel. Co., 45 id. 744.]

[4] Clark *v.* Pinney, 7 Cow. 681; Chitty on Contr. 352, n. (2), by Perkins; Bush *v.* Canfield, 2 Conn. 485; [Barnard *v.* Conger, 6 McLean C. C. 497; Halseys *v.* Hurd, ib. 102; Dana *v.* Fiedler, 2 Kernan (N. Y.) 40; Clark *v.* Dales, 20 Barb. (N. Y.) 42. It is to be noticed that when interest accrues on a breach of contract as *damages* from the date of the writ, if the defendant who so owes the damages is summoned as *trustee* of the plaintiff in other suits, interest will not be deemed to accrue in the principal suit, during the pendency of the trustee processes: Huntress *v.* Burbank, 111 Mass. 213; Smith *v.* Flanders, 129 id. 322.

The whole subject of the allowance of interest *as damages*, and the contradictory state of the authorities, is reviewed in White *v.* Miller, 78 N. Y. 393. Cf. Barnard *v.* Bartholomew, 22 Pick. (Mass.) 291; Amee *v.* Wilson, 22 Me. 116; Parrott *v.* Housatonic R. R. Co., 47 Conn. 575. The difference between interest *proper* and interest as damages is this: interest proper arises whenever *money is lent*, with an understanding that an equivalent shall be given for its use. In such case the rate of interest *agreed upon*, or, if none be agreed upon, then the rate existing by law, is the rate to be paid until the return of the money. This rate being part of the contract, any statutory change in the legal rate of interest will be unconstitutional so far as it affects this interest. But when agreements other than those for lending money are broken, a different rule prevails, for in those cases, as well as in cases of *torts*, *damages*, not interest, is to be administered. No *real* interest is due in such cases, but damages have been incurred, and the law takes the legal rate of interest as the fair measure of damages, on the theory that if the money had come to hand, it might have been invested, presumably at that rate: Jersey City *v.* O'Callaghan, 41 N. J. L. 349.]

the defendant offered to replace it, the plaintiff cannot recover more than the price on the day of tender.[5] In an action for a breach of warranty upon the sale of goods, the measure of damages is the difference of value between the article in a sound and in an unsound state, without regard to the price given.[6] And generally, in other cases of special contract, where one party agrees to do a certain thing, or to perform specific services, for a stipulated sum of money, as, for example, to perform a piece of mechanical work for an agreed price, or to occupy a tenement for a certain time at a specified rent, and deserts the undertaking before it is completed, or is turned away and forbidden to proceed by the other party, the measure of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained.[7] And in all cases of breach of such specific contracts, it is to be observed, that if the party injured can protect himself from damages at a trifling expense, or by any reasonable exertions, he is bound so to do. He can charge the delinquent party only for such damages as, by reasonable endeavors and expense, he could not prevent.[8]

[5] Shepard *v.* Johnson, 2 East 211; McArthur *v.* Lord Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412; {Huntingdon, etc. R. R. Co. *v.* English, 86 Pa. St. 247. Cf. West Branch, etc. Canal Co.'s Appeal, 81* id. 19.} But in Massachusetts the rule is confined to the price at the agreed day of transfer, and is not extended to any subsequent period: Gray *v.* Portland Bank, 3 Mass. 390. {Where a corporation refuses to give to an owner of shares therein certificates of such shares on demand, or to recognize him as the owner thereof, and sells the shares to a third person, it is liable to pay the owner the value of the shares at the time of his demand, and interest thereon from the time of the demand: Wyman *v.* American Powder Co., 8 Cush. (Mass.) 168.}

[6] Cothers *v.* Keever, 4 Barr 168; {*post*, § 262; Moulton *v.* Scruton, 39 Me. 287; Forman *v.* Miller, 5 McLean C. C. 218.}

[7] Clark *v.* Marsiglia, 1 Denio 317; Wilson *v.* Martin, ib. 602; Spencer *v.* Halsted, ib. 606; {Morgan *v.* Hefler, 68 Me. 131. Cf. Sausser *v.* Steinmetz, 88 Pa. St. 324. And the party turned away or forbidden may sue for breach of the contract, without a tender of further performance: Cort *v.* Ambergate, etc. R. R. Co., 6 Eng. L. & Eq. 230; s. c. 15 Jur. 807. So upon a refusal ever to marry after a promise, action lies at once. Foster *v.* Knight, 22 L. T. Exch. 77. Where there is a special contract to do a piece of work, as to build a dam, and the person agreeing to do the work builds a dam in good faith and with an honest intention of fulfilling the contract, though not according to the contract, the damages are found by deducting from the contract-price so much as the dam built is worth less than the dam contracted for: Gleason *v.* Smith, 9 Cush. (Mass.) 486. Where there is a deficiency in the work, the measure of damages is the amount required to be paid to complete the work according to the contract: ibid.; Snow *v.* Ware, 13 Met. (Mass.) 42; Wade *v.* Haycock, 25 Pa. St. (1 Casey) 382. In Kidd *v.* McCormick, 83 N. Y. 391, Folger, C. J., speaking of the rule of damages in actions on contract, says: "I am aware that there has not been harmony in the expressions of the learned judges in passing upon the question of the measure of damages. I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at, rather than in the rule that was to govern. Stated in its broadest form, the plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed." In that case the contract of the defendant was to build a house on the plaintiff's land. The house was partially built, but not completed. It was held that the plaintiff might recover as much as would put him in as good a plight as if the house had been finished, *i. e.* the difference in value between the house as it stood on the day the contract called for its completion, and the house as it would have been completed.}

[8] Miller *v.* Mariner's Church, 7 Greenl. 57. So in trespass: Loker *v.* Damon, 17

§ 261 *a*. **Contracts for Piece-work and Time Contracts.** A distinction, however, has been taken between contracts for specific work by the piece, and the like, and *contracts for the hire* of clerks, agents, laborers, and domestic servants for a year or shorter *determinate period;* and it is held in the latter class of cases that, if the person so employed is improperly dismissed before the term of service is expired, he is entitled to recover for the whole term; unless the defendant, on whom the burden of proof lies, can show, either that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected.[1] The same principle has also been applied in suits

Pick. 284. See, *contra*, Heaney *v.* Heeney, 2 Denio 625. {If cattle are only injured, not killed, the owner must take care of them so as to make the loss as little as may be: Ill., etc. R. R. Co. *v.* Finnegan, 21 Ill. 646. But, if killed, he is not bound to dispose of them for the best advantage, but may abandon them to the defendant, and recover the full value: Ohio, etc. R. R. Co. *v.* Hays, 35 Ind. 173. See, however, Toledo, etc. R. R. Co. *v.* Parker, 49 Ill. 385.}

[1] Costigan *v.* M. & H. Railroad Co., 2 Denio 609. In this case, which was for a full year's salary, where the plaintiff had been improperly dismissed after two months' service, the law was thus stated by Beardsley, J.: "As a general principle, nothing is better settled than that upon these facts the plaintiff is entitled to recover full pay for the entire year. He was ready during the whole time to perform his agreement, and was in no respect in fault. The contract was in full force in favor of the plaintiff, although it had been broken by the defendants. In general, in such cases, the plaintiff has a right to full pay. The rule has been applied to contracts for the hire of clerks, agents, and laborers, for a year or a shorter time, as also to the hire of domestic servants, where the contract may usually be determined by a month's notice, or on payment of a month's wages. The authorities are full and decisive upon this subject: Chitty on Contr. 5th Am. ed. 575–581; 1 Chit. Gen. Pr. 82, 83; Browne on Actions at Law, 181–185, 504, 505; Beeston *v.* Collyer, 4 Bing. 309; Fawcett *v.* Cash, 5 Barn. & Ad. 904; Williams *v.* Byrne, 7 Ad. & El. 177; French *v.* Brookes, 6 Bing. 354; Gandell *v.* Pontigny, 4 Campb. 375; Robinson *v.* Hindman, 3 Esp. 235; Smith *v.* Kingsford, 3 Scott 279; Smith *v.* Hayward, 7 Ad. & El. 544. The rule of damages against the employer for the breach of a contract to perform mechanical work by the piece is different. See Clark *v.* Marsiglia, 1 Denio 317. In no case which I have been able to find, and we were referred to none of that character, has it ever been held, or even urged by counsel, that the amount agreed to be paid should be reduced, upon the supposition that the person dismissed might have found other employment for the whole or some part of the unexpired term during which he had engaged to serve the defendant. And yet this objection might be taken in every such case, and in most of them the presumption would be much more forcible than in the case at bar. The entire novelty of such a defence affords a very strong, if not a decisive, argument against its solidity: The Duke of Newcastle *v.* Clarke, 8 Taunt. 602. Nor do I find any case in which it was proved that other employment was offered to the plaintiff after his dismissal, and that his recovery was defeated or diminished because he refused to accept of such proffered employment.

"It has however, been held, and rightly so, as I think, that where a seaman, hired for the outward and return voyage, was improperly dismissed by the captain before the service was completed, a recovery of wages by the seaman for the whole time was proper, deducting what he had otherwise received for his services after his dismissal and during the time for which his employer was bound to make payment: Abbott on Shipp. 4th Am. ed. 442, 443; Hoyt *v.* Wildfire, 3 Johns. 518; Ward *v.* Ames, 9 id. 138; Emerson *v.* Howland, 1 Mason 22, 51.

"And upon the same principle, where a merchant engages to furnish a given quantity of freight for a ship, for a particular voyage, and fails to do so, he must pay dead freight, to the amount so agreed by him, deducting whatever may have been received from other persons for freight taken in lieu of that which the merchant had stipulated to furnish: Abbott, 277, 278; Puller *v.* Staniforth, 11 East 232; Puller *v.* Halliday, 12 id. 494; Kleine *v.* Catara, 2 Gall. 66, 73. Upon this principle, as I understand

for the recovery of dead freight, where the quantity agreed to be put on board by the shipper has not been furnished.[2]

the case of Shannon *v.* Comstock, 21 Wend. 457, was decided. The defendants there engaged to pay the plaintiffs fifty-five dollars for the transportation of a certain number of horses on the canal from Whitehall to Albany, but failed to omply with their agreement. An action was thereupon brought to recover the fifty-five dollars, and, the contract and its violation having been shown, 'the defendants offered to prove that the damages sustained by the plaintiffs did not exceed five dollars.' What facts were offered to be given in evidence in order to establish this result cannot be collected with absolute certainty from the report of the case, but it does not appear that any objection was made to the form of the offer, and the report shows that *the evidence was objected to and excluded*. I infer, then, that the offer of the defendants was to show by competent evidence that the plaintiffs took other freight on board their boat instead of their horses, so that their loss, by the violation of this contract, was but small. Upon the ground already stated, that loss was the amount the plaintiffs were in law and justice entitled to recover. So this court held, and, as the evidence had been rejected in the court below, the judgment was reversed. The views of the Chancellor, as stated in the case of Taylor *v.* Read, 4 Paige 571, are to the same effect, and the propriety of the rule seems to me too apparent to admit of doubt.

"In these cases it appeared, or was offered to be shown, that the plaintiffs had in fact performed services for others, and for which they had been paid, in lieu of those they had bound themselves to perform for their defendants, and which the latter had refused to receive. In Heckscher *v.* McCrea, 24 Wend. 304, the court went a step further. That case arose in the Superior Court of the city of New York, where McCrea was plaintiff. It was an action for dead freight, which the plaintiff claimed under a special contract with the defendants. They had agreed with the plaintiff to furnish a given number of tons of freight, at a certain price, for a return cargo from China to New York, in the plaintiff's ship. A part of the freight was furnished by the defendants, as agreed, but they fell short about one hundred and thirty tons. The agents for the defendants at Canton, where the ship then was, having no more freight to put on board for the defendants, offered to supply the deficiency from the goods of other persons in their hands, which the agents were authorized to ship to the United States; such shipment to be made at a reduced, although the then current, rate, but with an express agreement that receiving this freight on such reduced terms should not interfere with the original agreement between the parties to this suit. This offer was declined, and to the extent of this deficiency the ship came home empty. The action was to recover for this deficient freight. The court held that the plaintiff should have taken the freight offered, although at a rate below what the defendants had agreed to pay; that so far it would have relieved the defendants, without doing injury to the plaintiff, and by which about two-thirds of the amount now claimed might have been saved.

"In all the cases I have cited, the facts on which the delinquent party sought to bring the amount to be recovered below the sum agreed to be paid were proved or offered to be proved on the trial. Nothing was left to inference or presumption, and it was virtually conceded that the *onus* of the defence rested on the defendant. They are also cases in which the plaintiffs had either earned and received money from others, during the time when they must have been employed in fulfilling their contract with the defendants, or in which they might have earned it in a business of the same character and description with that which they had engaged with the defendants to perform.

"The principles established by the cases referred to seem to me just, and, although I have found no case in which they have been applied to such an engagement as that

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[2] Abbott on Shipp. by Shee, pp. 242–245; Sedgwick on Damages, p. 377; Heckscher *v.* McCrea, 24 Wend. 304; Shannon *v.* Comstock, 21 id. 457. {Where goods are wrongfully taken from a vessel by the shipper before she has broken ground on the voyage, the ship-owner is not entitled to the stipulated freight as such, but to an indemnity for the breach of the contract. And if the vessel is a general ship, and the goods removed from only part of her cargo, and the ship-owner is bound by contracts with other shippers to perform the proposed voyage, and does perform it, the measure of damages is the stipulated freight, less the substituted freight actually made, or which might have been made by reasonable diligence: Bailey *v.* Damon, 3 Gray (Mass.) 92.}

§ 262. **Warranty of Goods.** In *assumpsit* upon the *warranty of goods*, the measure of damages is the difference between the value of the goods at the time of sale, if the warranty were true, and the actual value in point of fact.[1] If goods are warranted as fit for the particular purpose which they are asked for, the purchaser is entitled to recover what they would have been worth to him had they been so.[2] If they have been received back by the vendor, the plaintiff may recover the whole price he paid for them; otherwise, he may resell them, and recover the difference between the price he paid and the price received.[3] And if, not having discovered the unsoundness or defects of the goods, he sells them with similar warranty, and is sued thereon, he may recover the costs of that suit as part of the damages he has sustained by breach of the warranty made to himself, if he gave seasonable notice of the suit to the original vendor.[4]

between these parties, still I should have no hesitation, where the facts would allow it to be done, to apply them to such a case as this.

"But, first of all, the defence set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrong-doer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the *onus* must in all such cases be upon the defendant.

"Had it been shown, in the case at bar, that the plaintiff, after his dismissal, had engaged in other business, that might very well have reduced the amount which the defendants ought otherwise to pay. For this the cases I have referred to would furnish sufficient authority. But here it appears that the plaintiff was not occupied during any part of the time from the period of dismissal to the close of the year.

"Again, had it been shown on the trial that employment of the same general nature and description with that which the contract between these parties contemplated had been offered to the plaintiff, and had been refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence to engage in business of the same character with that in which he had been employed by the defendants."

[1] Caswell *v.* Coare, 1 Taunt. 566; Fielder *v.* Starkin, 1 H. Bl. 17; Curtis *v.* Hannay, 3 Esp. 83; Buchanan *v.* Parnshaw, 2 T. R. 745; Egleston *v.* Macauly, 1 McCord 379; Armstrong *v.* Percy, 5 Wend. 539; {Tuttle *v.* Brown, 4 Gray (Mass.) 460; Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Goodwin *v.* Morse, 9 Met. (Mass.) 278; Cothers *v.* Keever, 4 Barr (Pa.) 168. The measure of damages is the same in an action for a deceit in the sale: Stiles *v.* White, 11 Met. (Mass.) 356; Tuttle *v.* Brown, 4 Gray (Mass.) 460; Clare *v.* Maynard, 7 Car. & P. 743. [The better view is that in an action for deceit the measure of damages is entirely different, the plaintiff being allowed to recover for whatever loss is the proximate result of the deceit: Smith *v.* Bolles, 132 U. S. 125.] So, when the action is for a breach of warranty of a kind of seed, the rule of damages is the fair value of a crop that could have been raised had the seed been as warranted: Van Wyck *v.* Allen, 69 N. Y. 61.}

[2] Bridge *v.* Wain, 1 Stark. 504.

[3] Caswell *v.* Coare, 1 Taunt. 566; Buchanan *v.* Parnshaw, 2 T. R. 745; Woodward *v.* Thacher, 3 Am. Law Jour. N. S. 228.

[4] Lewis *v.* Peake, 7 Taunt. 153; Armstrong *v.* Percy, 5 Wend. 535. {He may recover his taxable costs (Coolidge *v.* Brigham, 5 Met. (Mass.) 72); but not counsel fees: Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166.}

§ 263. **Debt on Bond.** In *debt on bond*, interest, beyond the penalty, may be recovered as damages.[1] If the damages actually sustained are greater than the penalty and interest, the only remedy is by an action of covenant, which may be maintained where the condition discloses an agreement to perform any specific act; in which case, if it be other than the payment of money, the jury may ordinarily award the damages actually sustained, without regard to the amount of the penalty.

§ 264. **Covenant.** In an action of *covenant* upon any of the *covenants of title* in a deed of conveyance, except the covenant of warranty, the ordinary measure of damages is the consideration-money, or the proper proportion of it with interest.[1] But for breach of the *covenant of warranty*, though in some of the United States the same rule prevails as in covenants of title, yet, in others, the course is to award damages to the value of the land at the time of eviction. In the former States, the courts regard the modern covenant of warranty as a substitute for the old real covenant, upon which, in a writ of *warrantia chartæ*, or upon voucher, the value of the other lands to be recovered was computed as it existed at the time when the warranty was made; and accordingly they retain the same measure of compensation for the breach of the modern covenant. But in the latter States, the courts view the covenant as in the nature of a personal covenant of indemnification, in which, as in all other cases, the party is entitled to the full value of that which he has lost, to be computed as it existed at the time of the breach.[2]

[1] Lonsdale *v.* Church, 2 T. R. 388; Wilde *v.* Clarkson, 6 id. 303; McClure *v.* Dunkin, 1 East 436; Francis *v.* Wilson, Ry. & M. 104; Harris *v.* Clap, 1 Mass. 308; Pitts *v.* Tilden, 2 id. 118; Warner *v.* Thurlo, 15 id. 154.

[1] 4 Kent Comm. 474, 475; Dimmick *v.* Lockwood, 10 Wend. 142; {Frazer *v.* Peoria, 74 Ill. 282. But this limitation does not apply when an action is brought on covenants of seisin and quiet enjoyment, and it is shown that the vendor sold land to which he had not a perfect title, and *agreed* to complete and perfect the title: Taylor *v.* Barnes, 69 N. Y. 430. In an action on a covenant against incumbrances, if the incumbrance is of a permanent character, such as a right of way, or other easement which impairs the value of the premises and cannot be removed by the purchaser as a matter of right, the damages will be measured by the *diminished value* of the premises thereby occasioned: 2 Washb. Real Prop. (2d ed.) 730; Sedgwick on Damages (6th ed.) 199; Mitchell *v.* Stanley, 44 Conn. 312.}

[2] The consideration-money and interest is adopted as the measure of damages in New York (Staats *v.* Ten Eyck, 3 Caines 111; Pitcher *v.* Livingston, 4 Johns. 1; Bennett *v.* Jenkins, 13 id. 50); and in Pennsylvania (Bender *v.* Fromberger, 4 Dall. 441); and in Virginia (Stout *v.* Jackson, 2 Rand. 132); and in North Carolina (Phillips *v.* Smith, 1 N. C. Law Repos. 475; Wilson *v.* Forbes, 2 Dev. 30); and in South Carolina (Henning *v.* Withers, 2 S. C. 584; Ware *v.* Weathnall, 2 McCord 413); and in Ohio (Backus *v.* McCoy, 3 Ohio 211, 221); and in Kentucky (Hanson *v.* Buckner, 4 Dana 253; Cox *v.* Strode, 2 Bibb 272); and in Missouri (Tapley *v.* Lebaume, 1 Mo. 552; Martin *v.* Long, 3 id. 391); and in Illinois (Buckmaster *v.* Grundy, 1 Scam. 310). In Indiana, the question has been raised, without being decided: Blackwell *v.* Justices of Lawrence Co., 2 Blackf. 147.

The value of the land at the time of eviction has been adopted as the measure of damages in Massachusetts (Gore *v.* Brazier, 3 Mass. 523; Caswell *v.* Wendell, 4 id. 108; Bigelow *v.* Jones, ib. 512; Chapel *v.* Bull, 17 id. 213); and in Maine (Swett *v.* Patrick, 3 Fairf. 1); and in Connecticut (Sterling *v.* Peet, 14 Conn. 245); and in

§ 265. **Grounds of Damages.** In general, as we have already seen, damages are estimated by the *actual injury* which the party has received. But to this rule there are some *exceptions*. For, if the plaintiff has concurrent remedies, such as trespass and trover, he may elect one which, by legal rules, does not admit of the assessment of damages to the extent of the injury. Thus, if he elects to sue in trover, he can ordinarily recover no more than the value of the property, with interest; whereas, if he should bring trespass, he may recover not only the value of the goods, but the additional damages occasioned by the unlawful taking. And if he waives the tort, and brings *assumpsit* for money had and received, he can recover only what the goods were actually sold for by the defendant, though it were less than their real value.[1] So, if the plaintiff sue in debt for the escape of a debtor in execution, he will recover the whole amount of the judgment and costs, if he recovers at all, though the debtor were insolvent; whereas, if he sue in trespass on the case, he will recover only his actual damages.[2]

§ 266. **Aggravation and Mitigation of Damages.** It is frequently said, that, in actions *ex delicto*, evidence is admissible in *aggravation*, or in *mitigation of damages*.[1] But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the *injury itself*. The circumstances, thus proved, ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive.[2] Thus, in trespass on the case for an escape, the actual

Vermont (Drury *v.* Strong, D. Chipm. 110; Park *v.* Bates, 12 Vt. 481); and in Louisiana (Bissell *v.* Erwin, 13 La. 143). See also 4 Kent Comm. 474, 475; Rawle on Covenants of Title, pp. 263–280.

[1] See 3 Amer. Jurist, p. 288; Lindon *v.* Hooper, Cowp. 419; Parker *v.* Norton, 6 T. R. 695; Lamaine *v.* Dorrell, 2 Ld. Raym. 1216; Laugher *v.* Brefitt, 5 B. & Ald. 762; Bull. N. P. 32; Jacoby *v.* Lausatt, 6 S. & R. 300; Pierce *v.* Benjamin, 17 Pick. 356, 361; Barnes *v.* Bartlett, 15 id. 78; Otis *v.* Gibbs, MS., cited ib. 207; Whitwell *v.* Kennedy, 4 id. 466; Johnson *v.* Sumner, 1 Met. 172; Rogers *v.* Crombie, 4 Greenl. 274. {In Kirkpatrick *v.* Downing, 58 Mo. 32, it was held that, where a vendee takes possession under a contract of sale, and the vendor afterwards sells to another, the rule of damages is the natural loss to the vendee; that is, the difference between what he owes on the land at the time of the sale, and what the land is then worth. The case is an instructive one upon the general subject, and well worthy of perusal.}

[2] Bouafous *v.* Walker, 2 T. R. 126; Porter *v.* Sayward, 7 Mass. 377; 3 Am. Jur. 289. {In an action for taking insufficient bail, the measure of damages is the injury actually sustained by the judgment creditor; and evidence is competent of the pecuniary condition of the debtor three months before he was liable to be taken in execution: Danforth *v.* Pratt, 9 Cush. (Mass.) 318; 9 Met. (Mass.) 564. In case for an escape, the measure of damages is the value of the custody of the debtor at the moment of escape, and no deduction should be made for what the creditor might have obtained by diligence after the escape: Arden *v.* Goodacre, 5 Eng. L. & Eq. 436.}

[1] What is here said on the subject of evidence in aggravation or mitigation of damages is chiefly drawn from a masterly discussion of this subject by Mr. Justice Metcalf, in 3 Amer. Jur. pp. 287–313.

[2] "There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured

loss sustained by the plaintiff is the measure of damages, whether the escape were voluntary or negligent; and in cases of voluntary trespass, the innocent intentions of the party cannot avail to reduce the damages below the amount of the injury he has inflicted.

§ 267. **Damages for Injuries to Person and Reputation.** *Injuries to the person*, or to the *reputation*, consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also;[1] the injury to his

him accidentally, his loss being the same in both cases. It better accords, indeed, with our natural feelings, that the defendant should suffer more in one case than in the other; but points of mere sensibility and mere casuistry are not allowable to operate in judicial tribunals; and, if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury. It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, coextensive. The same principle will apply to the mitigation of damages. If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say that they shall be for a part only of the injury." 3 Amer. Jur. 292, 293.

[1] If the act were not wilfully done, it seems that the mere mental suffering resulting from it forms no part of the actionable injury: Flemington *v.* Smithers, 2 C. & P. 292. And see Canning *v.* Williamstown, 1 Cush. 451. {Damages have been not unfrequently given for mental pain, where the injury was not wilful: Smith *v.* Overly, 30 Ga. 241; Masters *v.* Warren, 27 Conn. 293; Memphis, etc. R. R. Co., 44 Miss. 466; West *v.* Forest, 22 Mo. 344; Stewart *v.* Ripon, 38 Wis. 584. The question has sometimes been raised, whether in addition to the rule that mental agitation, etc., may be given in evidence as an aggravation of personal injuries, they may not also be proved as a distinct cause of action. The rule is probably that they may not, unless they are produced by physical injury of some kind. Thus, in Wyman *v.* Leavitt, 71 Me. 227, it was held that where the action was for trespass in throwing rocks upon plaintiff's land by blasting, he could not prove the anxiety he had been caused for fear of his own and his child's safety. See also Canning *v.* Williamstown, 1 Cush. (Mass.) 451; Johnson *v.* Wells, 6 Nev. 224; Lynde *v.* Knight, 9 H. L. 577, p. 598; [Atchison, etc. R. *v.* Chance, 57 Kan. 40.] Where an action is brought under a statute (9 & 10 Vict. c. 93), by the personal representatives of a deceased person, to recover damages for his death, the damages must be confined to injuries of which a pecuniary estimate can be made, and they do not include the mental suffering caused to the survivors by his death: Blake *v.* Midland R. Co., 10 Eng. Law & Eq. 437. In an action to recover damages for a personal injury, the plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity: Ballou *v.* Farnum, 11 Allen 73. See, on this subject, Wade *v.* Leroy, 20 How. 43; Nebraska City *v.* Campbell, 2 Black 590; *post*, § 268 *a*, n. That these damages may be lessened by proof of provocation, see Bonino *v.* Caledonio, 144 Mass. 299; Mowry *v.* Smith, 9 Allen 67.

In an action for seduction, injury to the plaintiff's feelings is an element in computing the damages, as being a natural consequence of the principal injury, and need not be separately averred in the declaration: Phillips *v.* Hoyle, 4 Gray (Mass.) 568.

So, when the action is based on some indignity offered to the person of the plaintiff (Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; Fillebrown *v.* Hoar, 124 Mass. 580), or personal injury (Indianapolis, etc. R. R. Co. *v.* Stubbs, 62 Ill. 313). But it was held not an element of damages in a suit to recover for a personal injury caused by the employment of an incompetent servant: Joch *v.* Dankwardt, 85 Ill. 331.} [Where the act of the defendant inflicts no physical injury, there can be no recovery for mental suffering, nor for a physical injury resulting from such suffering: Victorian

reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act, and tending to the plaintiff's discomfort.[2] And, on the other hand, they are to consider any circumstances of recent and immediate misconduct on the part of the plaintiff, in respect to the same transaction, tending to diminish the degree of injury which, on the whole, is fairly to be attributed to the defendant.[3] Thus, if the plaintiff himself provoke the assault complained of, by words or acts so recent as to constitute part of the *res gestæ*;[4] or if the injury were an arrest without warrant, and he were shown to be justly suspected of felony;[5] or, in an action for seduction, if it appear that the crime was facilitated by the improper conduct or connivance of the husband or father;[6] these circumstances may well be considered as reducing the real amount of the plaintiff's claim of damages.[7]

R. *v.* Coultas, 13 A. C. 222; Spade *v.* Lynn, etc. R., 168 Mass. 285; Mitchell *v.* Rochester R., 151 N. Y. 107; Fox *v.* Barkey, 126 Pa. 164; Peay *v.* Western Union Tel. Co., 64 Ark. 538; Braun *v.* Craven, 51 N. E. 657, Ill.; *contra*, Bell *v.* Railway Co., 26 L. R. Ir. 428; Yoakum *v.* Kroeger, 27 S. W. 953, Tex. Civ. App.; Mack *v.* Railway Co., 29 S. E. 905, S. C. But where the act of the defendant causes a physical injury to the plaintiff, damages for mental suffering resulting from such injury are allowed: Sloane *v.* Southern, etc. R., 111 Cal. 668; Lambertson *v.* Consolidated, etc. Co., 60 N. J. L. 456; Warren *v.* Boston, etc. R., 163 Mass. 484; Central R. *v.* Serfass, 153 Ill. 379; Pittsburg, etc. R. *v.* Montgomery, 49 N. E. 582, Ind.; Gibney *v.* Lewis, 68 Conn. 392. For the distinction between mental suffering and injured feelings, see Chicago City R. *v.* Taylor, 170 Ill. 49; Chicago, etc. R. *v.* Caulfield, 27 U. S. App. 358. Damages for prospective mental anguish are not recoverable: Illinois Central R. *v.* Cole, 165 Ill. 334.]

[2] Coppin *v.* Braithwaite, 8 Jur. 875. [So, when a passenger was expelled from the cars wrongfully by the conductor, it was held that he might recover damages for the indignity suffered, and the injury to his feelings. If, however, in such a case, the jury give a verdict which is plainly excessive, it will be set aside: Quigley *v.* C. P. R. R. Co., 5 Sawy. C. Ct. 107.

So, in an action for a wrongful ejection from a house by the landlord, the injuries received from indignities may be included, but it is held that the plaintiff cannot recover for any injury to his health which resulted from exposure attendant on the proceedings, or contracted by attending his family while ill, or resulting from grief that they were ill: Fillebrown *v.* Hoar, 124 Mass. 580.]

[3] This principle is freely applied in actions on the case for negligence, where the rule is, that, though there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; but if, by ordinary care, he might have avoided them, he is the author of his own wrong: Bridge *v.* Grand Junction Railway Co., 3 M. & W. 244, per Parke, B.; Butterfield *v.* Forrester, 11 East 60; Holding *v.* Liverpool Gas. Co., 10 Jur. 883; Kennard *v.* Burton, 12 Shepl. 39; New Haven Steamboat Co. *v.* Vanderbilt, 16 Conn. 420. See §§ 220, 230. This rule was ably and fully discussed and explained by Redfield, J., in Robinson *v.* Cone, S. C. Vt., Feb. Term, 1850. See 3 Am. Law Journ. N. S. 313; [Boggers *v.* Metropolitan St. R., 118 Mo. 328.]

[4] Lee *v.* Woolsey, 19 Johns. 329; Fraser *v.* Berkley, 2 M. & Rob. 3; Avery *v.* Ray, 1 Mass. 12; [Crossley *v.* Humphreys, 59 Minn. 92.]

[5] Chinn *v.* Morris, Ry. & M. 24; Simpson *v.* McCaffrey, 13 Ohio 508.

[6] See *supra*, tit. Adultery, § 51.

[7] [So, in an action for breach of promise of marriage, any previous unchastity of the woman, though it may have been known to the defendant at the time the promise was made, is still admissible in mitigation of damages, *e. g.* that she has previously had an illegitimate child (Denslow *v.* Van Horn, 16 Iowa 476), or sexual intercourse with some other person than the defendant during the engagement (Burnett *v.* Simp-

§ 268. **Natural Results; Contract.** It seems, therefore, that, in the proof of damages, both parties must be confined to the *principal transaction* complained of, and to its *attendant circumstances* and natural *results;* for these alone are put in issue.[1] But where the act complained of was done in the execution of a contract with the State, for a work of public benefit, as, for example, the taking of stone and gravel from the plaintiff's land, to build a lock on a public canal, which the defendant had undertaken to construct, the defendant is entitled to stand in the same position as the State would, in the estimation of damages, and to set off, against the direct value of the materials taken, any general and incidental benefit resulting to the owner of the land from the work to which they were applied.[2]

§ 268 *a*. **Natural Results; Tort.** The *natural results* of a wrongful act are understood to include all the damage to the plaintiff of which such act was the efficient cause, though in point of time the damage did not occur until some time after the act done. Thus, in trespass *quare clausum fregit*, where the defendant had broken and dug away the bank of a river in the plaintiff's close, the jury were properly directed to assess the damages occurring three weeks afterwards by a flood, which rushed in at the breach, and carried away the soil.[1] So where the trespass consisted in pulling down the plaintiff's fence, whereby his cattle escaped and were lost, it was held that the defendant was liable for the value of the cattle, as the natural consequence of the trespass.[2] And it is further to be observed, that the proof of actual damages may extend to all facts which occur and grow out of the injury, even up to the day of the verdict; excepting those facts which not only happened since the commencement of the depending suit, but do of themselves furnish sufficient cause for a new action.[3] Upon this general principle it is that interest is computed up to the time of the verdict, in an action

kins, 24 Ill. 264; Sheahan *v.* Barry, 27 Mich. 217).} [The fact that a fight was voluntary will keep down punitive, but cannot reduce compensatory, damages: Grotton *v.* Glidden, 84 Me. 589. In some States plaintiff's negligence may be shown in mitigation of damages. See *ante*, § 232 *a*, n. 1.]

[1] {Billmeyer *v.* Wagner, 91 Pa. St. 92.}

[2] May *v.* Kornhaus, 9 Watts & Serg. 121. {If a plaintiff, by reason of not properly declaring on his cause of action is deprived of some damages which are the natural consequences of the principal wrong, and which he would otherwise have recovered, he cannot sue on these as a separate cause of action: Morey *v.* King, 51 Vt. 383.}

[1] Dickinson *v.* Boyle, 17 Pick. 78. See *supra*, §§ 55, 56. In an action of assumpsit, for the breach of an agreement, whereby "the plaintiff has been unnecessarily *put* to great expenses," it was held competent for the plaintiff, under this allegation, to prove and recover for the amount of bills which he had become legally liable to pay, though he had not yet paid them: Richardson *v.* Chassen, 34 Legal Obs. 883; 11 Jur. 890. And see Dixon *v.* Bell, 1 Stark. 387. But in trespass for seizing the plaintiff's goods under color of a judgment, by means whereof he was forced to pay large costs in setting aside the judgment, it was held, that these costs were not recoverable: Holloway *v.* Turner, 9 Jur. 160; 6 Ad. & El. N. S. 928. So, counsel fees have been rejected: Young *v.* Tustin, 4 Blackf. 277.

[2] Damron *v.* Roach, 4 Humph. 134.

[3] Wilcox *v.* Plummer, 4 Pet. 172, 182; 3 Com. Dig. 343, tit. Damages, D. See *infra*, § 273; Sedgwick on Damages, pp. 106–108; Johnson *v.* Perry, 2 Humph. 572.

for the non-payment of a sum of money. And, on the like principle, in actions of trespass and actions on the case, the jury are sometimes instructed, in their estimate of damages, to include the plaintiff's extra trouble and expenses in prosecuting his suit.[4]

§ 268 *b*. **Prospective Damages.** The damages may also in a certain sense be *prospective* beyond the time of trial. Thus, in trespass for breaking the plaintiff's leg, it was held proper to show the probable future condition of the limb; but not the consequences of a hypothetical second fracture.[1] So, in an action by the members of a commercial firm for a libel concerning their trade, it was held that the jury might estimate the damages likely to result to their trade as the probable consequences of the slander.[2]

§ 269. **Character, Rank, etc.** The *character* of the parties is immaterial; except in actions for slander, seduction,[1] or the like, where

[4] Linsley *v.* Bushnell, 15 Conn. 225, 236; Allen *v.* Blunt, 2 Woodb. & M. 121; Wilt *v.* Vickers, 8 Watts 227, 235; Rogers *v.* Fales, 5 Barr 159. See *contra*, Good *v.* Mylin, 8 id. 51, overruling the last two cases. {If A sells B one kind of turnip-seed as and for another kind, whereby a less valuable crop is raised, the rule of damages would be the difference between the market value of the crop actually raised, and the same crop from the seed ordered: Wolcott *v.* Mount, 36 N. J. 262; Passinger *v.* Thorburn, 34 N. Y. 634. And if he sells him a cow, warranted free from disease, and she proves to have a disease, which she communicates to other cows of B, the loss of the other cows may be assessed as damages, if A had reason to believe that the cow he sold would be put with other cows: Smith *v.* Green, L. R. 1 C. P. D. 92.} [So where the defendant sells the plaintiff an article to be used in making ice-cream, which poisons the ice-cream and makes plaintiff's customers sick, the plaintiff may recover for the injury to his business thus caused: Swain *v.* Schieffelus, 134 N. Y. 471. But see Dow *v.* Winnepesankee Gas Co., 41 A. 288, N. H.]

[1] Lincoln *v.* Saratoga Railroad Co., 23 Wend. 425; Johnson *v.* Perry, 2 Humph. 572; {Curtis *v.* Rochester & S. R. R. Co., 20 Barb. (N. Y.) 282; Passenger R. R. Co. *v.* Donahoe, 70 Pa. St. 119. The value of the plaintiff's business is an element to be considered in estimating damages in an action for an injury which disables the plaintiff from pursuing it: *ante*, § 89, n. See also Baldwin *v.* West. R. R. Co., 4 Gray (Mass.) 334; *ante*, § 267, n. In Whitney *v.* Clarendon, 18 Vt. 252, it was held that a recovery in an action of trespass on the case, brought by the father to recover damages sustained by himself in consequence of personal injuries to his son, is a bar to a second action by the father to recover for damages sustained in consequence of the same injury, notwithstanding the recovery in the first action was limited to damages which accrued prior to the commencement of that suit, and the second action is brought expressly to recover for loss of service and other damages sustained subsequent to that time: Hopkins *v.* Atlantic & St. Lawrence Railw., 36 N. H. 9; 2 Redfield on Railways, 220. But where the injury was the loss of tools with which the plaintiff earned his living, it was held that special damages for the loss of earnings which he might have made had not the tools been lost could not be recovered: Brock *v.* Gale, 14 Fla. 523. Where a father sues for the care, expense, and loss of service of his minor son, by death caused by the defendant's negligence, it has recently been held in Kentucky, contrary to the rule laid down in Ford *v.* Monroe, 20 Wend. (N. Y.) 210, that he is only entitled to recover for the loss of services between the injury and the death, and not at all after: Cov. St. R. R. Co. *v.* Parker, 9 Bush (Ky.) 455. But see Ihl *v.* Forty-second St., etc. R. R. Co., 47 N. Y. 317. Prospective damages need not be specifically claimed by the plaintiff in his writ. They are the natural consequences of the wrong, and will be allowed without such mention: Bradbury *v.* Benton, 69 Me. 194;} [Gorham *v.* Kansas City, etc. R., 113 Mo. 408; Washington, etc. R. *v.* Harmon, 147 U. S. 571.]

[2] Gregory *v.* Williams, 1 C. & K. 568. And see Ingram *v.* Lawson, 9 C. & P. 139, 140, per Maule, J.; s. c. 8 Scott 471, 477, per Bosanquet, J.; Hodsall *v.* Stallbrass, 9 C. & P. 63. {See also Pennsylvania R. R. Co. *v.* Dale, 76 Pa. St. 47.}

[1] See *infra*, § 274. [See also vol. 1, § 14 *d*.]

it is necessarily involved in the nature of the action. It is no matter how bad a man the defendant is, if the plaintiff's injury is not on that account the greater; nor how good he is, if that circumstance enhanced the wrong. Nor are damages to be assessed merely according to the defendant's *ability to pay;* for whether the payment of the amount due to the plaintiff, as compensation for the injury, will or will not be convenient to the defendant, does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive.[2] But so far as the defendant's *rank and influence* in society, and *therefore* the *extent of the injury,* are increased by his wealth, evidence of the fact is pertinent to the issue.[3]

§ 270. **Intention.** Whether evidence of *intention* is admissible, to affect the amount of damages, will, in like manner, depend on its materiality to the issue. In actions of trespass *vi et armis,* the secret intention of the defendant is wholly immaterial. For if the act was voluntarily done, that is, if it might have been avoided, the party is liable to pay some damages, even though he be an infant, under seven years of age, or a lunatic, and therefore legally incapable of any bad intention.[1] And where an authority or license is given by law, and the party exceeds or abuses it, though without intending so to do, yet he is a trespasser *ab initio;* and damages are to be given for all that he has done, though some part of it, had he done nothing more, might have been lawful.[2] His secret intention,

[2] See Lofft, 774, Ld. Mansfield's allusion to Berkeley *v.* Wilford. See also Stout *v.* Prall, Coxe (N. J.) 80; Coryell *v.* Colbaugh, ib. 77, 78; 6 Conn. 27; *supra,* § 265. [And plaintiff's rank and condition in life are also admissible on the question of damages: Klump *v.* Dunn, 66 Pa. St. 141; Gandy *v.* Humphreys, 35 Ala. 617. So are his earnings and expenses, and his surroundings generally: Welch *v.* More, 32 Mich. 77. So, it has been held that when a professional man sues for injuries resulting in a loss of time, the plaintiff may show what his time is worth, by testifying what he had previously been receiving for such time near the time of the injuries complained of: Nash *v.* Sharpe, 19 Hun (N. Y.) 365. Cf. Clifford *v.* Dam, 44 N. Y. Super. Ct. 391.] [But see Louisville, etc. R. *v.* Binion, 107 Ala. 645; Baltimore, etc. R. *v.* Camp, 81 F. 807, U. S. App.; Williams *v.* St. Louis, etc. R., 123 Mo. 573.]

[3] Bennett *v.* Hyde, 6 Conn. 24, 27; Shute *v.* Barrett, 7 Pick. 86, per Parker, C. J. See *supra,* §§ 55, n., 89; *infra,* §§ 424, 579; Grabe *v.* Margrave, 3 Scam. 372; Reed *v.* Davis, 4 Pick. 216; McNamara *v.* King, 2 Gilm. 432; McAlmont *v.* McClelland, 14 S. & R. 359; Larned *v.* Buffington, 3 Mass. 546; Stanwood *v.* Whitmore, 63 Me. 209. [Such evidence is admissible on the issue of exemplary damages (Washington Gas Light Co. *v.* Lansden, 172 U. S. 534; Courvoisier *v.* Raymond, 23 Col. 113; Pullman Co. *v.* Lawrence, 74 Miss. 782; Spear *v.* Sweeney, 88 Wis. 545); and in breach of promise suits to determine compensatory damages (Stratton *v.* Dole, 45 Neb. 472; Tamke *v.* Vaugsness, 75 N. W. 217; Humphrey *v.* Brown, 89 F. 640); but not in other cases (Roach *v.* Caldbeck, 64 Vt. 593).]

[1] Weaver *v.* Ward, Hob. 134; Bessey *v.* Olliot, T. Raym. 467; Gilbert *v.* Stone, Aleyn 35; s. c. Sty. 72; Sikes *v.* Johnson, 16 Mass. 289; Bingham on Infancy, pp. 110, 111; 3 Com. Dig. 627, tit. *Enfant,* D. 4; Macpherson on Infants, p. 481; Shelford on Lunatics, p. 407; Stock on Non Compotes Mentis, p. 76; 3 Am. Jur. 291, 297. [But see *ante,* § 89.]

[2] Six Carpenters' Case, 8 Co. 146; Bagshaw *v.* Gaward, Yelv. 96; Sackrider *v.* McDonald, 10 Johns. 253, 256; 3 Am. Jur. 297, 298; Kerbey *v.* Denby, 1 M. & W. 336.

whether good or evil, cannot vary the amount of injury to the plaintiff. So it is, if one set his foot upon his neighbor's land, without his license or permission; or if he injure him beyond or even contrary to his intention, if it might have been avoided.[3] And where, to an action of trespass, a plea of *per infortunium* was pleaded in bar, it was held bad, on demurrer, the court declaring that damages were recoverable "according to the hurt or loss."[4] In all such cases of voluntary act, the intent is immaterial, the only question being, whether the act was injurious, and to what extent.[5]

§ 271. **Same Subject.** In certain other actions, such as case for a *malicious prosecution*,[1] or for *false representations* of another person's credit in order to induce one to trust him,[2] or for *slander*, the *intention* of the defendant is of the gist of the action, and must therefore be shown to be malicious; not to affect the amount of damages, but to entitle the plaintiff to recover any damages whatever. Thus, in an action for a libel, either party may give evidence to prove or disprove the existence of a malicious intent, even though such evidence consist of other libellous writings; but if they contain matter actionable in itself, the jury must be cautioned not to increase the damages on account of them.[3]

§ 272. **Same Subject.** But where an evil *intent* has *manifested itself* in *acts* and circumstances accompanying the principal transaction, they constitute part of the injury, and, if properly alleged, may be proved, like any other facts material to the issue. Thus in trespass for taking goods, besides proof of their value, the inconvenience and injury occasioned to the plaintiff by taking them away, under the particular circumstances of the case, and the abusive language and conduct of the defendant at the time,[1] are admissible in evidence to the jury, who may give damages accordingly. And evidence of improper language or conduct of the defendant is also admissible, under proper allegations, in an action of trespass on the case, or of trespass *quare clausum fregit*, as constituting part of the

[3] Russell *v.* Palmer, 2 Wils. 325; Varill *v.* Heald, 2 Greenl. 92, per Mellen, C. J.; Brooks *v.* Hoyt, 6 Pick. 468; Bacon's Elements, p. 31; 2 East 104, per Ld. Kenyon.

[4] Weaver *v.* Ward, Hob. 134.

[5] Underwood *v.* Hewson, 1 Str. 596; 1 Chitty on Plead. 120; Weaver *v.* Ward, Hob. 134; Taylor *v.* Rainbow, 2 Hen. & Munf. 423; Wakeman *v.* Robinson, 1 Bing. 213. The rule is, that, under the general issue, any evidence is admissible which tends to show that the accident resulted entirely from a superior agency; for then it was no trespass; but that any defence which admits that the trespass complained of was the act of the defendant must be specially pleaded: Hall *v.* Fearnley, 3 Ad. & El. N. S. 919.

[1] 1 Chitty on Pl. 405 (7th ed.); Sutton *v.* Johnstone, 1 T. R. 493, 545; 3 Am. Jur. 295; Stone *v.* Crocker, 24 Pick. 81, 83; Grant *v.* Duel, 3 Rob. (La.) 17.

[2] Vernon *v.* Keyes, 12 East 632, 636; Young *v.* Covell, 8 Johns. 23.

[3] Pearson *v.* Lemaitre, 5 M. & G. 700; 7 Jur. 748.

[1] Churchill *v.* Watson, 5 Day 140; Tilden *v.* Metcalf, 2 id. 259; Johnson *v.* Courts, 3 Har. & McHen. 510; Ratliff *v.* Huntley, 5 Ired. 545; Wilkins *v.* Gilmore, 2 Humph. 140; Huxley *v.* Berg, 1 Stark. 98; Curtis *v.* Hoyt, 19 Conn. 154, 170; Huntley *v.* Bacon, 15 Conn. 267, 273.

injury.[2] And, generally, whenever the wrongful act of the defendant was accompanied by aggravating circumstances of indignity and insult, whether in the time, place, or manner, though they may not form a separate ground of action, yet, being properly alleged, they may be given in evidence, to show the whole extent and degree of the injury.[3] Thus, in an action upon an agreement to carry the plaintiff to a certain place, assigning a breach in causing him to be disembarked at an intermediate place, in a disgraceful manner and with contemptuous usage and insulting language, whereby he sustained damage, it was held that the allegation was proper, and that evidence of such circumstances was rightly received.[4] So, also, where to an action of trespass for false imprisonment the defendant pleaded, by way of justification, that the plaintiff had committed a felony, but abandoned the plea at the trial, and exonerated the plaintiff from the charge, it was held that the jury might lawfully consider the putting of such a plea on the record as persisting in the charge, and estimate the damages accordingly.[5] So, where in an assault and battery the defendant avowed an intent to kill the plaintiff.[6] And, on the other hand, the defendant may show any other circumstances of the transaction, in mitigation of the injury done by his trespass. Thus, where the defendant shot the plaintiff's dog soon after he had been worrying the defendant's sheep, this fact, and the habits of the animal, were held admissible in evidence for the defendant in the estimation of damages.[7] And in trespass *de bonis asportatis*, he may show that the goods did not belong to the plaintiff, and that they have gone to the use of the owner;[8] or

[2] Bracegirdle *v.* Orford, 2 M. & S. 77; Coppin *v.* Braithwaite, 8 Jur. 875; Cox *v.* Dougdale, 12 Price 708, 718; Merest *v.* Harvey, 5 Taunt. 442. In this case, Gibbs, C. J., expressed himself in these terms: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation in life who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done'? Would that be a compensation? I cannot say that it would be." 5 Taunt. 443. In trespass for entering the plaintiff's house, evidence may be given of keeping the plaintiff out, for that is a consequence of the wrongful entry: Sampson *v.* Coy, 15 Mass. 493. So, in trespass for destroying a mill-dam, damages may be recovered for the interruption of the use of the mill: White *v.* Moseley, 8 Pick. 356.

[3] Sears *v.* Lyons, 2 Stark. 282 [317]; 3 Am. Jur. 303, 312; 3 Wils. 19, per Bathurst, J.; Woert *v.* Jenkins, 14 Johns. 352; Pratt *v.* Ayler, 4 H. & J. 448; Jennings *v.* Maddox, 8 B. Monr. 432; Duncan *v.* Stalcup, 1 Dev. & Batt. 440.

[4] Coppin *v.* Braithwaite, 8 Jur. 875. And see Keene *v.* Lizardi, 8 La. 33.

[5] Warwick *v.* Foulkes, 12 M. & W. 507. But see *contra*, *post*, § 426.

[6] Pratt *v.* Ayler, 4 H. & J. 448.

[7] Wells *v.* Head, 4 C. & P. 568.

[8] Squire *v.* Hollenbeck, 9 Pick. 551. And see Pierce *v.* Benjamin, 14 id. 361.

that, belonging to the plaintiff, they have lawfully gone to his use.[9] So, where the defendant had seized and destroyed the plaintiff's gamecocks, under a warrant to search for gaming implements, it was held, that the jury might consider, in mitigation of the injury, the good motives of the defendant, and his belief that he was acting in the due execution of legal process; in which case the measure of damages was the actual value of the animals, as articles of merchandise.[10]

§ 273. **Trespass; Aggravation.** It may here also be remarked, that if the defendant, while he is an actual trespasser in the plaintiff's house or close, commit *any other acts of trespass* against the person of the plaintiff, his wife, children, or servants, these acts and their consequences may be alleged and proved in an action of trespass *quare clausum fregit*, as matter in aggravation of the injury.[1] It is on this ground that the plaintiff, in an action of trespass for breaking and entering his house, has been permitted to allege and recover full damages for the debauching of his daughter and servant. It makes no difference that the plaintiff may have a separate action for these additional wrongs, provided it be an action of trespass, or of trespass on the case; and not a remedy in another form. If he sues in trespass, and alleges the debauching of his servant in aggravation, the breach and entry of the house, being the principal fact complained of, must be proved, or the action will not be maintained.[2] And so it is in regard to any other consequential damages alleged in an action of trespass; for wherever the principal trespass, namely, the entry into the house or close, is justified, it is an answer to the whole declaration.[3]

[9] Kaley *v.* Shed, 10 Met. 317. See *infra*, §§ 276, 635 *a*; Anthony *v.* Gibbert, 4 Blackf. 348.

[10] Coolidge *v.* Choate, 9 Law Rep. 205; 11 Met. 79. See also Reed *v.* Bias, 8 Watts & Serg. 189; Conard *v.* Pacific Ins. Co., 6 Pet. 262, 282.

[1] Bennett *v.* Alcott, 2 T. R. 166; Shafer *v.* Smith, 7 H. & J. 68.

[2] Bennett *v.* Alcott, 2 T. R. 166; Ream *v.* Rank, 3 S. & R. 215; 2 Stark. Ev. 813; 3 Am. Jur. 298; Dean *v.* Peale, 5 East 45; Woodward *v.* Walton, 2 New R. 476; 1 Smith's Leading Cases [219] (Am. ed.), notes. See 43 Law Lib. 328, 330. Any other consequential damage to the plaintiff may be alleged and proved as matter of aggravation: 1 Chitty on Plead. 347, 348; Anderson *v.* Buckton, 1 Stra. 192; Heminway *v.* Saxton, 3 Mass. 222; Sampson *v.* Coy, 15 id. 493. But the proof must be restricted to damages resulting to the plaintiff alone, and not to another, nor to himself jointly with another: Edmonson *v.* Machell, 2 T. R. 4. See *supra*, § 268.

[3] Taylor *v.* Cole, 3 T. R. 292; 1 H. Bl. 555; Bennett *v.* Alcott, 2 T. R. 166; Monprivatt *v.* Smith, 2 Campb. 175; Phillips *v.* Howgate, 5 B. & Ald. 220; Ropes *v.* Barker, 4 Pick. 239. {The rule exists in actions of libel, and for breach of promise of marriage, that if a plea of justification is set up and is not proved, this fact is admissible to aggravate the damages: Thorn *v.* Knapp, 42 N. Y. 474; Davis *v.* Slagle, 27 Mo. 600. This has been said to rest on the ground that the justification is placed on the record, and will remain there, as a continual reiteration of the charge against the plaintiff, and that therefore a trifling verdict would not show that "such charge was unfounded." Kniffen *v.* McConnell, 30 N. Y. 285; Sedgwick on Damages, 7th ed. p. 148. As regards the action for breach of promise of marriage, this rule is an exception to the general principles upon which damages are given in an action *ex contractu*. As was said by Ingraham, J., in Kniffen *v.* McConnell, *sup.*, "It is an anomaly, in an action for a breach of contract, to hold that setting up matters to excuse such

§ 274. **Trespass; Mitigation.** But, though the plaintiff may generally show all the circumstances of the trespass tending in aggravation of the injury, it does not therefore follow, that the *defendant may,* in all cases, show them in mitigation; for he may *preclude himself* by his mode of defence, as well as the plaintiff may, as we have already seen, by his election of remedy. Thus, it is a sound rule in pleading, that matter which goes in complete justification of the charge must be specially pleaded, in order that the plaintiff may be prepared to meet it; and cannot be given in evidence under the general issue, for this would be a surprise upon him.[1] If, therefore, the defendant pleads the general issue, this is notice to the plaintiff that he has nothing to offer in evidence which amounts to a justification of the charge; and hence no evidence of matter which goes in justification will be received, even in mitigation of damages.[2] Thus, in trespass for an assault and battery, where the defendant, under the general issue, offered to prove that the beating was inflicted by way of correcting the misconduct of the plaintiff, who was a seaman on board the ship of which the defendant was master, the evidence was held inadmissible; and the jury were instructed, that they could neither increase the damages beyond a compensation for the injury actually sustained, nor lessen them on account of the circumstances under which the beating was given.[3] And in trespass by an apprentice against his master, for an assault and battery, the defendant cannot, under this issue, give evidence of an admission by the plaintiff, that his master had beaten him for misconduct.[4] So, in an action of slander, the defendant cannot, under the general issue, give the truth of the words in evidence, even in mitigation of damages;[5] nor can he, for this purpose, show that the plaintiff has for a long time been hostile to him, and has proclaimed that he did not wish to live with him on terms of peace.[6]

§ 275. **Slander.** In actions of *slander,* it is well settled that the plaintiff's *general character* is involved in the issue; and that therefore evidence, showing it to be good or bad, and consequently of much or little value, may be offered on either side to affect the

breach in an answer, the proof of which fails, is an aggravation of the damages:" Sedgwick on Damages, 7th ed. p. 149.}

[1] Co. Lit. 282 *b*, 283 *a*; 1 Chitty on Plead. 415; Trials per Pais, p. 403 (6th ed.); 3 Amer. Jur. 301; Watson *v.* Christie, 2 B. & P. 224, and n. (*a*).

[2] [But he may show that the plaintiff has incidentally received benefit: Hicks *v.* Drew, 117 Cal. 305.] {It has been held that if a defendant in an action for negligence suffer a default, he may, on a hearing to assess damages, show that he was not guilty of negligence, in order to reduce the damages: Mowry *v.* Shumway, 44 Conn. 494.}

[3] Watson *v.* Christie, 2 B. & P. 224; Bull. N. P. 16; 1 Salk. 11, per Holt, C. J.

[4] Pujolas *v.* Holland, 1 Longf. & Towns. 177.

[5] Underwood *v.* Parkes, 2 Stra. 1200; Mullett *v.* Hulton, 4 Esp. 248; 1 Chitty on Plead. 433; Shepard *v.* Merrill, 13 Johns. 475. Nor can the plaintiff prove the speaking of other slanderous words, in aggravation of the damages; though he may offer such evidence, in proof that the words charged were spoken maliciously. See 3 Am. Jur. 293, 294; 2 Stark. on Slander, pp. 48–51 [54–57] (Wendell's ed.).

[6] Andrews *v.* Bartholomew, 2 Met. 509.

amount of damages.[1] But whether the defendant will be permitted, under the general issue, to prove *general suspicions*, and *common reports* of the guilt of the plaintiff, in mitigation of damages, is not universally agreed.[2] It seems, however, that, where the evidence goes to prove that the defendant did not act wantonly and under the influence of actual malice, or is offered solely to show the real character and degree of the malice, which the law implies from the falsity of the charge, all intention of proving the truth being expressly disclaimed, it may be admitted, and of course be considered by the jury.[3] Evidence of any *misconduct of the plaintiff*, giving rise to the charge, such as an *attempt* by him to *commit the crime*,[4] or *opprobrious language* addressed by him to the defendant, either verbally or in writing, contemporaneously with the charge complained of, or tending to explain its meaning, may also be shown in mitigation of damages.[5] So, if, through the misconduct of the plaintiff, the defendant was led to believe that the charge was true, and to plead in justification accordingly, this may be shown to reduce the damages.[6] And if the charge was made under a *mistake*, upon discovering of which the defendant forthwith retracted it in a public and proper manner, and by way of atonement, this also may be shown in evidence, for the same purpose.[7] So, the extreme youth or partial insanity of the defendant may be shown, to convince the jury that the plaintiff has suffered but little injury.[8]

[1] 2 Stark. on Slander, pp. 77–86 [88–97], by Wendell; 3 Am. Jur. 294, 295; Wolcott *v.* Hall, 6 Mass. 514, 518. If the declaration states that the plaintiff had never been suspected to be guilty of the crime imputed to him, the defendant, under the general issue, may show that he was so suspected, and that in consequence of such suspicions his relatives and acquaintance had ceased to visit him: Earl of Leicester *v.* Walter, 2 Campb. 251.

[2] In England, and in Connecticut, Pennsylvania, Maryland, Kentucky, and South Carolina, such evidence is admissible. In Massachusetts, New York, and Virginia, it is not. See 2 Stark. on Slander, p. 84, n. (1), by Wendell; Wolcott *v.* Hall, 6 Mass. 514; Alderman *v.* French, 1 Pick. 1; Bodwell *v.* Swan, 3 id. 376; Root *v.* King, 7 Cowen 613; Matson *v.* Buck, 5 id. 499; McAlexander *v.* Harris, 5 Munf. 465. See also Boies *v.* McAllister, 3 Fairf. 310; Rigden *v.* Wolcott, 6 G. & J. 413. See also *post*, § 424.

[3] 2 Stark. on Slander, p. 88 n. (1), by Wendell; Root *v.* King, 7 Cowen 613; Gilman *v.* Lowell, 8 Wend. 582; Mapes *v.* Weeks, 4 id. 659, 662. {Express malice or ill-will on the part of the defendant is a ground for exemplary or punitive damages: Snyder *v.* Fulton, 34 Ind. 128; *ante*, § 254, n.}

[4] Anon., cited arg. 2 Camph. 254; 2 Stark. on Slander, p. 83, n. (1), by Wendell.

[5] Hotchkiss *v.* Lathrop, 1 Johns. 286; May *v.* Brown, 3 B. & C. 113; Wakley *v.* Johnson, Ry. & M. 422; Child *v.* Homer, 13 Pick. 503; Larned *v.* Buffington, 3 Mass. 553; Watts *v.* Frazer, 7 Ad. & El. 223; Beardsley *v.* Maynard, 4 Wend. 336; 7 id. 560; Gould *v.* Weed, 12 id. 12; Davis *v.* Griffith, 4 G. & J. 342.

[6] Larned *v.* Buffington, 3 Mass. 546. But see Alderman *v.* French, 1 Pick. 1, 19. The fact of the defendant's taking depositions to prove the truth of the words, and afterwards declining to justify them, is inadmissible in evidence for the plaintiff, to enhance the damages: Boswell *v.* Osgood, 3 Pick. 379. See also Bradley *v.* Heath, 12 Pick. 163; [*post*, § 420, n.]

[7] Larned *v.* Buffington, 3 Mass. 546, as qualified in 1 Pick. 19; Mapes *v.* Weeks, 4 Wend. 663; Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 515; 2 Stark. on Slander, p. 95, n., by Wendell; O'Shaughnessy *v.* Hayden, 2 Fox & Sm. 329.

[8] Dickinson *v.* Barber, 9 Mass. 225, 228; 3 Am. Jur. 297. But the defendant will not be permitted to offer, in mitigation of damages, any evidence impeaching his own character for veracity: Howe *v.* Perry, 15 Pick. 506.

§ 276. **Trover.**[1] In *trover*, the value of the property at the time of the conversion, if it has not been restored and accepted by the plaintiff, with interest on that amount, is ordinarily the measure of damages.[2] It has been further held, that the jury may, in their discretion, find the value at a subsequent time. Thus, in trover for East India Company's warrants for cotton, where the value at the time of the conversion was sixpence the pound, but it afterwards rose to upwards of tenpence, the jury were left at liberty to find the latter price as the value; for though the plaintiff might with money have replaced the goods at the former price, yet he might not have been in funds for that purpose.[3] And in England, the plaintiff is permitted to recover any special damage which he may allege and be able to prove as the result of the wrongful act of the defendant. Thus, under a count in trover for the conversion of tools, by means whereof the plaintiff was prevented from working at his trade of a carpenter, and was greatly impoverished, they being the implements of his trade, it was held that the special damage directly flowing from the detention of his tools was recoverable.[4] But in the United States, upon consideration of the rule, it has been held safer to adhere to the value at the time of the conversion, with interest. But if the defendant has enhanced the value of the goods by his labor, as, for example, if he has taken logs, and converted them into boards, the plaintiff is permitted to recover the enhanced value, namely, the value of the boards, and is not confined to the value of the material, either at the place of taking, or of manufacture.[5] Where the subject is a written security, the damages are usually assessed to the amount of the principal and interest due upon it.[6] If the plaintiff has himself recovered the property, or it has been restored to him and accepted, the actual injury occasioned by the conversion, including the expenses of the recovery, will form the measure of damages;[7] and if the property in whole or in part has been applied to the payment of the plaintiff's debt or otherwise to

[1] [See also § 649, *post.*]

[2] 3 Campb. 477, per Ld. Ellenborough; Pierce *v.* Benjamin, 14 Pick. 356, 361; Parks *v.* Boston, 15 id. 198, 206, 207; Stone *v.* Codman, ib. 297, 300; Greenfield Bank *v.* Leavitt, 17 id. 1; Hepburn *v.* Sewell, 5 H. & J. 212. See Sedgwick on Damages, c. 19; {Wehle *v.* Haveland, 69 N. Y. 448; Tilden *v.* Johnson, 52 Vt. 628;} [Howery *v.* Hoover, 97 Ia. 581; Richardson *v.* Ashby, 132 Mo. 238.]

[3] Greening *v.* Wilkinson, 1 C. & P. 625.

[4] Bodley *v.* Reynolds, 10 Jur. 310. See also Davis *v.* Oswell, 7 C. & P. 804.

[5] Greenfield Bank *v.* Leavitt, 17 Pick. 3; Baker *v.* Wheeler, 8 Wend. 505; Rice *v.* Hollenbeck, 19 Barb. 664; [Powers *v.* Tilley, 87 Me. 34; Wright *v.* Skinner, 34 Fla. 453; Nicklase *v.* Morrison, 56 Ark. 553. But see Hartford Iron Co. *v.* Cambria, etc. Co., 93 Mich. 90. If the conversion is innocent, the plaintiff cannot recover the enhanced value of the property: Fisher *v.* Brown, 37 U. S. App. 407; White *v.* Yankey, 108 Ala. 270; Carpenter *v.* Lingenfelter, 42 Neb. 728. *Contra*, Wright *v.* Skinner, 34 Fla. 453.]

[6] Mercer *v.* Jones, 3 Campb. 477; [Lovell *v.* Hammond Co., 66 Conn. 500.]

[7] Greenfield Bank *v.* Leavitt, 17 Pick. 3; Hepburn *v.* Sewell, 5 H. & J. 12; {Bates *v.* Clark, 95 U. S. 204.}

his use, this may be considered by the jury as diminishing the injury, and consequently the damages.[6]

§ 277. **Joint Torts.** In all actions for a *joint tort*, against *several defendants*, the jury are to assess damages against all the defendants jointly, according to the amount which, in their judgment, the most culpable of the defendants ought to pay.[1] And if several damages are assessed, the plaintiff may elect which sum he pleases, and enter judgment *de melioribus damnis* against them all.[2] But if several trespassers are charged in the declaration, and the defendants plead severally, and are found severally guilty of *distinct trespasses*, the damages ought to be severed and assessed for each trespass against him who committed it.[3]

§ 278. **Alia Enormia.** The averment of *alia enormia*, at the end of a declaration in trespass, seems to have been designed to enable the plaintiff to give evidence of circumstances belonging to the transaction which were not in themselves actionable, and which could not conveniently be put upon the record. And it has frequently been said, that, under this averment, things may be proved which could not be put upon the record because of their indecency and that, therefore, in trespass for breaking and entering the plaintiff's house, he might under this averment prove that the defendant, whilst there, debauched his daughter. When this doctrine was first

[6] Pierce *v.* Benjamin, 14 Pick. 356, 361; Kaley *v.* Shed, 10 Met. 317. [But this must be clearly shown: Coburn *v.* Watson, 48 Neb. 257; Watson *v.* Coburn, 35 id. 492.] {In an action of trover, if the defendant at the time of the conversion had a lien on the goods to a certain amount, the rule of damages is the value of the goods, deducting the amount of the lien and adding interest on the balance: Fowler *v.* Gilman, 13 Met. (Mass.) 267. So if a plaintiff in a suit makes an illegal attachment of goods, and a few days afterwards makes a legal attachment and gets judgment and takes the goods on execution, if he is sued for a conversion in making the first attachment, the measure of damages is only the loss caused to the owner of the goods by the original attachment and detention: Lazarus *v.* Ely, 45 Conn. 504.}

[1] Brown *v.* Allen, 4 Esp. 158; Lowfield *v.* Bancroft, 2 Stra. 910; Bull. N. P. 15; Ansten *v.* Willward, Cro. El. 860; Heydon's Case, 11 Co. 5; Onslow *v.* Orchard, 1 Stra. 422; Smithson *v.* Garth, 3 Lev. 324; 3 Com. Dig. 348, tit. Damages, E, 6; Elliot *v.* Allen, 1 M. G. & S. 18. [But evidence to charge one defendant with exemplary damages is inadmissible where the other defendants are voluntarily joined by the plaintiff; and if such evidence is admitted, the judgment must be reversed as against all the defendants: Washington Gas Light Co. *v.* Lansden, 172 U. S. 534.] {When damage results from two different causes, for only one of which the defendant is responsible, the burden of proof is upon the plaintiff to show the extent of the damage occasioned by the cause for which the defendant is liable: Priest *v.* Nichols, 116 Mass. 401. See also *ante*, Vol. I. § 48, n.}

[2] Heydon's Case, 11 Co. 5; Headley *v.* Mildmay, 1 Roll. 395, pl. 17; s. c. 7 Vin. Abr. 303, pl. 5; Johns *v.* Dodsworth, Cro. Car. 192; Doune *v.* Estevin de Darby, 44 E. III, 7; F. N. B. [107] E; Walsh *v.* Bishop, Cro. Car. 243; Rodney *v.* Strode, Carth. 19; 2 Tidd's Pr. 896 (9th ed.); Halsey *v.* Woodruff, 9 Pick. 455.

[3] Prop'rs of Kennebec Purchase *v.* Bolton, 4 Mass. 419. Where an injury was done by two dogs jointly, which belonged to several owners, it was held that each owner was liable only for the mischief done by his own dog: Buddington *v.* Shearer, 20 Pick. 477; Russell *v.* Tomlinson, 2 Conn. 206. {In an action of trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and the judgment is joint: Gerrish *v.* Cummings, 4 Cush. (Mass.) 391; Gardner *v.* Field, 1 Gray (Mass.) 151.}

advanced, it was generally understood that no action would lie for this latter injury, unless as an aggravation of the former; and hence, the judges may have been led to find a special reason for admitting this evidence. But since it is well settled, and has become the ordinary course, to sue especially for this injury to a daughter and servant, as well as for criminal conversation with a wife, and to allege the main facts upon the record, no reason is perceived for retaining this anomaly in practice.[1] There is no injury, however indecent in its circumstances, but may be substantially stated with decency on the record; the law permitting and even requiring parties, as well as witnesses, to state in general terms, and with indirectness, those things which cannot otherwise be expressed with decency; and to this extent, at least, every party is entitled, by the settled rules of pleading, as well as by the reason of the thing, to be informed of that which is to be proved against him. The circumstances and necessary results of the defendant's wrongful act may be shown without this averment; and as to those consequences which, though natural, did not necessarily follow, they must, as we have seen,[2] be specially alleged.[3]

[1] [*Post*, §§ 571 *et seq.*]

[2] See *supra*, § 253.

[3] See the observations of Mr. Peake, Evid. p. 505, by Norris; Mr. Phillips, 2 Phil. Evid. 180; id. p. 136 (2d Am. ed.); and Mr. Starkie, 2 Stark. Evid. 815; 1 Chitty on Pl. 412 (7th ed.); Chitty's Precedents, p. 716, n. (*k*); Bull. N. P. 89; Lowden *v.* Goodrick, Peake's Cas. 46; Pettit *v.* Addington, ib. 62.

DEATH.

§ 278 *a*. **Proof of Death in Civil and Criminal Cases.** The amount of evidence required to establish the fact of death is somewhat affected by the nature of the case in which the question arises. In trials for *homicide*, this is, of necessity, to be proved at the outset, in the most satisfactory manner, and beyond any reasonable doubt; such being the rule of evidence in the criminal law.[1] This, therefore, is the highest degree of proof demanded of this fact. In *civil cases* it is ordinarily sufficient to prove it by the mere preponderance of evidence; and yet here there is a difference in the amount of proof required, according to the materiality of the fact to the subject in controversy. Thus, in a claim of title by descent or succession, or of the right of administration, the party is held to a more strict proof of the death of the ancestor than in cases where the question arises incidentally and collaterally in the proceedings, as, for example, on a motion to read the deposition of a witness, or to give evidence of his testimony at a former trial, on the ground of his subsequent decease; for these are cases addressed to the discretion of the court, in which the consequences of mistake are comparatively of not much importance, and are without difficulty retrieved.[2]

§ 278 *b*. **When Proof is required.** In the United States, the *proof of death*, in cases not criminal, is required *in claiming title to land* by descent, as heir, against a stranger; or as dowress, against any tenant of the freehold; or, in the *probate courts*, in an application for letters testamentary, upon the probate of a will; or of letters of administration; or, in a claim of the *insurance-money*, upon a policy on the life of another, by the party to whom it was made payable at his death; or in a claim of *wages* or *pension* or *bounty-money*, by the *widow* or *child* of one entitled under the laws regulating the *military, land*, or *naval service*.

§ 278 *c*. **Direct Proof.** The *direct* and most satisfactory *proof of the death* of a person is the testimony of those who saw him die, or who, having known him when living, saw and recognized his body after his decease. In the former of these cases, if the circumstances

[1] See *post*, Vol. III. §§ 30, 130–132.
[2] Carrington *v.* Cornock, 2 Sim. 567.

were of a nature to leave the fact in any degree doubtful, as, for instance, in apparent sudden death, whether from the inhalation of noxious gases, or other accident, the testimony of a medical person is desirable, and, if possible, should be obtained.

§ 278 *d*. **Indirect Proof.** The *indirect evidence* of death is either *documentary* or *oral*. Among the *documentary* instruments of proof which have been received may be enumerated Parish and other Registers, where such are required by law to be kept;[1] Muster Rolls and Returns, in the military and naval service;[2] Coroners' Inquests;[3] Probate of the will of the deceased, or the grant of administration on his estate;[4] the assignment of the widow's dower upon writ, or other legal proceedings; previous litigation respecting the estate of the deceased, terminated in favor of those claiming as heirs. The *identity of the person* is, *prima facie*, inferred from the identity of the name; except where the place of residence was in a large city or town, in which case, proof of some additional circumstances seems to be necessary.[5]

§ 278 *e*. **Oral Evidence.** The *oral evidence*, indirectly proving death, consists of those circumstances from which the death of the person may reasonably be inferred; such as long absence, without any intelligence respecting him, reputation in the family, and their conduct thereupon, and other circumstances.[1] In regard to *long absence*, this alone, without the aid of other facts, has been said not to furnish any presumption of the party's death; on the ground of another rule, namely, that the last-proved state of things is presumed to continue; and that, therefore, the existence of a living person being once shown, he is presumed to continue alive, and the burden of proof is upon the party asserting his death. This presumption is held by the civilians to continue for a hundred years;[2]

[1] See *ante*, Vol. I. §§ 483–485, 493; Bull. N. P. 247; Doe *v.* Andrews, 15 Ad. & El. N. S. 756. A consul's certificate is not evidence of the death of a person: Morton *v.* Barrett, 1 Applet. 109.

[2] Ibid.

[3] Ibid.; Sergeson *v.* Sealey, 2 Atk. 412; 1 Saund. 362, n. (1), by Williams.

[4] *Infra*, §§ 355, 693; *ante*, Vol. I. §§ 41, 550. {In some cases, although holding that the absence of a person from the State without being heard from for any period short of seven years is not sufficient to raise a legal presumption of his death, it has been considered that where letters of administration had been granted, after an absence of three years, and a suit had been brought upon a promissory note payable to the intestate without any plea in abatement being interposed, a conclusive presumption of the death of the intestate arose from the above facts: Newman *v.* Jenkins, 10 Pick. (Mass.) 515. We apprehend the presumption would be *prima facie* in favor of the decease if a plea in abatement were interposed, but open to proof that the testator is still living: 2 Redfield on Wills, 2; Lancaster *v.* Washington Life Insurance Co., 62 Mo. 121; Tisdale *v.* Connecticut Insurance Co., 26 Iowa 170. But it is denied in Ins. Co. *v.* Tisdale, that letters of administration are even *prima facie* evidence of death: *ante*, Vol. I. § 550, n.}

[5] Hubback on Succession, pp. 103, 464, 465; [*ante*, Vol. I. §§ 38, 43 *a*, 512, 575.]

[1] {Connecticut Insurance Co. *v.* Tisdale, 26 Iowa 170.}

[2] "Vivere etiam usque ad centum annos quilibet præsumitur." Corpus Juris Glossatum, tom. ii. p. 718. And see Mascardus, De Probat. vol. i. concl. 103, n. 5; id. vol. iii. concl. 1075, n. 1, 1078, n. 6.

and it has been applied in courts of common law to almost as great an extent.[3] But it is conceived that the presumption of continuance can justly be applied only until a contrary presumption is raised, from the nature of the subject.[4] It would surely be unreasonable to presume that an orange, proved to have existed fresh ten years ago, is still sound; a contrary presumption having arisen, from the ascertained average duration of that fruit in a sound state. On the same principle, the average duration of human life, after any given age, being now ascertained and stated in well-authenticated tables, which have been recognized by the courts as safe rules in the calculation of the value of annuities, and in other similar cases, no good reason is perceived why the same tables may not be resorted to as furnishing ground legally to presume the death of a person, after the lapse of the period of the probable duration of his life, in the absence of any evidence to the contrary.[5]

§ 278 *f*. **Presumption as to Death.** But however this may be, as a mere presumption of law, the rule is now settled, for most judicial purposes, that the *presumption of life*, with respect to persons of whom no account can be given, *ends at the expiration of seven years* from the time they were last known to be living; after which, the burden of proof is devolved on the party asserting the life of the individual in question.[1] The issue, in such cases, is an issue of fact; and the jury are at liberty to find the fact of death within the period of seven years, upon the circumstances proved in the case.[2] Among

[3] In Atkins *v.* Warrington [1 Ch. Pl. 258], it is said that the Court of Queen's Bench refused judicially to presume that a person, alive in the year 1034, was not living in the year 1827. See Best on Presumptions, § 139. And in Benson *v.* Olive, 2 Stra. 920, when the deposition of a witness, examined in 1672, was offered to be read at a trial had in 1731, on the presumption that the witness was dead; Reynolds, C. B., refused to admit it, without proof of proper but ineffectual search and inquiry after him. See also Hubback on Succession, pp. 167, 168.

[4] See *ante*, Vol. I. §§ 14*t*, 41; 2 Cruise's Dig. tit. 16, c. 1, § 25; id. c. 3, §§ 8–10 (Greenl. ed.) [2d ed. 1856]; Fearne, Rem. pp. 21–23.

[5] See Hubback on Succession, pp. 171, 172. But see *In re* Hall, Wallace, Jr. 85.

[1] See *ante*, Vol. I. § 41; Best on Presumptions, § 140; Hubback on Succession, pp. 170–173; Thorne *v.* Rolff, Dyer 185 *a*; Gilleland *v.* Martin, 3 M'Lean 490; Doe *v.* Jesson, 6 East 85.

{For the presumption of death, see *ante*, Vol. I. §§ 29, 30, 35, 41.

There is no presumption of the *date* of the death even after the seven years have elapsed. The party who relies on the occurrence of the death at any particular time must give evidence tending to prove that it occurred at that time: *In re* Phene's Trusts, L. R. 5 Ch. 139; *Re* Lewes's Trusts, L. R. 11 Eq. 236; Corbishley's Trusts, L. R. 14 Ch. D. 846; Spencer *v.* Roper, 13 Ired. (N. C.) 333; McCartee *v.* Carmel, 1 Barb. (N. Y.) Ch. 455; State *v.* Morse, 11 Ired. (N. C.) 160; Hancock *v.* American Life Insurance Co., 62 Mo. 26; Emerson *v.* White, 9 Foster (N. H.) 482; Whiteside's Appeal, 23 Pa. St. 114. The general rule is, that the presumption of the continuance of life from absence or other cause is regarded as mere presumption of fact, to be weighed by the jury in connection with the attending circumstances. But, for convenience, the period of seven years has been fixed as the limit of the *prima facie* presumption of death, in the absence of all circumstances tending to the contrary: 2 Redfield on Wills, 3. A mere failure to hear from a person for seven years, residing, when last heard from, in a distant city, does not raise the presumption of death: McRee *v.* Copelin, Cir. Ct. St. Louis Co., Mo., 2 Cen. L. J. 813.}

[2] Ibid.; White *v.* Mann, 13 Shepl. 361.

the circumstances material to this issue are, the age of the party, his situation, habits, employment, state of health, physical constitution; the place or climate of the country whither he went, and whether he went by sea or land; the facilities of communication between that country and his former home; his habit of correspondence with his relatives; the terms of intercourse on which he lived with them; in short, any circumstances tending to aid the jury in finding the fact of life or death.[3] There must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who probably would have heard of him, if living; and also at the place of his fixed foreign residence, if he was known to have had any.[4]

§ 278 *g*. **Reputation in Family.** *Reputation in the family* and *family conduct* admissible in cases of *pedigree*, which have been treated in the preceding volume, are also admissible in proof of the death of a member of the family.[1]

§ 278 *h*. **Evidence less strict in Special Cases.** It may be added, that where the subject of the claim is paramount, so that no injury to the absent owner can result from any mistake in regard to his death; as, for example, real property, in an action for the mere possession; death may be presumed from circumstances much less weighty and persuasive than will be required where the subject may be irretrievably lost to the right owner, by payment or delivery to the wrong person. Thus, in an action on a policy of insurance on the life of the assured, payable to the plaintiff on his death, Lord Mansfield instructed the jury, that if the evidence left the time of the death so doubtful in their minds that they could not form an opinion, they ought to find for the defendant.[1]

[3] {Matter of Ackermann, 2 Redf. (N. Y.) 154; Hancock *v.* American Life Insurance Co., 62 Mo. 26; Sheldon *v.* Ferris, 45 Barb. (N. Y.) 124; Whiteside's Appeal, 23 Pa. St. 114.}

[4] See Hubback on Succession, pp. 172–174; McCartee *v.* Camel, 1 Barb. Ch. 455; Doe *v.* Andrews, 15 Ad. & El. N. S. 756.

[1] *Ante*, Vol. I. §§ 103–106; Cochrane *v.* Libby, 6 Shepl. 39. {See *ante*, Vol. I. §§ 103–108, notes. Reputation may also be proved by charts, tables, registers, etc., of births, deaths, etc., kept in the family, tombstones, etc. Shrewsbury Peerage Case, 7 H. of L. C. 1; Haslam *v.* Cron, 19 W. R. 968; Eastman *v.* Martin, 19 N. H. 152.}

[1] Patterson *v.* Black, Park, Ins. 433, 434 (2d Am. ed.). And see Masten *v.* Cookson, 2 Eq. Cas. Abr. 414; Doe *v.* Deakin, 4 B. & Ald. 433; Hubback on Succession, pp. 176–179. For the case of *commorientes*, or persons perishing in the same calamity, see *ante*, Vol. I. §§ 29, 30; Moehring *v.* Mitchell, 1 Barb. Ch. 264.

DEBT.

§ 279. **Debt lies for Sum certain.** The action of debt lies for a sum certain; whether it have been rendered certain by contract between the parties, or by judgment, or by statute,[1] as when this remedy is given for a penalty, or for the escape of a judgment debtor.[2] Where the contract is by a specialty, the execution of the

[1] [State *v.* Manchester, etc. R., 38 A. 736, N. H.]

[2] The *common consolidated count* in debt is as follows: "For that the said (*defendant*), on ——, was indebted to the plaintiff in —— dollars, for [*here state what the debt is for, as in Assumpsit, which see*], which moneys were to be paid to the plaintiff upon request; whereby, and by reason of the non-payment thereof, an action hath accrued to the plaintiff to demand and have from the said (*defendant*) the sums aforesaid, amounting in all to the sum of ——. Yet the said (*defendant*) has never paid the same," etc.

On a *promissory note*, between the original parties, the declaration is as follows: "For that the said (*defendant*), on ——, made his promissory note and delivered the same to the plaintiff, and thereby, for value received, promised the plaintiff to pay him the sum of —— in —— months, [*as the case may be*], and, by reason of the non-payment thereof, an action hath accrued to the plaintiff, to demand and have from the said (*defendant*) the sum aforesaid. Yet," etc.

In *debt on a judgment*, the count is thus: "For that the plaintiff, at the —— court [*here describe the court by its proper title*], begun and holden at —— within and for the [*county or district*] of ——, on [*here state the day appointed by law for holding the term*], by the consideration of the justices of said court, recovered judgment against the said (*defendant*) for the sum of —— debt or damage, and the further sum of —— for costs of suit, as by the record thereof in the same court remaining appears; which said judgment remains in full force, unreversed and unsatisfied; whereby an action has accrued to the plaintiff, to demand and have from the said (*defendant*) the sums aforesaid, amounting to the sum of ——. Yet the said (*defendant*) has not paid the same [*nor any part thereof*]," etc.

The following is the usual count *in debt upon a bond:* "For that the said (*defendant*) on ——, by his writing obligatory of that date, which the plaintiff here produces in court, bound and acknowledged himself indebted to the plaintiff in the sum of —— to be paid to the plaintiff on demand. Yet the said (*defendant*) has not paid the same," etc.

In *debt for rent*, founded upon the defendant's occupancy, and not upon the indenture, the count is as follows: "For that the plaintiff on —— demised to the said (*defendant*) a certain messuage and premises, with the appurtenances, situate in ——, to have and to hold the same to the said (*defendant*) for the term of —— thence next ensuing, yielding and paying therefor to the plaintiff, during the said term, the yearly rent of ——, to be paid [*here insert the times of payment*], by equal portions; by virtue of which demise the said (*defendant*) entered into said demised premises, and was possessed thereof thenceforth and until the —— day of ——, when a large sum of money, to wit, the sum of —— of the rent aforesaid, accruing up to the day last aforesaid, was due and payable from said (*defendant*) to the plaintiff; whereby an action has accrued to the plaintiff to demand and have from the said (*defendant*) the said sum last mentioned. Yet the said (*defendant*) has never paid the same," etc: ‡Knowles *v.* Eastham, 11 Cush. (Mass.) 429; Allen *v.* Lyman, 1 Williams (Vt.) 20; Addison *v.* Preston, 10 Eng. Law & Eq. 489. Debt will lie for liabilities, penalties, and forfeitures imposed by statute, and where no form of action is given: Com. *v.* Davenger, 10 Phila. (Pa.) 478; Vaughan *v.* Thompson, 15 Ill. 39; Portland Dry Dock, etc. Co. *v.* Portland, 12

deed is put in issue by the plea of *non est factum*, which, as it may also be made in an action of covenant, will hereafter be considered under the title of Deed. The liability of an heir, on the bond of his ancestor, will be treated under the title of Heir.

§ 280. **Nil Debet, when Proper Plea.** When this action is brought upon a *parol contract*, or for an *escape*, or for a *penalty* given by statute, the general issue is *nil debet;* under which, as it is a traverse of the plaintiff's right to recover, he must prove every material fact alleged in the declaration. And, on the other hand, as the defendant alleges that he does not owe, this plea enables him to give in evidence any matters tending to deny the existence of any debt, such as a release, satisfaction, arbitrament, non-delivery of goods, and the like. And, generally, when the action is upon a matter of fact, though the fact be proved by a specialty, or by a record, the plea of *nil debet* is good, and will open the whole declaration, as well as admit the defendant to make any defence showing that he is not indebted. But if the specialty is itself the foundation of the action, though extrinsic facts be mixed with it, the rule is otherwise. Thus, in *debt for rent, due by indenture*, the action is founded on the fact of occupation of the premises, and pernancy of the profits by the defendant, the lease being alleged only by way of inducement; and, therefore, the plea of *nil debet* puts the plaintiff upon proof of the whole declaration; and, under it, the defendant may give in evidence a release; payment; or, that possession was withheld by the lessor; or, that he was subsequently ousted or evicted by the lessor, or by a stranger having a better title. If the ouster or eviction was by the lessor, and was of only a part of the premises, it will bar the whole action, for, being a wrong-doer, no apportionment will be made in his favor; but if it were by a stranger, the rent will be apportioned. So, in debt for an escape upon a *devastavit*, the judg-

B. Mon. 77; Strange *v.* Powell, 15 Ala. 452; [Russell *v.* Louisville, etc. R., 93 Va. 322; Rockland *v.* Farnsworth, 87 Me. 473.] It will not lie to recover dues payable out of a particular fund: Insane Hospital *v.* Higgins, 15 Ill. 185. An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the plaintiff would carry a like quantity for the defendant: Bracegirdle *v.* Hincks, 24 Eng. Law & Eq. 534. But to support the action there must be some promise, express or implied, to pay the money. So it will not lie on a mortgage which contains no promise to pay the money due: Larmon *v.* Carpenter, 70 Ill. 549; Fidelity, etc. Insurance Co. *v.* Miller, 89 Pa. St. 26.

An action of debt may be sustained on an obligation to pay a certain sum of money with interest, "which sum may be discharged in notes or bonds due on good solvent men residing in the county of Randolph, Virginia:" Butcher *v.* Carlile, 12 Gratt. (Va.) 520. Such an action will lie upon the decree of a court of equity for the payment of a specific sum, whenever it can be brought upon the judgment of a court of law. The records of both courts are of equal authority: Pennington *v.* Gibson, 16 How. (U. S.) 85.

An action of debt may be sustained upon an instrument under seal, for a sum certain payable at a certain time, and to a specified person; and any recital of the consideration for which it was given may be rejected as surplusage: Nash *v.* Nash, 16 Ill. 79. See also Smith *v.* Webb, ib. 105; Dunlap *v.* Buckingham, ib. 109; Turney *v.* Paw, ib. 485; Gilmore *v.* Logan, 30 La. An. Pt. II. 1276.]

ment is but inducement, the action being founded on the fact of the escape or of the waste.[1]

§ 281. **Debt for Rent; Pleading; Evidence.** In *debt for rent*, founded upon a *demise by deed*, if the defendant pleads *nil habuit in tenementis*, the plaintiff may estop him by replying the deed; but if, instead of so doing, he takes issue upon the plea, the deed is no estoppel, and the jury may find according to the truth, upon the whole matter. And if he pleads *nil debet*, he cannot, under this issue, give in evidence that the plaintiff had no interest in the demised premises; because, if he had pleaded it specially, the plaintiff might have replied the deed by way of estoppel; of which right he shall not be deprived, but by his own laches.[1] Nor can the defendant, under this plea, give evidence of any disbursement for necessary repairs, where the plaintiff is bound to repair; for his remedy is by an action of covenant.[2] But if it be part of the covenant that the tenan may make repairs out of the rent, the evidence is admissible.[3]

§ 281 *a*. **Debt on Parol Contract.** In debt upon a *parol contract*, also, the suit being founded upon the facts of the transaction, whether the contract be express or implied, the plaintiff must allege, and under the general issue must prove, all the material facts from which the obligation arises; the proof being generally the same as in an *assumpsit* for the like causes of action.[1] And the defendant, as before stated, may be admitted to any defence which shows that the plaintiff never had a cause of action; such as infancy, mental incapacity, coverture, duress, want or illegality of consideration, release, or payment before breach, term of credit unexpired,[2] or the like; and may also show many matters which go in discharge of his liability which once existed, such as payment, accord and satisfaction, release, and other matters already noticed in the action of *assumpsit*.[3]

§ 282. **Statute of Limitations must be specially pleaded.** The *statute of limitations* cannot be given in evidence under the plea of

[1] Steph. on Plead. 177; 1 Chitty on Plead. 423; Tyndal *v.* Hutchinson, 3 Lev 170. Bullis *v.* Giddens, 8 Johns. 83; Minton *v.* Woodworth, 11 id. 474; Jansen *v.* Ostrander, 1 Cowen 670; Stilson *v.* Tobey, 2 Mass. 521; 2 Saund. 187 *a*, n. (2), by Williams. See, as to apportionment, Woodfall's Landlord & Tenant, p. 301 (5th ed.), by Wollaston; Vaughan *v.* Blanchard, 1 Yeates 175; Gilb. Evid. 283, 284; Bull. N. P. 197; Bredon *v.* Harman, 1 Stra. 701; {Matthews *v.* Redwine, 23 Miss. 233; King *v.* Ramsay, 13 Ill. 619. To an action on a covenant not to do a certain thing, the condition being set out and the breaches assigned in the declaration, *nil debet* is not a good plea: Hogencamp *v.* Ackerman, 4 Zabr. (N. J.) 133. *Nil debet* cannot be pleaded to an action on the judgment of a court of another State: Buchanan *v.* Port, 5 Ind. 264; Henzley *v.* Force, 12 Ark. 756.} [And see *post*, § 291 *a*, n. 1.]

[1] Bull. N. P. 170; Trevivan *v.* Lawrence, 1 Salk. 277.

[2] Bull. N. P. 176, 177; Taylor *v.* Beal, Cro. El. 222.

[3] Clayton *v.* Kynaston, 1 Ld. Raym. 420, per Holt, C. J.

[1] See *supra*, tit. Assumpsit, §§ 112–129.

[2] Broomfield *v.* Smith, 1 M. & W. 542.

[3] See *supra*, §§ 135, 136 *a*, 280.

nil debet; it must be specially pleaded. Nor can a *former recovery* by another person be given in evidence under this plea, when pleaded to an action of debt for a penalty given by statute; for if it could be so shown, the plaintiff might be deprived of the opportunity of pleading *nul tiel record*, or of proving that the recovery was by fraud.[1] But in debt upon a parol contract, under the plea of *nil debet*, the defendant may take advantage of the *statute of frauds;* for the plaintiff, under that issue, is bound to prove his case by such evidence as the statute requires.[2]

§ 283. **Debt for Penalty; Evidence.** In *debt for a penalty* given by statute, and in every other case, where a criminal omission of duty is charged, whether official or otherwise, we have already seen that the allegation, though negative in its character, must be proved by the plaintiff.[1] But if the action is founded on the doing of an act without being duly licensed or qualified, the burden of proving the license or qualification lies on the defendant, because it is a matter lying peculiarly within his own knowledge.[2]

§ 284. **Plaintiff's Case.** The *plaintiff in such action*, besides proving the *corpus delicti* as alleged, must also show that the action has been regularly commenced within the limited time, if the statute has made this essential to his right to recover; and in the right county, if any is designated by law.[1] If the time of the commencement of the action does not appear on the record, it may be shown by the writ, or, *aliunde*, by any other competent evidence.[2] And if part of the penalty is given to the town or parish where the offence was committed, or to the poor thereof, it must be proved that the offence was committed in that town or parish.[3]

§ 285. **Defence.** The *defendant, in a penal action*, may, under the general issue, avail himself of any statutory provision exempting him from the penalty, whether it be contained in the same statute on which the action is founded, or in any other.[1] He may also,

[1] Bull. N. P. 197; Bredon *v.* Harman, 1 Stra. 701.

[2] Fricker *v.* Thomlinson, 1 M. & G. 772. So, in assumpsit, the same defence is open under the general issue: Buttemere *v.* Hayes, 5 M. & W. 456; Eastwood *v.* Kenyon, 11 Ad. & El. 438.

[1] *Ante*, Vol. I. §§ 78, 80.

[2] *Ante*, Vol. I. § 79. {But if the license is to be given by the plaintiff himself, he must prove that it was not given: Abney *v.* Austin, 6 Ill. App. 49; } [Farrow *v.* Nashville, etc. R., 109 Ala. 448.]

[1] Bull. N. P. 194, 195. And see, as to the place where the offence was committed, Scott *v.* Brest, 2 T. R. 238; Butterfield *v.* Windle, 4 East 385; Pope *v.* Davies, 2 Campb. 266; Scurry *v.* Freeman, 3 B. & P. 331; Pearson *v.* McGowran, 3 B. & C. 700. {And he must show that his action is clearly within the statute, in every way: Gilbert *v.* Bone, 79 Ill. 343.

In an action which is instituted under a statute which provides a penalty for cutting timber on the lands of another without his permission, the plaintiff must aver and prove that he owns the land in fee. He can make this out *prima facie* by showing possession under a deed purporting to convey the land to him in fee: Abney *v.* Austin, 6 Ill. App. 49.}

[2] Johnson *v.* Smith, 2 Burr. 950; Granger *v.* George, 5 B. & C. 149.

[3] Evans *v.* Stephens, 4 T. R. 226; Frederick *v.* Lookup, 4 Burr. 2018.

[1] R. *v.* St. George, 3 Campb. 222.

under this issue, take advantage of any variance between the allegation and the proof on the part of the plaintiff; for, as we have already seen, the plaintiff is held to the same strictness of proof in a penal action or in an action founded in tort, where a contract is set forth, as in an action upon the contract itself.[2]

§ 286. **Debt for Bribery.** In an action of debt for *bribery* at an election, the material fact is that the party was bribed to vote; and the plaintiff must therefore prove some bribe, promise, or agreement, according to the statute, previous to voting. But though several candidates are mentioned in the declaration, it will not be necessary to prove that the party was bribed to vote for more than one; nor that they were all candidates; nor will it be necessary to prove that the party bribed was a voter, the offer of a bribe by the defendant being conclusive evidence, against him, of that fact.[1] A *wager* with the voter, by a person who is not one, that he will not vote for a particular candidate, is an offer or agreement to bribe; and in any case is competent evidence for the plaintiff, the intent being for the consideration of the jury.[2]

§ 287. **Defence.** The *defendant* in such action may, under the general issue, show that the money was a mere loan; but though a note be given, the question whether it was a loan or a gift will still be for the jury.[1] It is no defence that the party did not vote as he was requested; nor that he never intended so to do;[2] nor that the party corrupted had no right to vote, if he claimed such right, and the party offering the bribe thought he had such right.[3]

§ 288. **Debt for an Escape.** In *debt for an escape*, the plaintiff must prove, (1) the judgment by a copy of record; (2) the issuing and delivery of the writ of execution to the officer; (3) the arrest of the debtor; and (4) the escape. The process may be proved by its production, or, if it has been returned, by a copy. If the defendant has made the return, this is conclusive evidence against him, both of the delivery of the precept to him, and of the facts stated in the return. If the process is not returned, after proof of notice to the defendant to produce it, secondary evidence of it is admissible.[1]

[2] *Ante*, Vol. I. §§ 58, 65; Parish *v.* Burwood, 5 Esp. 33; Everett *v.* Tindal, ib. 169; Partridge *v.* Coates, 1 C. & P. 534; s. c. Ry. & M. 153.

[1] Combe *v.* Pitt, 3 Burr. 1586; Rigg *v.* Curgenven, 2 Wils. 395.

[2] Allen *v.* Hearn, 1 T. R. 56, 60; Anon., Lofft 552; U. S. *v.* Worrall, 2 Dall. 384. See Com. *v.* Chapman, 1 Virg. Cas. 138. Whether an agreement to vote for each other's candidates for different offices amounts to bribery, *quære;* and see Com. *v.* Callaghan, 2 Virg. Cas. 460.

[1] Sulston *v.* Norton, 1 W. Bl. 317, 318.

[2] Sulston *v.* Norton, 1 W. Bl. 317. 318; s. c. 3 Burr. 1235; Henslow *v.* Faucet, 3 Ad. & El. 51; Harding *v.* Stokes, 2 M. & W. 233.

[3] Lilly *v.* Corne, 1 Selw. N. P. 650, n.

[1] Cook *v.* Round, 1 M. & Rob. 512. {The escape may be proved by evidence that the jailer permitted the prisoner committed to jail on execution to go at large without giving a bond as required by law (Hotchkiss *v.* Whitten, 71 Me. 577), or by proof that after giving bail for the limits, the prisoner afterwards went beyond the limits (Stickle *v.* Reed, 23 Hun (N. Y.) 417).

There is no need of proving negligence of the sheriff in such a case. He is bound

The escape, if voluntary, may be proved by the party escaping; for though the whole amount of the debt may be recovered against the sheriff, yet this will be no defence for the debtor in an action by the creditor against him.[2]

§ 289. **Breaches of Covenant.** Where *breaches* of covenant are *assigned on the record*, the plaintiff should be prepared to prove the breaches assigned or suggested, and the amount of damages.[1] And if the condition of the bond declared on is for the performance of the covenants in some other deed, he must prove the execution of that deed also, as well as the breaches alleged.[2] If the condition of the bond is not set out in the pleadings, but is only suggested on the record after a judgment on demurrer, the plaintiff, in proving his damages, must produce the bond, and prove its identity with the bond declared on; but of this fact, slight evidence, it seems, will ordinarily suffice.[3]

§ 290. **Plea of Solvit ad Diem.** The plea of *solvit ad diem*, to an action of debt on a bond, payable on a certain day, will be supported by evidence of payment *before* the day; for if the money were paid before the day, the obligee held it in trust for the obligor until the day, and then it became his own.[1] But if the bond was payable on or before a certain day, the payment before the day may be so pleaded and proved.[2] This plea may be supported by the lapse of twenty years, without any payment of interest on the bond within that period. But as the payment of any interest after the day will falsify this plea,[3] the plaintiff, where interest or part of the principal has been so paid, should plead *solvit post diem;* in which case the lapse of twenty years since the last payment will, in the absence of opposing proof, warrant the jury in finding for the defendant.[4]

to keep the prisoner, unless the custody is terminated by the act of God, or some irresistible force: Shattuck *v.* State, 51 Miss. 575. [This rule is relaxed in some States: Comer *v.* Huston, 55 Ill. App. 153.]

The sheriff cannot give evidence of the insolvency of the prisoner as a defence or in mitigation of damages, but the creditor may recover the whole amount in the writ and interest. Nor will a defect in the process of commitment, unless such as to render it void, be a defence: Dunford *v.* Weaver, 21 Hun (N. Y.) 349; [Hoagland *v.* State, Ind. App., 40 N. E. 931; McManus *v.* Wells, 29 N. B. 449.] But a valid order of discharge, though not served, is a defence: Richmond *v.* Praim, 24 Hun (N. Y.) 578.}

[2] Bull. N. P. 67; Hunter *v.* King, 4 B. & Ald. 210, per Abbott, C. J.; *ante*, Vol. I. § 404.

[1] 2 Saund. 187 *a*, n. (2); 2 Phil. Evid. 169.

[2] 2 Phil. Evid. 169.

[3] Hodgkinson *v.* Marsden, 2 Campb. 121.

[1] Tryon *v.* Carter, 7 Mod. 231; s. c. 2 Stra. 994; Dyke *v.* Sweeting, Willes 585. {Under plea of payment and set-off, proof of a payment by defendant on a bond which plaintiff was liable on is a good payment on a bond to plaintiff: Huffmans *v.* Walker, 26 Gratt. (Va.) 314.} If one only of several joint and several obligors is sued, he may give evidence of any payment made by his co-obligors: Mitchell *v.* Gibbes, 2 Bay 475.

[2] 2 Saund. 48 *b*.

[3] Moreland *v.* Bennett, 1 Stra. 652; Denham *v.* Crowell, Coxe 467.

[4] 2 Saund. 48 *b;* Bull. N. P. 174; Moreland *v.* Bennett, 1 Stra. 652; 2 Steph. N. P. 1259. The plea of *solvit post diem* was bad at common law, but was permitted by Stat. 4 Anne, c. 16, § 12.

This presumption of payment, arising from the lapse of twenty years, is not conclusive; and, on the other hand, the jury may infer the fact of payment from the lapse of a shorter period, with corroborating circumstances.[5]

§ 291. **Rebuttal.** This *presumption*, arising from lapse of time, may be *repelled* by evidence of the defendant's recent admission of the debt or duty; such as the payment of interest, and the like.[1] But an indorsement of part payment, made on the bond by the obligee, is not alone evidence of that fact; the indorsement must be proved to have been made at a time when the presumption of payment could not have arisen, and when, therefore, the indorsement was contrary to the interest of the obligee.[2] This presumption may also be repelled by evidence of other circumstances, such as the plaintiff's absence abroad, and the like, explanatory of his neglect to demand his money.[3]

§ 291 *a*. **Debt on Judgment.** In *debt on a judgment*, it has been held, that satisfaction of the judgment may be proved by parol, even though the payment was of a less sum than the whole amount due, provided it was actually received and accepted in full satisfaction of the judgment.[1] And if the judgment were against the debtor by his family name only, and in the action of debt upon it he is sued by both his Christian name and surname, the plaintiff may prove the identity of the person by parol.[2]

§ 292. **Plea of Non est Factum.** The plea of *non est factum*, to an action of debt on bond, puts in issue only the execution of the

[5] Oswald *v.* Leigh, 1 T. R. 271; Colsell *v.* Budd, 1 Campb. 27. See also 4 Burr. 1963; [Jones *v.* Wilkey, 78 F. 532. And see *post*, § 528; *ante*, Vol. I. § 39.]

[1] 1 T. R. 271.

[2] See *ante*, Vol. I. §§ 39, 121, 122. See also Roseboom *v.* Billington, 17 Johns. 182; Rose *v.* Bryant, 2 Campb. 321. The creditor's indorsement alone is now rendered insufficient, by Stat. 9 Geo. IV. c. 14, and by the statutes of several of the United States. See Massachusetts Rev. Stat. c. 120, § 17; Maine Rev. Stat. c. 146, § 23.

[3] Newman *v.* Newman, 1 Stark. 101; Willaume *v.* Gorges, 1 Campb. 317. See Best on Presumptions, pp. 187–189. The whole subject of Presumptive Evidence has been treated with much ability and clearness by Mr. Best, in his "Treatise on Presumptions of Law and Fact." The lapse of twenty years is now made a bar, by Stat. 3 & 4 W. IV. c. 42. See also Massachusetts Rev. Stat. c. 120, § 7; Maine Rev. Stat. c. 146, § 11.

[1] Tarver *v.* Rankin, 3 Kelley 210. And see Sewall *v.* Sparrow, 16 Mass. 24; 9 Johns. 221; 7 Wend. 301. {Under a plea of *nil debet*, to an action upon a judgment recovered in another State, payment may be proved; and a receipt signed by the plaintiff, acknowledging payment, though it be not under seal, is admissible as *prima facie* evidence of payment: Clark *v.* Mann, 33 Me. 268. *Nil debet* cannot be pleaded to an action on the judgment of a court of another State: Indianapolis, etc. R. R. Co. *v.* Risley, 50 Ind. 60; [Sammis *v.* Wightman, 31 Fla. 10. And see *ante*, § 280, n. 1.] A recovery in an action of debt on a judgment should be in form of debt for the amount of the original judgment and for the amount of the interest accrued thereon as damages: Spooner *v.* Warner, 2 Ill. App. 240; Buchanan *v.* Port, 5 Ind. 264; Hensley *v.* Force, 12 Ark. 756.}

[2] Root *v.* Fellowes, 6 Cush. 29. {See also Barry *v.* Carothers, 6 Rich. 331; Ducommon *v.* Hysinger, 14 Ill. 249. And where a judgment was obtained in one State against one J. P. M., and an action on said judgment was brought in another State against one J. P. M., the identity of the defendant will be presumed: Thompson *v.* Manrow, 1 Cal. 428. When a judgment debt is assignable, any subsequent assignee may sue on it: Wood *v.* Decoster, 66 Me. 542.}

instrument declared on, and admits every other allegation. Therefore the defendant, under this issue, cannot give in evidence, as a defence, anything arising under the condition of the bond;[1] nor can he show that the bond was not taken conformably to the requisitions of a statute.[2] And if the action is against one obligor alone, as jointly *and severally* bound, the plaintiff cannot, under this plea, give in evidence a *joint* bond of the defendant and the other person mentioned, though it agrees in date and amount with the bond described in the declaration.[3] So, if the declaration is against one as principal and the other as surety, and the evidence is a bond given by the two, as sureties only, it is a *variance* equally fatal.[4]

[1] Rice *v.* Thompson, 2 Bailey 339. {The plea of *non est factum* to an action of debt on a note puts in issue only the execution of the note; fraud, covin, or illegality of consideration cannot be proved under it: Chambers *v.* Games, 2 Greene (Iowa) 320.}

[2] Commissioners *v.* Hanion, 1 Nott & McC. 554.

[3] Postmaster-General *v.* Ridgway, Gilpin 135.

[4] Bean *v.* Parker, 17 Mass. 605. {An instrument by which three persons bound themselves to pay a sum of money, and which purported to be under their hands and seals, was signed by one of the parties without a seal, and it was held, upon demurrer, that one action of debt might be brought against all the parties: Rankin *v.* Roler, 8 Gratt. (Va.) 63.}

DEED.

§ 293. **Proof under Plea of Non est Factum.** When a deed or specialty is the foundation of the action, whether it be an action of covenant or of debt, and the defendant would deny the genuineness or legal formality of execution of the instrument, this fact is put in issue by the plea of *non est factum*. Under this plea, the plaintiff need not prove the other averments in his declaration.[1]

§ 294. **Burden of Proof.** The *burden of proof* of the formal execution of a deed, whether it is put in issue by a special plea, or is properly controverted under any other issue, is upon the party claiming under it. This proof consists in producing the deed, removing any suspicions arising from alterations made in it, and showing that it was signed, sealed, and delivered by the obligor; and where any particular formalities are required by statute, as essential to its validity, such as a stamp, or the like, the party must show that these have been complied with.

§ 295. **Signing and Sealing.** The subject of the *production* of deeds, and of the nature and effect of *alterations* in them, has been treated in the preceding volume.[1] The cases in which the evidence of the subscribing witnesses is dispensed with have also been considered.[2] In the proof of *signing* and *sealing*, it is not necessary that the witnesses should have seen this actually done; it is sufficient if the party showed it to them as his hand and seal, and requested them to subscribe the instrument as witnesses.[3] So, where the witness was requested to be present at the execution of the writings, and saw the money paid, and proved the handwriting of the obligor, but did not see him sign, seal, or deliver the instrument, this was held sufficient proof to admit the instrument to go to the jury.[4] If the attesting witness has no recollection of the facts, but recognizes his own signature as genuine, and from this and other circumstances, which he states to the jury, has no doubt that he witnessed the

[1] Chitty on Pl. 424, 428; Kane *v.* Sanger, 14 Johns. 89; Gardiner *v.* Gardiner, 10 id. 47; People *v.* Rowland, 5 Barb. S. C. 449. As to the proof of a lost deed, see *ante*, Vol. I. § 558, n.

[1] *Ante*, Vol. I. §§ 144, 559–563, 564–568.

[2] *Ante*, Vol. I. §§ 569–575. As to the proof of the formal execution of deeds, see 4 Cruise's Dig. tit. 32, c. 2 (Greenleaf's n.) [2d ed. 1856].

[3] Munns *v.* Dupont, 3 Wash. 42; Ledgard *v.* Thompson, 11 M. & W. 41; *infra*, tit. Wills, § 676.

[4] Lesher *v.* Levan, 2 Dall. 96.

execution of the instrument, this also, uncontradicted, has been held sufficient.[5] And if the witness recollects seeing the signature only, but the attestation clause is in the usual form, the jury will be advised, in the absence of controlling circumstances, also to find the sealing and delivery.[6] Indeed, if there is any evidence, however slight, tending to prove the formal execution of the instrument, it is held sufficient to entitle it to go to the jury.[7] If the signature of the obligor's name is made by a stranger, in his presence and at his request, it is a sufficient signing.[8]

§ 296. **Sealing.** In regard to *sealing*, where there are several obligors or grantors, it is sufficient if there be several impressions, though there be but one piece of wax.[1] And in the sale of lands by a committee of a corporation, it is sufficient if the deed have but one seal, if it be signed by all the members of the committee.[2] If the deed bears on its face a declaration that it was signed and sealed,

[5] Pigott *v.* Holloway, 1 Binn. 436. See also Dewey *v.* Dewey, 1 Met. 349; Quimby *v.* Buzzell, 4 Shepl. 470; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; *ante*, Vol. I. § 572; Pearson *v.* Wightman, 1 Const. Rep. 344; Denn *v.* Mason, 1 Coxe 10; Currie *v.* Donald, 2 Wash. 58; Russell *v.* Coffin, 8 Pick. 143.

[6] Burling *v.* Paterson, 9 C. & P. 570; Curtis *v.* Hall, 1 South. 148; Long *v.* Ramsay, 1 S. & R. 72.

[7] Berks. Turnp. Co. *v.* Myers, 6 S. & R. 12; Sigfried *v.* Levan, ib. 308; Scott *v.* Galloway, 11 id. 347; Churchill *v.* Speight, 2 Hayw. 338. In New Hampshire (Rev. St. c. 130, § 3); Connecticut (Rev. St. 1838, p. 390; Coit *v.* Starkweather, 8 Conn. 293); Ohio (3 Ohio 89; Walk. Introd. 354); Vermont (Rev. St. 1839, c. 60, § 4); Georgia (Prince's Dig. p. 160, § 6); Florida (Thomps. Dig. p. 177); Michigan (Rev. St. 1846, c. 65, § 8); and Arkansas (Rev. St. 1837, c. 81, § 12), two witnesses are required to the validity of a deed of conveyance of lands. In Indiana (Rev. St. 1838, c. 44, § 7); New Jersey (Elmer's Dig. p. 83, § 12); Illinois (Rev. St. 1833, p. 131, § 9); and in Alabama (Aikin's Dig. p. 88), the deed must be either acknowledged before a magistrate, or be proved by one or more of the attesting witnesses, before it is admissible in evidence. But in the latter State, the statute is not considered as excluding the proof by evidence *aliunde:* Robertson *v.* Kennedy, 1 Stew. 245. See further as to witnesses, 4 Cruise's Dig. tit. 32, c. 2, § 77, n. (Greenl. ed.) [2d ed. 1856]. Whether a deed, invalid to pass the estate, for want of witnesses, can be read to support an action of covenant, on proof of its execution at common law, *quære;* and see French *v.* French, 3 N. H. 234; Pritchard *v.* Brown, 4 id. 397; Merwin *v.* Camp, 3 Conn. 35, 41.

[8] R. *v.* Longnor, 1 Nev. & Mann. 576; {Lovejoy *v.* Richardson, 68 Me. 386; McMurtry *v.* Brown, 6 Neb. 368; Mutual Benefit Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Pierce *v.* Hakes, 23 Pa. St. 231.} So the party's *mark* is a sufficient signature: Pearcy *v.* Dicker, 13 Jur. 997; Pierce *v.* Hakes, 23 Pa. St. (11 Harris) 231. {When a deed, purporting to be executed by a corporation, bears the corporate seal and the signature of the president duly proved, it is a good execution of the deed by the corporation: Murphy *v.* Welch, 128 Mass. 489; Chicago, etc. R. R. Co. *v.* Lewis, 53 Iowa 101; Savannah etc. R. R. Co. *v.* Lancaster, 62 Ala. 555; Moore *v.* Willamette Transportation, etc. Co., 7 Or. 359.}

[1] Perk. § 134. {And a seal by a wafer or other tenacious substance, upon which an impression is or may be made, is a valid seal to a deed: Tasker *v.* Bartlett, 5 Cush. (Mass.) 359. So a piece of paper, gummed to the deed and stamped: Gillespie *v.* Brooks, 2 Redf. (N. Y.) 349. But a mere printing on the paper of the deed has been held not a seal in New York: Richard *v.* Boller, 6 Daly (N. Y.) 460.} It has also been held, that many obligors may adopt one seal: Hollis *v.* Pond, 7 Humph. 222. See, as to seals, 4 Cruise's Dig. tit. 32, c. 2, § 54, n. (Greenl. ed.) [2d ed. 1856]. In Kentucky, obligatory writings without seal are placed on the footing of specialties by Stat. 1812, c. 375, § 8; Hughes *v.* Parks, 4 Bibb 60; Handley *v.* Rankin, 4 Monr. 556.

[2] Decker *v.* Freeman, 3 Greenl. 338. So, if a bond be executed by a private agent of several obligors, one seal is sufficient: Martin *v.* Dortch, 1 Stew. 479.

and there is a seal upon it, proof of the signature is evidence to be left to a jury that the party sealed and delivered it, even though the witness does not recollect whether or not it had a seal at the time of attestation.[3] And if the party, on being inquired of, acknowledge his signature without objection, this also is sufficient,[4] though it were signed without his authority.[5]

§ 297. **Delivery.** The *delivery* of a deed is complete when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent. It follows, therefore, that no form of words is necessary if the act is done; and that the delivery may be complete without the presence of the other party, or any knowledge of the fact by him at the time, if it be made to his previously constituted agent, or if, being made to a stranger, the transaction is subsequently ratified.[1] The receipt of the purchase-

[3] Talbot *v.* Hodson, 7 Taunt. 251; s. c. 2 Marsh. 527; Ball *v.* Taylor, 1 C. & P. 417. In some modern cases it is held, that proof of the signature alone is sufficient proof of the seal, though there be no mention of the seal in the body of the instrument: Merritt *v.* Cornell, 5 N. Y. Leg. Obs. p. 300; Taylor *v.* Glaser, 2 S. & R. 504; Sicard *v.* Davis, 6 Pet. 137; Lesher *v.* Levan, 2 Dall. 96. {In McCarley *v.* Tippah County, 58 Miss. 483, 749, it is said that an instrument will be considered sealed where the intent to affix a seal is clear, but that a recital in the deed that it is sealed is not enough. But in Le Frave *v.* Richmond, 5 Sawyer Cir. Ct. 601, such a declaration was considered enough.} [Whether an instrument is under seal or not is a question for the court upon inspection; but whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper: Jacksonville, etc. R. *v.* Hooper, 160 U. S. 514.]

[4] Byers *v.* McClanahan, 6 Gill & J. 250.

[5] Hill *v.* Scales, 7 Yerg. 410. In several of the American States, south of New York, a scroll, made with a pen, denoting the place of a seal, is held a sufficient sealing: 4 Kent Comm. 453; M'Dill *v.* M'Dill, 1 Dall. 63; Long *v.* Ramsay, 1 S. & R. 72; Taylor *v.* Glaser, 2 id. 504; [Cosner *v.* McCrum, 40 W. Va. 339.] But in some States it is necessary that the instrument should in such cases 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 id. 442; {Wilson *v.* McEwan, 7 Or. 87; Burton *v.* Le Roy, 5 Sawyer C. Ct. 510. But in this case it was held that the intent might be inferred from the circumstances of the case and the instrument itself;} or, at least, that the obligor acknowledged it as his seal: U. S. *v.* Coffin, Bee 140. In New Jersey, the scroll is restricted to money bonds: Hopewell *v.* Amwell, 1 Halst. 169. See also Newbold *v.* Lamb, 2 South. 449. But it seems that such an instrument, in States where the common-law rule prevails, would still be regarded only as a simple contract: Adam *v.* Kerr, 1 B. & P. 360; Warren *v.* Lynch, 5 Johns. 239. {When a scroll is considered a seal, the word "seal" written in place of a seal is equally good: Lewis *v.* Overby, 28 Gratt. (Va.) 127.} [A statute dispensing with seals does not make deeds of instruments previously executed without seals: Wisdom *v.* Reeves, 110 Ala. 418.]

[1] Porter *v.* Cole, 4 Greenl. 25, 26, per Mellen, C. J.; *ante*, Vol. I. § 568 *a*; 4 Cruise's Dig. tit. 32, c. 2, §§ 46, 64, notes (Greenleaf's ed.) [2d ed. 1856]; Mills *v.* Gore, 20 Pick. 28, 36; Hatch *v.* Hatch, 9 Mass. 307; Maynard *v.* Maynard, 10 id. 456; Harrison *v.* Phillips Academy, 12 id. 456; Chapel *v.* Bull, 17 id. 213, 220; Woodman *v.* Coolbroth, 7 Greenl. 181; Goodrich *v.* Walker, 1 Johns. Cas. 256; Barnes *v.* Hatch, 3 N. H. 304; Ward *v.* Lewis, 4 Pick. 588; Goodright *v.* Gregory, Lofft 339. Though the grantor die before the deed reaches the hands of the grantee, it is still a good delivery: Wheelwright *v.* Wheelwright, 2 Mass. 447. And it is not necessary that the delivery be made to an agent of the grantee or obligee: Doe *v.* Knight, 5 B. & C. 671. It may remain in the grantor's own custody, as bailee: ib.; Scrugham *v.* Wood, 15 Wend. 545; Hall *v.* Palmer, 8 Jur. 459; Hope *v.* Harman, 11 id. 1097. See further,

money, or bringing an action to recover it, is evidence of the delivery of the deed.[2] So, where the obligor, after signing and sealing a bond, held it out to the obligee, saying, "Here is your bond; what shall I do with it?" this has been held a sufficient delivery, though it never came to the actual possession of the obligee.[3] So, if the parties meet, read, sign, and acknowledge the deed before the proper officer, this has been held sufficient evidence of delivery, though the deed remained afterwards in the possession of the grantor.[4] Putting the deed in the post-office, addressed to the grantee, is also held sufficient.[5] If the effect of the instrument is beneficial to the party to whom it is made, as, for example, if it be an absolute conveyance of land in fee-simple, or an assignment to pay a debt, his assent to it will be presumed.[6] The possession of a deed by the grantee or obligee is, in the absence of opposing circumstances, *prima facie* evidence of delivery.[7] So, also, is the registration of a deed by the

Verplanck *v.* Sterry, 12 Johns. 536; Ruggles *v.* Lawson, 13 id. 285; Gardner *v.* Collins, 3 Mason 398; Harris *v.* Saunders, 2 Strobh. Eq. 370. {If the grantor deliver a deed to a third person, to be by him delivered to the grantee after the death of the grantor, it becomes a good delivery upon the happening of the contingency, and relates back so as to divest the title of the grantor, by relation from the first delivery (Foster *v.* Mansfield, 3 Met. (Mass.) 412; O'Kelly *v.* O'Kelly, 8 id. 436; Crooks *v.* Crooks, 34 Ohio St. 610); [Shea *v.* Murphy, 164 Ill. 614; Wiltenbrock *v.* Cass, 110 Cal. 1; Brown *v.* Westerfield, 47 Neb. 399; Gish *v.* Brown, 171 Pa. 479; Dinwiddie *v.* Smith, 141 Ind. 318; Bury *v.* Young, 98 Cal. 446; Arnegaard *v.* Arnegaard, 7 N. D. 475;] or if delivered to the officer taking the acknowledgment or the recorder, with directions to give it to the grantee, whenever he calls for it (Black *v.* Hoyt, 33 Ohio St. 203; Young *v.* Stearns, 3 Ill. App. 498). And the delivery may be made as well after the deed has been recorded as before it was put on record: Parker *v.* Hill, ib. 447. Proof of the execution of a deed implies proof of its delivery, unless the objection be raised at the time, during the trial: Van Rensselaer *v.* Secor, 32 Barb. (N. Y.) 469. Anything done, by word or act, showing that a delivery is intended, is enough: Burkholder *v.* Carad, 47 Ind. 418; Nichol *v.* Davidson County, 3 Tenn. Ch. 547.}

[2] Porter *v.* Cole, 4 Greenl. 20.

[3] Folly *v.* Vantuyl, 4 Halst. 153. See also Byers *v.* McClanahan, 6 G. & J. 250.

[4] Scrugham *v.* Wood, 15 Wend. 545.

[5] McKinney *v.* Rhoades, 5 Watts 343.

[6] Camp *v.* Camp, 5 Conn. 291; Jackson *v.* Bodle, 20 Johns. 184; Halsey *v.* Whitney, 4 Mason 206.

[7] Mallory *v.* Aspinwall, 2 Day 280; Clarke *v.* Ray, 1 H. & J. 323; Ward *v.* Lewis, 4 Pick. 518; Union Bank *v.* Ridgley, 1 H. & Gill 324; Hare *v.* Horton, 2 B. & Ad. 715; Maynard *v.* Maynard, 10 Mass. 456, 458; Den *v.* Fairlee, 1 N. J. 279; {Goodwin *v.* Ward, 6 Baxt. (Tenn.) 107; Roberts *v.* Swearingen, 8 Neb. 363; Chandler *v.* Temple, 4 Cush. (Mass.) 285; Balkley *v.* Buffington, 5 McLean C. C. 457; [Wright *v.* Wright, 77 F. 795; Nichols *v.* Sadler, 99 Ia. 429; Ward *v.* Ward, 43 W. Va. 1; Nixon *v.* Post, 13 Wash. 181; Pool *v.* Davis, 135 Ind. 323; Campbell *v.* Carruth, 32 Fla. 264.] But this may also be rebutted by evidence which shows that the delivery was false. Thus where the deed had been made and acknowledged by the grantor before the proper officer, without the knowledge of the grantees, but not recorded till after the grantor's death, thirteen years later, and the grantees during that time had lived on the land, which they all worked in common with the grantor, and the land had been assessed to him alone and he paid the taxes, and there was no visible change in the control or management of the land after the execution of the deed, it was held that the possession of the deed by the grantees raised no presumption of its delivery as a valid deed: Stewart *v.* Stewart, 50 Wis. 445. Cf. Knolls *v.* Barnhart, 71 N. Y. 474. But the whole question is one of the weight of evidence: Snow *v.* Orleans, 126 Mass. 453.

If the deed is by several grantors, and the delivery by one, any other may prove that the delivery was unauthorized or fraudulent as to him: Williamson *v.* Carskadden, 36 Ohio St. 664. But cf. Edwards *v.* Dismukes, 53 Tex. 605.}

grantor, if it be done for the use of the grantee.[8] And where the instrument was executed in the presence of a witness, who signed his name to the attestation clause, which was in the usual formula of "signed, sealed, and delivered," but the deed had never been out of the actual possession of the grantor, it has been held that, in the absence of opposing circumstances, the jury might properly find that it was delivered.[9] And a deed duly executed and acknowledged will be presumed to have been delivered on the day of its date, unless the contrary is proved; the burden of proof being on the party alleging a delivery on another day.[10]

§ 298. **Proof of Execution.** If the instrument is formally executed in a foreign country, and the execution is *authenticated by a notary public*, this is sufficient proof to entitle it to be read.[1] But if the authentication was before the *mayor of a foreign town*,

[8] Hedge *v.* Drew, 12 Pick. 141; Chess *v.* Chess, 1 Pa. 32. And see Powers *v.* Russell, 13 Pick. 69; Elsey *v.* Metcalf, 1 Denio 323; Commercial Bank *v.* Reckless, 1 Halst. Ch. 430; Ingraham *v.* Grigg, 13 S. & M. 22; Rathbun *v.* Rathbun, 6 Barb. S. C. 98. {When a deed is upon record, duly acknowledged and attested, that is *prima facie* proof of delivery: Kille *v.* Ege, 79 Pa. St. 15; Lawrence *v.* Farley, 24 Hun (N. Y.) 293; [Bjmerland *v.* Eley, 15 Wash. 101; Helms *v.* Austin, 116 N. C. 751; Laughlin *v.* Calumet Co., 24 U. S. App. 573; Ellis *v.* Clark, 39 Fla. 714; Gustin *v.* Michelson, 75 N. W. 153, Neb.; though not of acceptance by the grantee: Rittmaster *v.* Brisbane, 19 Col. 371.] But *contra*, Watson *v.* Ryan, 3 Tenn. Ch. 40. There is no delivery of the deed when it is executed, acknowledged, and recorded, and returned by the register to the grantor at his request: Ruckman *v.* Ruckman, 33 N. J. Eq. 354. And the presumption of delivery raised by the proof that the deed has been recorded may be rebutted, as by proof that it was intended to confer no benefit on the grantee, and its execution and recording were not known by him: Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; Hawkes *v.* Pike, 105 Mass. 560;} [Fairhaven, etc. Co. *v.* Owens, 69 Vt. 246; Bush *v.* Genther, 174 Pa. 154; Sullivan *v.* Eddy, 154 Ill. 199.]

[9] Hope *v.* Harman, 11 Jur. 1097. And see Hall *v.* Bainbridge, 12 Ad. & El. N. S. 699.

[10] McConnell *v.* Brown, Litt. Sel. Cas. 459, Elsey *v.* Metcalf, 1 Denio 323; {Harman *v.* Oberdorfer, 33 Gratt. (Va.) 497; [Nichols *v.* Sadler, 99 Ia. 429; Smith *v.* Scarborough, 61 Ark. 104; Gordon *v.* San Diego, 108 Cal. 264; Lake Erie, etc. R. *v.* Whitham, 155 Ill. 514; McFarlane *v.* Louden, 75 N. W. 394, Wis.] The date of a deed is only presumptive evidence of the time of its delivery, and that presumption does not arise when there is no proof or acknowledgment or subscribing witness; and it is utterly repelled when it appears in the proofs that the instrument continued in the hands of its grantor until after its date: Harris *v.* Norton, 16 Barb. (N. Y.) 264; [or where a similar deed is executed several years afterward: Flynn *v.* Flynn, 31 A. 30, N. J. Eq.] It has been held that there is no presumption that a forged instrument was delivered on the day on which it bears date: Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474. See also *ante*, Vol. I. § 38.

The certificate of acknowledgment by the magistrate before whom the deed is acknowledged is *prima facie* evidence of the facts that it states (see § 299, *post*), but may be shown to be untrue. Thus, if a magistrate for the county of A properly takes the acknowledgment of a deed of land situated in that county, and certifies the fact as done in the county of B, the latter being printed, and the magistrate having inadvertently failed to change the name of the county from B to A, parol evidence is admissible to show that the acknowledgment was taken in the county of A: Angier *v.* Schieffelin, 72 Pa. St. 106.} [Acceptance of a deed is not essential to its validity at common law: Xenos *v.* Wickham, L. R. 2 H. L. 296; Jones *v.* Swayze, 42 N. J. L. 279; Harriman on Contracts, 42; Roberts *v.* Security Co., 1897, 1 Q. B. 111. This rule is altered in many American jurisdictions: Welch *v.* Sackett, 12 Wis. 243; Derry Bank *v.* Webster, 44 N. H. 264. See Harriman on Contracts, 42; Revised Reports, vol. 29, preface, by Sir F. Pollock.]

[1] Lord Kinnaird *v.* Lady Saltoun, 1 Madd. 227. [See *ante*, Vol. I. §§ 569, 575.]

it is not received without some evidence of his holding that office.[2]

§ 299. **Acknowledgment; Registry.** Where the instrument is required by law to be *acknowledged* and *registered*, or to be examined and *approved* by a judge or other public officer, as is the case of some official bonds, such acknowledgment or other official act, duly authenticated, is in some courts considered as *prima facie* evidence of all the circumstances necessary to give validity to the instrument, and, of course, will entitle it to be read.[1] But the practice, in this particular, is not sufficiently uniform to justify the statement of it as a general rule.

§ 300. **Proof by Defendant under Non est Factum.** Under the issue of *non est factum*, the defendant may prove that the deed was delivered, and still remains as an *escrow*;[1] or he may take advantage of any material *variance* between the deed as set forth by the plaintiff and the deed produced at the trial;[2] or may give any evidence showing that the deed either (1) was originally void, or (2) was made void by matter subsequent to its execution and before the time of pleading; for it is to the time of pleading that the averment relates. Thus, the defendant may show under this issue that the deed is a forgery; that it was obtained by fraud; or was executed while he was insane, or so intoxicated as not to know what he was about; or that it was made by a *feme covert;* or to her, but her husband disagreed to it; or that it was delivered to a stranger for the use of the plaintiff, who refused it; or that it was never delivered

[2] Garvey *v.* Hibbert, 1 Jac. & W. 180. {A registry copy of a deed, executed in 1792, acknowledged before the "Mayor of the city of Hudson," and recorded in the proper registry of deeds in Massachusetts, in 1802, may be read in evidence in a suit in Massachusetts, in the absence of anything to show that the acknowledgment was not properly made before such officer: Palmer *v.* Stevens, 2 Gray (Mass.) 147.}

[1] See *ante*, Vol. I. § 573; Craufurd *v.* State, 6 H. & J. 234. {The certificate of acknowledgment is sufficient, if it substantially conforms to the statute: Calumet, etc. Co. *v.* Russell, 68 Ill. 426. An unacknowledged deed, though recorded, is not notice; but an acknowledged deed recorded, though not indexed, is: Bishop *v.* Schneider, 46 Mo. 472, Chatham *v.* Bradford, 50 Ga. 327. In Illinois, an unrecorded deed, if duly filed in the recorder's office for record, secures all the grantee's rights: Polk *v.* Cosgrove, Biss. (Ill.) 437. An office copy of a deed *inter partes* executed *in pais*, acknowledged and recorded in the courts of another State, is not such a record or judicial proceeding as can be authenticated under the act of Congress of 1794, though it might perhaps be included under the supplemental act of 1804: Warren *v.* Wade, 7 Jones (N. C.) Law 404. In Massachusetts, the recorded deed of the heir is good against the unrecorded deed of the person from whom he inherits: Earle *v.* Fiske, 103 Mass. 491.}

[1] Bull. N. P. 172; 1 Chitty Pl. 424; Stoytes *v.* Pearson, 4 Esp. 255; Union Bank of Maryland *v.* Ridgely, 1 A. & G. 324.

[2] 1 Chitty Pl. 268, 269, 316; *ante*, Vol. I. § 69; Howell *v.* Richards, 11 East 633; Swallow *v.* Beaumont, 1 Chitty 518; Horsefall *v.* Testar, 7 Taunt. 385; Morgan *v.* Edwards, 6 id. 394; s. c. 2 Marsh. 96; Bowditch *v.* Mawley, 1 Campb. 195; Birch *v.* Gibbs, 6 M. & S. 115. {A variance in the middle initial letter of the name of the grantor, as written in the body and in the signature of the deed, will not vitiate the deed: Erskine *v.* Davis, 25 Ill. 251. A deed ran to Louis S.; it appeared that no person of that name was known to exist, and the circumstances of the transaction clearly showed that the intended grantee was Arnold S., who had possession of the deed. *Held*, that this was a latent ambiguity explainable by parol, and the title passed to Arnold S.: Staak *v.* Sigelkow, 12 Wis. 234.}

at all.[3] Or he may show that, since its execution, it has become void by being materially *altered* or *cancelled* by tearing off the seal.[4] But matters which do not impeach the execution of the deed, but go to show it *voidable* by common law, or by statute, such as usury, infancy, duress, gaming, or that it was given for ease and favor, or the like, must be specially pleaded.[5] And here it may be observed, that, under a general plea of *non est factum*, the burden of proving the deed lies upon the plaintiff; but that, under any special plea of matter in avoidance of the deed, the burden of proving the plea lies upon the defendant.[6]

[3] Bull. N. P. 172; 1 Chitty Pl. 425; Whelpdale's Case, 5 Co. 119; Pitt *v.* Smith, 3 Campb. 33; Dorr *v.* Munsell, 13 Johns. 430; Van Valkenburg *v.* Rouk, 12 id. 337; Roberts *v.* Jackson, 1 Wend. 478; Jackson *v.* Perkins, 2 id. 308; Wigglesworth *v.* Steers, 1 Hen. & Munf. 69; Curtis *v.* Hall, 1 South. 361. As to the principles on which chancery acts in setting aside deeds on the ground of the intoxication of the grantor, see Nagle *v.* Baylor, 3 Dru. & War. 60.

[4] Leyfield's Case, 10 Co. 92. The intent with which the cancellation was made is a fact to be found by the jury: Grummer *v.* Adams, 13 L. J. N. S. 40.

[5] 1 Chitty Pl. 425; Harmer *v.* Wright, 2 Stark. 35; Colton *v.* Goodridge, 2 W. Bl. 1108; Bull. N. P. 172.

[6] Snell *v.* Snell, 4 B. & C. 741; Bushell *v.* Passmore, 6 Mod. 218, per Holt, C. J.; 5 Com. Dig. Pleader, 2 W. 18. If an indorsement on the back of a deed has no signature and seal, but is claimed as a defeasance, the party claiming it as such will be required to prove that it was upon the deed at the time of its execution: Emerson *v.* Murray, 4 N. H. 171.

DURESS.

§ 301. **Duress per Minas.** By *duress*, in its more extended sense, is meant that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness.[1] The common law has divided

[1] "Non suspicio vel cujuslibet vani vel meticulosi hominis, sed talis qui cadere possit in virum constantem; talis enim debet esse metus, qui in se contineat mortis periculum, et corporis cruciatum:" Bracton, lib. 2, c. 5, par. 14; [Kennedy *v.* Roberts, 75 N. W. 363, Ia.; Hartford Ins. Co. *v.* Kirkpatrick, 111 Ala. 456; Morse *v.* Woodworth, 155 Mass. 233. But see Parmentier *v.* Pater, 13 Or. 121.] {The decisions seem to turn more on this point than on the distinction between bodily harm and harm to property only, mentioned below. If the threats are of such a nature as to induce a man of reasonable courage to act against his will, his act is not voluntary, and any claim which is based on the voluntariness of such an act must fail. But if the violence offered is not of such a nature, the act may be voluntary. Thus, where the defendant in an action on a promissory note was threatened, as he was taking the train from Nashville, Tenn., to his home in Maine, that he would not be allowed to leave the town till he signed the note, but there was no menace of violence and no officer present, nor pretence of legal authority, this was held not to be a sufficient defence to the action: Seymour *v.* Prescott, 69 Me. 376.

Redfield, J., in his notes to a former edition, says: "It would seem that the rule of law in regard to duress *per minas* is stated too narrowly in the text. In Robinson *v.* Gould, 11 Cush. (Mass.) 57, the Supreme Judicial Court of Massachusetts say that 'duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty: 2 Rol. Ab. 124; 2 Inst. 482, 483; Bac. Ab. Duress, A; 20 Amer. Jur. 24.' So a threat of imprisonment has been held to amount to duress: Foshay *v.* Ferguson, 5 Hill (N. Y.) 154; Taylor *v.* Jacques, 106 Mass. 291. [The threat must be of unlawful imprisonment: McCormick, etc. Co. *v.* Miller, 74 N. W. 1061, Wis.; but see Heaton *v.* Norton, etc. Bank, 52 P. 876, Kan.; Giddings *v.* Iowa S. B., 74 N. W. 21, Ia. *Contra*, Hartford Ins. Co. *v.* Kirkpatrick, 111 Ala. 456.] It is not necessary that the violence should be offered to the party who is to sign the deed or make the contract. It is enough if it is offered to a person in whom he is so interested that he acts under the fear of such violence. Thus, a threat made to the wife to prosecute her husband for embezzlement, in Eadie *v.* Slimmon, 26 N. Y. 9; Singer Manufacturing Co. *v.* Rawson, 50 Iowa 634; [Heaton *v.* Norton, etc. Bank, 52 P. 876, Kan.; Giddings *v.* Iowa S. B., 74 N. W. 21, Ia.;] or extorting a note from a father by arresting his son (Shenk *v.* Phelps, 6 Ill. App. 612); or a mortgage from an aunt by threatening her nephew with arrest (Sharon *v.* Gager, 46 Conn. 189), have been held to be duress. But a threat by a husband to his wife that he will commit suicide is not such duress: Wright *v.* Remington, 41 N. J. L. 48; Lefebvre *v.* Detruit, 51 Wis. 326. But a threat by the husband that he will abandon her if she does not sign a deed is enough to avoid it: Kocourek *v.* Marak, 54 Tex. 201; Line *v.* Blizzard, 70 Ind. 23. The fraudulent seizing and withholding of property by legal process may amount to duress: Spaid *v.* Barrett, 57 Ill. 289. And the courts show a tendency to give the rule as to duress *per minas* a broader application than formerly. Trespass to real estate, withholding personal property, and the like, have been held to be duress if they so far overcome the party threatened, that the obligation sued upon would not have been entered into had the acts not been done: U. S. *v.* Huckabee, 16 Wall. (U. S.) 431; Miller *v.* Miller, 68 Pa. St. 486; Walbridge *v.* Arnold, 21 Conn. 231; [Lonergan *v.* Buford, 148 U. S. 581.] See also *ante*, § 121, n. But a threat to sue (Harris *v.* Tyson, 24 Pa. St. 347);

it into two classes; namely, duress *per minas*, and duress of imprisonment. Duress *per minas* is restricted to fear of loss of life, or of mayhem, or loss of limb; or, in other words, of remediless harm to the person. If, therefore, duress *per minas* is pleaded in bar of an action upon a deed, the plea must state a threat of death, or mayhem, or loss of limb; and a threat to this specific extent must be proved. A fear of mere battery, or of destruction of property, is not, technically, duress, and therefore is not pleadable in bar;[2] but facts of this kind, it is conceived, are admissible in evidence to make out a defence of *fraud* and *extortion* in obtaining the instrument.[3]

§ 302. **Duress of Imprisonment.** The plea of *duress of imprisonment* is supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. If the imprisonment was lawful, that is, if it were by virtue of legal process, the plea is not supported,[1] unless it appear that the arrest was upon process sued out maliciously and without probable cause; or that, while the party was under lawful arrest, unlawful force, constraint, or severity was inflicted upon him, by reason of which the instrument was executed.[2] But in all cases the duress must

[Savannah S. B. *v.* Logan, 99 Ga. 291; York *v.* Hinkle, 80 Wis. 624; Dunham *v.* Griswold, 100 N. Y. 224; Whittaker *v.* Southwest, etc. Co., 34 W. Va. 217; Jones *v.* Houghton, 61 N. H. 51; Burke *v.* Gould, 105 Cal. 277;] or to prosecute merely (Harmon *v.* Harmon, 61 Me. 227; Plant *v.* Gunn, 2 Woods C. C. 372), is not duress. Nor is a pressing want of money: Miller *v.* Coates, 4 N. Y. Sup. Ct. 429. Nor is the payment of taxes illegally assessed: Swanston *v.* Ijams, 63 Ill. 165. After all, perhaps the real question is, whether, under the circumstances, the threats are the means by which the party making them gains an unjust advantage."]

[2] 1 Bl. Comm. 131. In Louisiana, any threats will invalidate a contract, if they are "such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, *reputation*, or *fortune:*" Civil Code La. art. 1845. And the age, sex, health, disposition, and other circumstances of the party threatened, are taken into consideration: ib. The contract is equally invalidated by a false report of threats, if it were made under a belief of their truth; and by threats of injury to the wife, husband, descendant, or ascendant of the party contracting: id. arts. 1846, 1847. These rules apply to cases where there may be some other motive for making the contract besides the threats. But if there is no other motive or cause, then any threats, even of slight injury, will invalidate it: id. art. 1853.

[3] See Evans *v.* Huey, 1 Bay 13; Collins *v.* Westbury, 2 id. 211; James *v.* Roberts, 18 Ohio 548; Sasportas *v.* Jennings, 1 Bay 470, 475. In this last case, the rule is broadly laid down, that where assumpsit would lie to recover back the money, had it been paid under restraint of goods, a promise to pay it, made under the like circumstances, may be avoided by a plea of duress.

[1] 1 Bl. Comm. 136, 137; Hob. 266, 267; 2 Inst. 482; Anon., 1 Lev. 68, 69; Wilcox *v.* Howland, 23 Pick. 167; Waterman *v.* Barratt, 4 Harringt. 311; Neally *v.* Greenough, 5 Foster (N. H.) 325.

[2] Anon., Aleyn 92; Watkins *v.* Baird, 6 Mass. 506; [Soule *v.* Bonney, 37 Me. 128; Breck *v.* Blanchard, 22 N. H. 303; Taylor *v.* Cottress, 16 Ill. 93. Not only is a direct promise void, if made under duress and an illegal arrest, but so also are admissions thus made of a former promise; and the jury cannot inquire whether such admissions were made because they were true, or because the party making them was under duress: Tilley *v.* Damon, 11 Cush. (Mass.) 247. So is a lawful arrest, for an unlawful purpose: Severance *v.* Kimball, 8 N. H. 386; Heaps *v.* Dunham, 95 Ill. 583. So is an arrest for a just cause, but by irregular proceedings: Fisher *v.* Shattuck, 17 Pick. (Mass.) 252.]

affect the party himself; for if there be two obligors, one of whom executed the bond by duress, the other cannot take advantage of this to avoid the bond as to himself.[3]

[3] Huscombe *v.* Standing, Cro. Jac. 187; Thompson *v.* Lockwood, 15 Johns. 256; {Mantel *v.* Gibbs, 1 Brownlow 64; Wayne *v.* Sands, ib. 351; Shep. Touch. 62; McClintick *v.* Cummins, 3 McLean C. C. 158; 20 Amer. Jur. 26; Robinson *v.* Gould, 11 Cush. (Mass.) 57. Sureties upon a recognizance cannot plead the duress of their principal in discharge of their liability: Plumer *v.* People, 16 Ill. 358. But see State *v.* Bruntley, 27 Ala. 44.} [The distinction between duress, which is a legal defence, and undue influence, which is material only in equity, is often lost sight of in courts where there is only one form of action; or, at least, the term "duress" is very loosely used. See Harriman on Contracts, 255–258.]

EJECTMENT.

§ 303. **Ejectment defined.** This, which was originally a personal action of trespass, is now a mixed action, for the recovery of land and damages, and is become the principal, and in some States the only, action by which the title to real estate is tried, and the land recovered.[1] In several of the United States, the remedy for the recovery of land is by an action frequently called an ejectment, but in form more nearly resembling the writ of entry on disseisin, in the nature of an assize.[2] But in all the forms of remedy, as they are now used in practice, the essential principles are the same, at least so far as the law of evidence is concerned. The real plaintiff, in every form, recovers only on the strength of *his own title;*[3] and he must show that he has the *legal interest*, and a *possessory title*, not barred by the statute of limitations.[4]

§ 304. **Proof under General Issue.** When the title of the real plaintiff in ejectment is controverted under the *general issue*, he

[1] {Ejectment does not lie to enforce an incorporeal hereditament: Harlow *v.* Lake Superior Mining Co., 36 Mich. 105; Taylor *v.* Gladwin, 40 Mich. 232.}

[2] Jackson on Real Actions, 2, 4.

[3] Roe *v.* Harvey, 4 Burr, 2484, 2487; Jackson on Real Actions, p. 5; Adams on Eject. pp. 32, 285, by Tillinghast; 1 Chitty on Pl. 173; Williams *v.* Ingalls, 21 Pick. 288; Martin *v.* Strachan, 5 T. R. 108, n.; Goodtitle *v.* Baldwin, 11 East 488, 495; Lane *v.* Reynard, 2 S. & R. 65; Covert *v.* Irwin, 3 S. & R. 288; {Lathrop *v.* American Emigrant Co., 41 Iowa 547; [King *v.* Mullins, 171 U. S. 404; Omaha R. E. Co. *v.* Kragscow, 47 Neb. 592; Blackman *v.* Riley, 138 N. Y. 318; White *v.* Keller, 114 Mo. 479; McKinney *v.* Daniel, 90 Va. 702; Jennings *v.* Burnham, 56 N. J. L. 289; Everson *v.* Webster, 5 S. D. 266; Parker *v.* Cassingham, 130 Mo. 348.] Though in ejectment, the plaintiff cannot recover, except by proving title in himself, yet when the parties claim under conflicting titles, and the only question is which of the two is good, it is proper to instruct the jury that the one having the best title must recover: Busenius *v.* Coffee, 14 Cal. 91. See also *post*, §§ 331, 613, n. And where two parties have equal rights to acquire public land, one under State law, and the other under United States law, the party first commencing proceedings has the better right: Young *v.* Shinn, 48 Cal. 26. A patent of land from the State is *prima facie* evidence of title in the grantee, who is not to be called upon to produce proof of the regularity also of the preliminary proceedings: Brady *v.* Begun, 36 Barb. (N. Y.) 533. So is a certificate of purchase of public lands issued to the plaintiff by the United States: Sacramento, etc. Bank *v.* Hynes, 50 Cal. 195. So the certificate of location of a State school lands in the hands of the person to whom it is issued or his vendees, is *prima facie* evidence: Stanway *v.* Rubio, 51 Cal. 41.}

[4] Chitty on Pl. 172; id. 209 (7th ed.); [Prentice *v.* Northern P. R., 154 U. S. 163; Sioux City, etc. R. *v.* Countryman, 159 id. 377; Wilson *v.* Johnson, 145 Ind. 40; Gibbs *v.* McGuire, 70 Miss. 646; Kinney *v.* Dexter, 81 Wis. 80. In some States an equitable title is made sufficient by statute. Boyd *v.* Mammoth Spring Co., 137 Mo. 482; Merrill *v.* Dearing, 47 Minn. 137. Where plaintiff's title is admitted, he need not prove possession within the statutory period; it is for the defendant to show adverse possession for that period: Kingston Race Stand *v.* Kingston, 1897, A. C. 509.]

must prove (1) that he had the *legal estate* in the premises, at the time of the demise laid in the declaration; (2) that he also had the *right of entry;* and (3) that the defendant, or those claiming under him, were in *possession* of the premises at the time when the declaration in ejectment was served.[1]

§ 305. **When there is Privity in Estate.** If a *privity* in estate has subsisted between the parties, proof of title is ordinarily unnecessary; for a party is not permitted to dispute the original title of him by whom he has been let into the possession.[1] This rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease.[2] And when the relation of landlord and tenant is once established by express act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much affected by the acts and admissions of his predecessor, in regard to the title, as if they were his own.[3] Even an agreement to purchase the lands, if made deliberately, estops the purchaser from denying

[1] Adams on Eject. p. 247, by Tillinghast. [Where the plaintiff and the defendant do not claim from a common source, the plaintiff must trace his title back to the United States or the State (Omaha R. E. Co. *v.* Kragscow, 47 Neb. 592); or else must raise a presumption of title by showing possession prior to his ouster by the defendant in himself or in some one under whom he claims: House *v.* Reavis, 89 Tex. 626; Goodwin *v.* Markwell, 37 Fla. 464; Florida S. R. *v.* Burt, 36 id. 497; Coombs *v.* Hertig, 162 Ill. 171; Elofrson *v.* Lindsay, 90 Wis. 203; Shannahan *v.* Tomlinson, Cal., 36 P. 1009; Stewart *v.* Scott, 57 Ark. 153; Campbell *v.* Silver Bow Min. Co., 7 U. S. App. 71; Weaver *v.* Rush, 62 Ark. 51; Oregon R. *v.* Hertzberg, 26 Or. 216; Bains *v.* Bullock, 129 Mo. 117. Some of these cases intimate that the possession must be with color of title and claim of ownership; but the true rule is that possession in itself, naked and unexplained, raises a presumption of ownership; which, of course, is strengthened when the possession is with color of title. See *ante*, Vol. I. § 34. On the other hand, color of title without actual possession will not support ejectment: Gist *v.* Beaumont, 104 Ala. 347; Greenleaf *v.* Brooklyn, etc. R., 141 N. Y. 395. As to what is sufficient evidence of possession, see Greenleaf *v.* Brooklyn, etc. R., *supra*.

The defendant's possession must, of course, be shown when denied: St. Louis, etc. R. *v.* Hamilton, 158 Ill. 366. As to what constitutes possession by the defendant, see Zander *v.* Blatz Brewing Co., 95 Wis. 162; Lowndes *v.* Huntington, 153 U. S. 1; New York *v.* Law, 125 N. Y. 380.]

[1] *Ante*, Vol. I. §§ 24, 25; Adams on Eject. p. 247, by Tillinghast; Wood *v.* Day, 7 Taunt. 646; 1 Moore 389; Jackson *v.* Reynolds, 1 Caines 444; Jackson *v.* Whitford, 2 id. 215; Jackson *v.* Vosburg, 7 Johns. 186; Williams *v.* Annapolis, 6 H. & J. 533; Jackson *v.* Stewart, 6 Johns. 34; Jackson *v.* De Walts, 7 id. 157; Jackson *v.* Hinman, 10 id. 292; Doe *v.* Edwards, 6 C. & P. 208. [See Haws *v.* Victoria Copper Co., 160 U. S. 303.] The lessee of a close in severalty, demised to him by one of several tenants in common, cannot set up an adverse title in bar of an action by his lessor: Doe *v.* Mitchell, 1 B. & B. 11; Jackson *v.* Creal, 13 Johns. 116.

[2] Jackson *v.* Styles, 1 Cowen 575; Doe *v.* Baytup, 3 Ad. & El. 188; 4 N. & M. 837. So, though the landlord's title was acquired by wrong (Parry *v.* House, Holt's Cases, 489); or was only an equitable title (Doe *v.* Edwards, 6 C. & P. 208).

[3] Taylor *v.* Needham, 2 Taunt. 278; Doe *v.* Mills, 2 Ad. & El. 17; Doe *v.* Lewis, 5 id. 577; Jackson *v.* Davis, 5 Cowen 123; Jackson *v.* Harsen, 7 id. 323; Jackson *v.* Scissam, 3 Johns. 499; Graham *v.* Moore, 4 S. & R. 467; Jackson *v.* Walker, 7 Cowen 637; Cooper *v.* Blandy, 4 M. & Scott 562; Doe *v.* Mizen, 2 M. & Rob. 56, Barwick *v.* Thompson, 7 T. R. 488. The purchaser at a sheriff's sale is privy to the debtor's title, and is therefore equally estopped with him: Jackson *v.* Graham, 3 Caines 188; Jackson *v.* Bush, 10 Johns. 223.

the title of the vendor.[4] But evidence of an agreement for a lease, if none was ever executed, is not alone sufficient to establish this relation, against a tenant already holding adversely.[5] Nor is the tenant precluded from showing that an agreement to purchase from the plaintiff was made by him under a mistake, or that the title was in himself, or out of the lessor;[6] or that a lease, which he has taken while in possession, was unfairly imposed upon him, by misrepresentation and *fraud*.[7] The same principle applies to any other act of acknowledgment, amounting to an admission of tenancy or title.[8] But the tenant may always show that his *landlord's title has expired*;[9] or that he has sold his interest in the premises;[10] or that it is alienated from him by judgment and operation of law.[11]

§ 306. **Proof of Privity.** One of the ordinary methods of establishing a privity in estate is by proof of the *payment of rent* which is always *prima facie* evidence of the title of the landlord, and is conclusive against the party paying, and all others claiming under and in privity with him.[1] And the payment of rent, after an occupancy of many years, is sufficient evidence, if unexplained, to show that the occupancy began by permission of the party to whom it was paid.[2]

§ 307. **Same Subject.** Where both parties *claim under the same third person*, it is *prima facie* sufficient to prove the derivation of title from him, without proving his title.[1] So, if either has held under such third person, as his tenant, and is thereby estopped to

[4] Whiteside *v.* Jackson, 1 Wend. 418; Jackson *v.* Walker, 7 Cowen 637; Jackson *v.* Norris, ib. 717; Hamilton *v.* Taylor, Litt. Sel. Cas. 444; Doe *v.* Burton, 6 Eng. Law & Eq. 325.

[5] Jackson *v.* Cooley, 2 Johns. Cas. 223.

[6] Jackson *v.* Cuerden, 2 Johns. Cas. 353.

[7] Brown *v.* Dysinger, 1 Rawle 408; Miller *v.* M'Brier, 14 S. & R. 382; Hamilton *v.* Marsden, 6 Binn. 45; Jackson *v.* Ayres, 14 Johns. 224; Jackson *v.* Norris, 7 Cowen 717.

[8] Gregory *v.* Doidge, 3 Bing. 474; s. c. 11 Moore 394.

[9] Neave *v.* Moss, 1 Bing. 360; s. c. 8 Moore 389; England *v.* Slade, 4 T. R. 682; Doe *v.* Whitroe, 1 Dowl. & R. 1; Brook *v.* Briggs, 2 Bing. N. C. 572.

[10] Doe *v.* Watson, 2 Stark. 230.

[11] Jackson *v.* Davis, 5 Cowen 123, 135; Camp *v.* Camp, 5 Conn. 291.

[1] Doe *v.* Pegge, 1 T. R. 758, 759, n.; Doe *v.* Clarke, Peake Add. Cas. 239; Hall *v.* Butler, 10 Ad. & El. 204; s. c. 2 P. & D. 374; Jew *v.* Wood, 1 Craig & Phil. 185; 5 Jur. 954. {Evidence of payment by defendant to plaintiff's vendor after the sale will not be received to prove the occupation: Johnson *v.* Futch, 57 Miss. 73.}

[2] Doe *v.* Wilkinson, 3 B. & C. 413.

[1] {Cronin *v.* Gore, 38 Mich. 381; Miller *v.* Hardin, 64 Mo. 545; Spect *v.* Gregg, 51 Cal. 198; [Burns *v.* Edwards, 163 Ill. 494; Jay *v.* Michael, 82 Md. 1; Carrell *v.* Mitchell, 37 W. Va. 130; Drake *v.* Happ, 92 Mich. 580; Cox *v.* Hart, 145 U. S. 376; Cave *v.* Anderson, 50 S. C. 293.] And that they derive from a common source may be proved by the affidavit of plaintiff's attorney, based on conversations with the parties and examinations of the deeds on record: Hartshorn *v.* Dewson, 79 Ill. 108.} [As to the burden of proof where the plaintiff establishes the common source of title by the defendant's abstract, see Page *v.* Simpson, 172 Pa. 288.

The holder of a tax deed does not claim title under the prior owner, where the deed purports to convey the interest of all claimants to the land: Hendricks *v.* Huffmeyer, 90 Tex. 577.]

deny his title.[2] But the defendant, if not otherwise estopped, may still set up a title paramount to the common source, and derive to himself; or a title under an incumbrance created by the common grantor, prior to the title of the plaintiff.[3]

§ 308. **Identity of Estate.** The *identity* of the lands, and the *possession* of them by the defendant, may be proved by the payment of rent, or by the defendant's admission of his tenancy, or by any other competent evidence of the fact; it being merely a matter of fact, provable, like other facts, by parol evidence.[1]

§ 309. **What Lineal Heir must prove.** The party claiming as *lineal heir* must prove that the ancestor from whom he derives title was the person last seized of the premises as his inheritance, and that he is the heir of such ancestor.[1] This seisin may, in the first instance, be proved by showing that the ancestor was either in actual possession of the premises at the time of his death, and within the period of the statute of limitations, or in the receipt of rent from the terre-tenant; possession being *prima facie* evidence of a seisin in fee.[2] If he claims as *collateral heir*, he must show the descent of himself, and the person last seized, from some common ancestor, together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births, and deaths necessary to complete his title, and the identity of the persons.[3]

§ 310. **Devisee.** Where the plaintiff claims as *devisee* of a freehold, he must prove the seisin and death of the devisor, and the due execution of the will; unless it is thirty years old, in which case it

[2] Adams on Eject. p. 248, by Tillinghast. But, in the former case, a mere possessory title, which would be good against a stranger, and may have been gained by a tortious entry, is not always sufficient: Sparhawk *v.* Bullard, 1 Met. 95; Oakes *v.* Marcy, 10 Pick. 195; {Mickey *v.* Stratton, 5 Sawyer C. Ct. 475.}

[3] Wolfe *v.* Dowell, 13 S. & M. 103. {Thus, in Henry *v.* Reichert, 22 Hun (N. Y.) 394, the defendant was allowed to show that the common grantor had no title and conveyed nothing by either deed. Either party may set up a paramount claim, if not otherwise estopped: Wade *v.* Thompson, 52 Miss. 367. A defendant in ejectment, for the purpose of proving title, may show even by presumptive evidence an outstanding title in another, even though defendant be in no way connected with such outstanding title. In such actions, circumstances in themselves slight and trivial, if accompanied by long-continued possession, should be allowed to go to the jury as evidence for the defendant to prove the presumed existence and loss of deeds and other instruments: Townsend *v.* Downer, 32 Vt. 183.}

[1] Adams on Eject. p. 248, by Tillinghast; Jackson *v.* Vosburg, 7 Johns. 186. By the modern rules of practice in England, the possession by the defendant is admitted in the consent-rule: 4 B. & Ald. 196; 2 B. & B. 470.

[1] Adams on Eject. p. 253, by Tillinghast; Jackson on Real Actions, p. 157; Co. Lit. 11 *b*; Jenkins *v.* Prichard, 2 Wils. 45. {Where there may be many heirs, one who claims as sole heir must show that he is such: Dupon *v.* McLaren, 63 Ga. 470;} [Kelso *v.* Steiger, 75 Md. 376; Malone *v.* Kelly, 28 S. E. 689, Ga. In Illinois the intestacy of the ancestor must also be proved: St. Louis, etc. R. *v.* Warfel, 163 Ill. 641.]

[2] Adams on Eject. p. 254, by Tillinghast; Bull. N. P. 102, 103.

[3] Ibid.; 2 Bl. Comm. 208, 209; Roe *v.* Lord, 3 W. Bl. 1099. For the proof of pedigree, see Vol. I. §§ 103–105, 134; and *infra*, tit. Heir. See, further, Richards *v.* Richards, 15 East 294, n.

may be read without further proof; and the age of the will is to be reckoned from the day of its date, and not from the death of the testator.[1]

§ 311. **Seisin.** The *seisin* of the ancestor or devisor[1] may be proved by his receipt of rent, or by his actual possession of the premises; either of which is *prima facie* evidence of title in fee;[2] or by proof of an *entry* into one of several parcels of the land, if they were all in the same county, and there was no adverse possession at the time, for this gives a seisin of them all.[3] If there was an adverse possession, and the owner's right of entry was not barred, his entry, in order to revest the seisin in himself, should have been an open and notorious entry, into that particular parcel; and in every case an entry, to revest an estate, must be made with that intention, sufficiently indicated either by the act or by words accompanying it.[4]

§ 312. **Entry.** The *entry*, to gain a seisin, needs not be made by the very *person entitled;* but may be made by another in his behalf, even if it be by a *stranger*, without any precedent command, or express subsequent agreement. By the common law, the entry of one joint tenant, tenant in common, or coparcener, is deemed the entry of all; and the entry of a guardian tenant for years, tenant by *elegit*, or younger brother or sister, enures to the benefit of the ward, lessor, or other person entitled.[1] So, the possession of the mother becomes the seisin of her posthumous son.[2] And it seems that the heir may acquire an actual seisin, without any entry by himself, by making a lease for years or at will, if his possession in law is unrebutted by the actual seisin of any other person.[3]

§ 313. **Same Subject.** There can be no mesne seisin of a *remainder* or *reversion* expectant on an estate of *freehold*, while such remainder or reversion continues in a regular course of descent; for if it be granted over, it vests immediately in the grantee, making him the new stock of descent for any subsequent claimant; the exercise of such ownership being equivalent to the actual seisin of

[1] Adams on Eject. p. 259; *ante*, Vol. I. § 570, n.; Doe *v.* Wolley, 3 B. & C. 22; McKenire *v.* Fraser, 9 Ves. 5; Jackson *v.* Laroway, 3 Johns. Cas. 283, 286; Jackson *v.* Christman, 4 Wend. 277, 282. For the proof of wills, see *infra*, tit. Will. {Where one of the links in the chain of title is a will, its admission to probate must be alleged: Castro *v.* Richardson, 18 Cal. 478.} [And proved: Snuffer *v.* Howerton, 124 Mo. 637.]

[1] See *infra*, § 555.

[2] Bull. N. P. 103; Jayne *v.* Price, 5 Taunt. 326; s. c. 1 Marsh. 68; 2 Phil. Evid. 282.

[3] Co. Lit. 15 *a*, *b*, 252 *b;* 1 Cruise Dig. tit. 1, §§ 24, 25 (Greenleaf's ed.) [2d ed. 1856].

[4] Co. Lit. 245 *b;* Robison *v.* Swett, 3 Greenl. 316; *supra*, § 23.

[1] Co. Lit. 15 *a*, 245 *b*, 258 *a;* 2 Cruise Dig. tit. 18, c. 1, § 63; id. c. 2, § 14 (Greenleaf's ed.) [2d ed. 1856].

[2] 3 Cruise Dig. tit. 29, c. 3, §§ 55–57 (Greenleaf's ed.) [2d ed. 1856]; Goodtitle *v.* Newman, 3 Wils. 516.

[3] Watkins on Descents, pp. 67, 68, (49), (50).

an estate, which is capable of being reduced to possession by entry. He, therefore, who claims an estate in remainder or reversion by a descent must make himself heir, either to him in whom such estate first vested by purchase, or to the person to whom it was last granted by the owner.[1]

§ 314. **Legatee.** Where the plaintiff claims as *legatee of a term of years*, he must show the probate of the will, and prove the assent of the executor to the legacy, without which he cannot take. But allowing the legatee to receive the rents, or applying them to his use, or any other slight evidence of assent on the part of the executor, such as, on the part of a tenant, would amount to an attornment, will be sufficient; and such assent, once given, is irrevocable.[1] He must also show that the testator had a chattel and not a freehold interest in the premises; because we have already seen that his possession, unexplained, will be presumed a seisin in fee. Of this fact, the lease itself will be the most satisfactory evidence; but it may be proved by any solemn admission of the other party, as, for example, by his answer as defendant to a bill in equity, in which he stated that "he believed that the lessor was possessed of the leasehold premises in the bill mentioned."[2]

§ 315. **Executor.** If the plaintiff claims a chattel real as *executor*, or *administrator*, he must prove the grant of the letters of administration, or the probate of the will, in addition to the evidence of the testator's or intestate's title.[1] And where no formal record of the grant of letters of administration or letters testamentary is drawn up, they may be proved by the book of Acts, or other brief official memorial of the fact.[2] If the plaintiff claims as *guardian*, he must in like manner prove, not only the title of the ward, and his minority at the time of the demise laid in the declaration, but also the due execution of the deed or will, appointing him guardian, if such was the source of his authority; or the due issue of letters of guardianship, if he was appointed by the tribunal having jurisdiction of that subject.[3]

§ 316. **Purchaser.** Where the plaintiff claims as *purchaser under a sheriff's sale*, made by virtue of an execution *against the defendant in ejectment*, it is sufficient to show the execution, and the proceedings under it,[1] without producing a copy of the record of the judg-

[1] Watkins on Descents, pp. 137, 138, 151, (110), (118).

[1] 1 Roper on Legacies, 250, 251.

[2] Doe *v.* Steel, 3 Camph. 115.

[1] {But a party who claims by a deed from executors need not put the will in evidence to make out a *prima facie* case: Coggins *v.* Griswold, 64 Ga. 323.}

[2] Bull. N. P. 246; Elden *v.* Keddel, 8 East 187; *ante*, Vol. I. § 519; Adams on Eject. p. 271, by Tillinghast. A court of common law takes no notice of a will, as a title to personal property, until it has been proved in the court having jurisdiction of the probate of wills: Stone *v.* Forsyth, 2 Doug. 707. An executor may lay a demise before probate of the will: Roe *v.* Summersett, 2 W. Bl. 694.

[3] Adams on Eject. by Tillinghast, p. 275.

[1] The sheriff's return is itself conclusive evidence between the parties and those in

ment itself; for the debtor might have applied to have the execution set aside, if it had been issued without a valid judgment to support it; but not having done so, it will be presumed, in an action against him, that the judgment is right. But where the action of ejectment is against a *stranger*, no such presumption is made, and the plaintiff will be required to prove the judgment, as well as the execution.[2] In some of the United States, the freehold estate of a judgment debtor may be taken on execution in the nature of an extent, and set off to the creditor, at an appraised value; in which case an actual seisin is vested in the creditor, by virtue of which he may maintain a real action, even against the debtor himself.[3]

§ 317. **Joint Demise.** If a *joint demise* is laid in the declaration, evidence must be given of a joint interest in the lessors.[1] But if *several demises* are laid, the declaration will be supported by proof of several demises, even by joint tenants; for a several demise severs a joint tenancy.[2] So, if four joint tenants jointly demise, such of them as give notice to quit may recover their several shares, in an ejectment on their several demises.[3] By the common law, tenants in common cannot recover upon a joint demise; but must sue separately, each for his share, in whatever form of real action the remedy is sought.[4] But in some of the United States this rule has been changed by statute, and in others it has been broken in upon by a long course of practice in the courts, permitting tenants in common, and all others claiming as joint tenants, or as coparceners, to join or sever in suits for the recovery of their lands.[5] If the declaration is for a certain quantity of land, or for a certain fractional part, and the plaintiff proves title to a part only of the

privity with them of all the facts it recites, which relate to his own doings by virtue of the precept: Bott *v.* Burnell, 11 Mass. 163; Whitaker *v.* Sumner, 7 Pick. 551, 555; Lawrence *v.* Pond, 17 Mass. 433. Where the deed of one acting under legal authority is offered in proof, not of title, but of a collateral fact, the authority needs not be proved: Bolles *v.* Beach, 3 Am. Law Journ. N. s. 122.

[2] Doe *v.* Murless, 6 M. & S. 110: Hoffman *v.* Pitt, 5 Esp. 22, 23; Cooper *v.* Galbraith, 3 Wash. C. C. 546; {Canly *v.* Blue, 62 Ala. 77. And then even the sheriff's certificate of a sale of real estate is *prima facie* evidence of the facts it recites as against the judgment debtor: Clute *v.* Emmerich, 21 Hun. (N. Y.) 122; Claflin *v.* Robinhorst, 40 Wis. 482.} But this point was otherwise decided, and the judgment was required to be proved, in an ejectment against the debtor himself, in Doe *v.* Smith, 1 Holt's Cas. 589, n.; 2 Stark. 199, n.; Fenwick *v.* Floyd, 1 H. & Gill 172.

[3] Gore *v.* Brazier, 3 Mass. 523; Blood *v.* Wood, 1 Met. 528, 534. [The debtor is not entitled to notice to quit: Downing *v.* Sullivan, 64 Conn. 1.]

[1] [Joint plaintiffs must recover jointly or not at all: McGlansory *v.* McCormick, 99 Ga. 148; Towns *v.* Mathews, 91 id. 546.]

[2] Doe *v.* Read, 12 East 57; Doe *v.* Fenn, 3 Campb. 190; Roe *v.* Lonsdale, 12 East 39.

[3] Doe *v.* Chaplin, 3 Taunt. 120.

[4] Co. Lit. 197; Hammond on Parties, p. 251; 1 Chitty on Pl. 14 (7th ed.); Innis *v.* Crawford, 4 Bibb 241; Taylor *v.* Taylor, 3 A. K. Marsh. 18; White *v.* Pickering, 12 S. & R. 435.

[5] Maine Rev. St. c. 145, § 12; Massachusetts Rev. St. c. 101, § 10; Jackson *v.* Bradt, 2 Caines 169; Jackson *v.* Sample, 1 Johns. Cas. 231; Jackson *v.* Sidney, 12 Johns. 185; Doe *v.* Potts, 1 Hawks 469; [Wheat *v.* Morris, 21 D. C. 11; Mather *v.* Dunn, 76 N. W. 922, S. D.]

land or to a smaller fraction, the declaration is supported for the quantity or fraction proved, and he may accordingly recover.[6] But whether, if any entirety is demanded, the plaintiff may recover an undivided part, is not uniformly agreed; though the weight of authority is clearly in favor of his recovery.[7]

§ 318. **Joint Tenant and Tenant in Common.** If the action is by a joint tenant, parcener, or tenant in common, *against his companion*, the consent-rule, if it is in the common form, will be sufficient evidence of an *ouster;* but if it is special, to confess lease and entry only, the ouster must be proved.[1] Possession alone will not be sufficient proof of an ouster by one owner against his companion; for where both have equal right to the possession, each will be presumed to hold under his lawful title, till the contrary appears. An ouster in such case, therefore, must be proved by acts of an adverse character, such as claiming the whole for himself; denying the title of his companion; or refusing to permit him to enter; and the like.[2] A bare perception of the whole profits does not, of itself, amount to an ouster; yet an undisturbed and quiet possession for a long time is a fact from which an ouster may be found by the jury.[3]

§ 319. **Landlord against Tenant.** Where the action is brought by a *landlord against his tenant*, or is between persons in privity with them, the claimant must show that the *tenancy is determined;* otherwise, being once recognized, it will be presumed still to subsist. It may be determined, either by efflux of time; or by notice; or by forfeiture for breach of condition.[1]

[6] Denn *v.* Purvis, 1 Burr. 326; Guy *v.* Rand, Cro. El. 12; Santee *v.* Keister, 6 Binn. 36; {Gatton *v.* Tolley, 22 Kan. 678; Roche *v.* Campbell, 4 Col. 254. If a party relies on a reservation in a grant he must show that the land in the reservation is that he claims: Gudyer *v.* Hensley, 82 N. C. 481; Reidinger *v.* Cleveland Iron Mining Co., 39 Mich. 30.} [But if he claims under the grant, he must show that the lands are not within the reservation: Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586; Reusens *v.* Lawson, 91 Va. 226.]

[7] Doe *v.* Wippel, 1 Esp. 360; Roe *v.* Lonsdale, 12 East 39; Dewey *v.* Brown, 2 Pick. 387; Somes *v.* Skinner, 3 id. 52; Holyoke *v.* Haskins, 9 id. 259; Gist *v.* Robinet, 3 Bibb 2; Ward *v.* Harrison, ib. 304; Larue *v.* Slack, 4 id. 358; [Nye *v.* Lovitt, 92 Va. 710; King *v.* Hyatt, 51 Kan. 504; Harrelson *v.* Sarvis, 39 S. C. 14.] *Contra*, Carroll *v.* Norwood, 1 H. & J. 108, 167; Young *v.* Drew, 1 Taylor 119. [In North Carolina one co-tenant may recover the land from a stranger for the benefit of all: Foster *v.* Hackett, 112 N. C. 546. In South Dakota, one partner may maintain ejectment for the partnership land: Brady *v.* Kreuger, 8 S. D. 464.]

[1] Doe *v.* Cuff, 1 Campb. 173; Oakes *v.* Brydon, 3 Burr. 1895; Doe *v.* Roe, 1 Anstr. 86. [In Pennsylvania the sheriff's return and general issue are *prima facie* evidence of ouster: Kelly *v.* Kelly, 182 Pa. 131.]

[2] {So it was held that when the owner of one twelfth declined to surrender occupancy of the other eleven twelfths, this was evidence of an ouster: Avery *v.* Hall, 50 Vt. 11. So the denial of plaintiff's title by defendant in his answer in the ejectment suit is proof of an ouster: Spect *v.* Gregg, 51 Cal. 198. And where one of them entered on the premises, and locked the door, claiming to be the sole owner, this is enough: Trustees, etc. of North Greig *v.* Johnson, 66 Barb (N. Y.) 119.}

[3] Doe *v.* Prosser, Cowp. 217; Fairclaim *v.* Shackleton, 5 Burr. 2604; Brackett *v.* Norcross, 1 Greenl. 89; Doe *v.* Bird, 11 East 49. And see 2 Cruise's Dig. tit. 20, § 14, n. by Greenleaf [2d ed. 1856].

[1] Adams on Eject., by Tillinghast, pp. 276, 277.

§ 320. **When Tenancy is determined by Lapse of Time.** If the tenancy is determined by *lapse of time*, this may be shown by producing and proving the counterpart of the lease. And if it depended on the happening of a particular event, the event also must be proved to have happened.[1] If the demise was by parol, or the lease is lost, it may be proved by a person who was present at the demise; or by evidence of the payment of rent; or by admissions of the defendant, or other competent secondary evidence.[2]

§ 321. **Notice to quit.** Where it is determined by *notice to quit*, or by notice from the tenant that he will no longer occupy, the tenancy must be proved, with the tenor and service of the notice given, the authority of the person who served it, if served by an agent, and that the time mentioned in the notice was contemporaneous with the expiration of the tenancy, or with the period when the party was at liberty so to terminate it. And if a custom is relied on, as entitling the party so to do, this also must be shown.[1] If the tenant, on application of his landlord to know the time when the lease commenced, states it erroneously, and a notice to quit is served upon him according to such statement, the tenant is estopped to prove a different day.[2] He is also concluded by the time stated in the notice, if at the time of service he assents to its terms.[3] But if the tenant, being personally served with notice, made no objection to it at the time, this is *prima facie* evidence, to the jury, that the term commenced at the time mentioned in the notice.[4] If, however, the notice was not personally served, or was not read by the tenant nor explained to him, no such presumption arises from his silence.[5]

§ 322. **Service of Notice.** The *service of the notice* may be proved by the person who delivered it; but if there was a subscribing witness, he also must be called, as in other cases of documentary evidence. The *contents* of the notice may be shown by a copy; or, if no copy was taken, it may be proved by a witness; and in either case no previous notice to produce the original will be required.[1]

[1] Adams on Eject., by Tillinghast, p. 278.

[2] See *ante*, Vol. I. § 560, as to laying a foundation for the admission of secondary evidence of a written instrument, by notice to the adverse party to produce it.

[1] Adams on Eject., by Tillinghast, pp. 120, 131, 278, 279. By the common law, a parol notice is sufficient: Doe *v.* Crick, 5 Esp. 196; Legg *v.* Benion, Willes 43. If the party has disclaimed or denied the tenancy, no notice is necessary: Doe *v.* Grubb, 10 B. & C. 816; Doe *v.* Pasquali, Peake's Cas. 196; Bull. N. P. 96. And a new notice, or receipt of rent, or a distress for rent, subsequently accrued, is evidence of a waiver of a prior notice: Doe *v.* Palmer, 16 East 53; Zouch *v.* Willingale, 1 H. Bl. 311; Doe *v.* Batten, Cowp. 243.

[2] Doe *v.* Lambly, 2 Esp. 635.

[3] Adams on Eject. p. 280.

[4] Doe *v.* Forster, 13 East 405; Doe *v.* Woombwell, 2 Campb. 559; Thomas *v.* Thomas, ib. 647; Oakapple *v.* Copous, 4 T. R. 361.

[5] Doe *v.* Harris, 1 T. R. 161; Doe *v.* Calvert, 2 Campb. 378.

[1] *Ante*, Vol. I. §§ 561, 569; Adams on Eject., by Tillinghast, p. 279; Jory *v.* Orchard, 2 B. & P. 39, 41; Doe *v.* Durnford, 2 M. & S. 62; Doe *v.* Somerton, 7 Ad. & El. N. S. 58.

§ 323. **Form of Notice.** The *form of notice* must be explicit and positive, truly giving to the party, in itself, all that is material for him to know upon the subject. A misdescription of the premises, or a misstatement of dates, which cannot mislead, will not vitiate the notice;[1] nor need it be directed to the person.[2] Even if directed by a wrong name, yet, if he keeps it without objection, the error is waived.[3] A notice as to part only of the demised premises is bad;[4] but a notice by one of several joint tenants will enable him to recover his share.[5] The notice, however, must be such as the tenant may act upon at the time when it is given. Where, therefore, two only of three executors gave notice, "acting on the part and behalf of themselves and the said J. H.," the other executor, this was held insufficient, though it was afterwards recognized by the third, the lease requiring a notice in writing, under the hands of the respective parties; for, at the time when it was served, the tenant could not know that it would be ratified and adopted by the other.[6] But where the notice was signed by an agent professing to act as the agent of all the lessors, it was held sufficient to enable the defendant to act upon with certainty, though in fact the letter of attorney was not signed by all the lessors until a subsequent day.[7]

§ 324. **Service.** *Service of notice* at the dwelling-house of the party is sufficient, whether upon the party in person, or his wife, or servant.[1] And if there are two joint lessees, service on one of them is *prima facie* evidence of a service on both.[2] If the lessee has assigned his interest to one between whom and the landlord there is no privity, the notice should be served on the original lessee.[3]

§ 325. **Notice, when necessary.** *Notice to quit* is not necessary, where the relation of landlord and tenant is at an end, as in the case of a tenant holding over by *sufferance*;[1] nor where the person in possession is but a *servant* or *bailiff* to the owner;[2] nor where he has either never admitted the relation of landlord and tenant, as, if he claims in fee, or adversely to the plaintiff;[3] or has subsequently disclaimed and repudiated it, as, for example, by attorning

[1] Doe d. Cox *v.* Roe, 4 Esp. 185; Doe *v.* Kightley, 7 T. R. 63.
[2] Doe *v.* Wrightman, 4 Esp. 5.
[3] Doe *v.* Spiller, 6 Esp. 70.
[4] Doe *v.* Archer, 14 East 245.
[5] Doe *v.* Chaplin, 3 Taunt. 120.
[6] Right *v.* Cuthell, 5 East 421, 499, per Lawrence, J.
[7] Goodtitle *v.* Woodward, 3 B. & Ald. 689.
[1] Widger *v.* Browning, 2 C. & P. 523; Doe *v.* Dunbar, 1 M. & Malk. 10; Jones *v.* Marsh, 4 T. R. 464; Doe *v.* Lucas, 5 Esp. 153.
[2] Doe *v.* Crick, 4 Esp. 196; Doe *v.* Watkins, 7 East 553.
[3] Roe *v.* Wiggs, 2 New R. 330; Pleasant *v.* Benson, 14 East 234.
[1] Jackson *v.* Parkhurst, 5 Johns. 128; Thunder *v.* Belcher, 3 East 449, 451; Jackson *v.* McLeod, 12 Johns. 182.
[2] Jackson *v.* Sample, 1 Johns. Cas. 231.
[3] Jackson *v.* Devo, 3 Johns. 422; Jackson *v.* Cuerden, 2 Johns. Ch. 353; Doe *v.* Williams, Cowp. 622; Doe *v.* Creed, 5 Bing. 327; [McCarthy *v.* Brown, 113 Cal. 15.]

to a stranger, or the like.[4] But such notice is deemed necessary only where the relation of landlord and tenant does exist, whether it be created by an express demise, or is incidentally admitted, either by the acceptance of rent, or by entering under an agreement to purchase, or the like.[5] And notice, if given, is *waived*, on the part of the landlord, by a subsequent new notice to quit; or, by the receipt of rent before the bringing of an ejectment; or, by a distress for rent accruing subsequently to the expiration of the notice to quit; or, by an action for subsequent use and occupation; or, by any other act on the part of the lessor, after knowledge by him of the tenant's default, recognizing the tenancy as still subsisting.[6]

§ 326. **Forfeiture by Non-payment of Rent.** Where the ejectment is founded upon the *forfeiture* of a lease for *non-payment of rent*, and the case is not governed by any statute, but stands at common law, the plaintiff must prove that he demanded the rent, and that the precise sum due, and neither more nor less, was demanded; that the demand was precisely upon the day when the rent became due and payable; that it was made at a convenient time before sunset on that day; that it was made upon the land, and at the most notorious place upon it, and if there be a dwelling-house on it, then at the front or principal door, though it is not necessary to enter the house, even if the door be open; and that a demand was in fact made, although no person was there to pay it. But if any other place was appointed, where the rent was payable, the demand must be proved to have been made there. A demand made after or before the last day of payment, or not upon the land or at the place, will not be sufficient to defeat the estate.[1]

§ 327. **By Limitation.** If the lease contained an express *limitation*, that upon non-payment, or other breach, the lease should become *absolutely void*, then no entry by the landlord need be made; but an ejectment lies immediately, upon the breach, with proof of demand of rent as before stated, if the breach was by non-payment. But where the terms of the lease are, that upon non-payment or other breach it shall be lawful for the lessor to *re-enter* there, by the common law, the plaintiff must show an entry, made in reason-

[4] Bull. N. P. 96; Doe *v.* Frowd, 4 Bing. 557, 560; Jackson *v.* Wheeler, 6 Johns. 272; Doe *v.* Grubb, 10 B. & C. 816; Doe *v.* Whittick, Gow 195.

[5] Jackson *v.* Wilsey, 9 Johns. 267; Jackson *v.* Rowen, ib. 330; Ferris *v.* Fuller, 4 id. 213; Jackson *v.* Devo, 3 id. 422.

[6] Doe *v.* Palmer, 16 East 53; Doe *v.* Inglis, 3 Taunt. 54; Armsby *v.* Woodward, 6 B. & C. 519; Roe *v.* Harrison, 2 T. R. 425; Goodright *v.* Davis, Cowp. 803; Doe *v.* Batten, ib. 243; Doe *v.* Meaux, 1 C. & P. 346; s. c. 4 B. & C. 606; Doe *v.* Johnson, 1 Stark. 411. By the common law, the receipt of the rent previously due is a waiver of the forfeiture occasioned by its non-payment: 1 Saund. 287, n. (16), by Williams.

[1] See 1 Saund. 287, n. (16), by Williams, and cases there cited. The strictness of the common law, in the particulars mentioned in the text, has been abated, and the subject otherwise regulated by statutes, both in England and several of the United States; but as these statutory provisions are various in the different States, rendering the subject purely a matter of local law, they are not here particularly stated.

able time, and because of such breach; unless the entry is confessed in the consent-rule, which is now held sufficient. And in this latter class of cases, if the lessor, after notice of the forfeiture (which is an issuable fact), accepts rent subsequently accruing, or distrains for the rent already due, or does any other act which amounts to a recognition of the relation of landlord and tenant as still subsisting, or to a dispensation of the forfeiture, the lease, which before was voidable, is thereby affirmed; and this will constitute a good defence to the action.[1] If the tenant, after demand of the rent, but before the expiration of the last day, tenders the sum due, this also will save the forfeiture.[2]

§ 328. **Underletting.** If the breach consisted in assigning or *underletting without the consent of the lessor*, it has been held sufficient for the plaintiff to show that another person was found in possession, acting and appearing as tenant, this being *prima facie* evidence of an underletting, and sufficient to throw upon the defendant the burden of proving in what character such person held possession of the premises. And in such case, the declarations of the occupant are admissible against the defendant, to show the character of the occupancy.[1]

§ 329. **Mortgagee and Mortgagor.** Where the action is between a *mortgagee and the mortgagor*, the mortgagee's case is ordinarily made out by the production and proof of the mortgage deed, which the defendant is estopped to deny. If the action is against a tenant of the mortgagor, the determination of the tenancy must be proved; unless it commenced subsequent to the mortgage, and has not been acknowledged by the mortgagee; in which case no notice to quit needs be shown.[1] And where the mortgage deed contains a proviso that the mortgagor may remain in possession until the condition is broken, it will be necessary for the plaintiff to prove a breach.[2] Whether, in general, a mortgagor is entitled to notice to quit, seems not to be perfectly clear by the authorities. In England, he is held not entitled to such notice;[3] but in some of the United States it has been held otherwise.[4]

[1] 1 Saund. 287 n. (16), by Williams, and cases there cited; Doe *v.* Banks, 4 B. & Ald. 401; Fawcett *v.* Hall, 1 Alcock & Napier 248; Zouch *v.* Willingale, 1 H. Bl. 311. But the rent must have been received as between landlord and tenant, and not upon any other consideration: Right *v.* Bawden, 3 East 260.

[2] Co. Lit. 202 (*a*).

[1] Doe *v.* Rickarby, 5 Esp. 4, per Ld. Alvanley; *ante*, Vol. I. §§ 108, 109.

[1] Thunder *v.* Belcher, 3 East 449; Keech *v.* Hall, 1 Doug. 21; Jackson *v.* Chase, 2 Johns. 84; Jackson *v.* Fuller, 4 id. 215; Birch *v.* Wright, 1 T. R. 378, 388. But if the mortgagee or the assignee of the mortgage has acknowledged the tenancy by the receipt of rent, a notice to quit is necessary to be proved: Ibid.; Clayton *v.* Blackey, 8 T. R. 3. See also Jackson *v.* Stackhouse, 1 Cowen 122.

[2] Hall *v.* Doe, 5 B. & Ald. 687; {Oldham *v.* Pfleger, 84 Ill. 102. And the mortgagor has no action of ejectment against the mortgagee, if the foreclosure sale is void: ibid.}

[3] Keech *v.* Hall, 1 Doug. 21; Thunder *v.* Belcher, 3 East 449; Patridge *v.* Beere, 5 B. & Ald. 604.

[4] Jackson *v.* Laughead, 2 Johns. 75; Jackson *v.* Green, 4 id. 186.

§ 330. **Payment of Mortgage.** *Payment* of the mortgage debt is a good defence to an action at law, brought by the mortgagee, against the mortgagor, to obtain possession of the mortgaged premises; but if the mortgagee is already in possession, the remedy of the mortgagor, where no other is provided by statute, is by bill in equity.[1] And where *usury* renders the security void, this may also be shown in defence, against an action brought by the mortgagee upon the mortgage.[2]

§ 331. **Plaintiff must show Title.** As the claimant in ejectment, or other real action, can recover only upon the strength of his own title, and not upon the weakness of that of the tenant, *the defence* will generally consist merely in rebutting the proofs adduced by the plaintiff.[1] For possession is always *prima facie* evidence of title; and the party cannot be deprived of his possession by any person but the rightful owner, who has the *jus possessionis*.[2] The defendant, therefore, needs not show any title in himself, until the plaintiff has shown some right to disturb his possession.[3] Thus, if the plaintiff claims as heir, and proves his heirship, the defendant may show a devise by the ancestor to a stranger, or that, by the local law, some other person is entitled as heir; or that the claimant is illegitimate, or the like. So, if he claims as devisee, the defendant may prove that the will was obtained by fraud, or may impeach its validity on any other grounds, not precluded by the previous probate of the will.[4] And he may also defeat the plaintiff's claim, by showing that the real title is in another, without claiming under it, or deducing it to himself, either by legal conveyance, or operation of law.[5]

[1] Gray *v.* Jenks, 3 Mason 520; Gray *v.* Wass, 1 Greenl. 260; Vose *v.* Handy, 2 id. 322; Perkins *v.* Pitts, 11 Mass. 125; Erskine *v.* Townsend, 2 id. 493; Wade *v.* Howard, 11 Pick. 289; Howard *v.* Howard, 3 Met. 548, 557; Hitchcock *v.* Harrington, 6 Johns. 290, 294; Jackson *v.* Stackhouse, 1 Cowen 122; Deering *v.* Sawtel, 4 Greenl. 191.

[2] Holton *v.* Button, 4 Conn. 436; Deering *v.* Sawtel, 4 Greenl. 191; Chandler *v.* Morton, 5 id. 174; Richardson *v.* Field, 6 id. 35.

[1] See *infra*, §§ 555–558. {Where the only question in an action of ejectment was whether there was an outstanding title superior to that of the plaintiff, it was held not to be material for the jury to consider whether the defendant's title connected with it or not: Clegg *v.* Fields, 7 Jones (N. C.) Law 37.} [The presumption of plaintiff's title springing from his prior possession is not overcome by proof of the issuance of a patent by the State, with which he does not connect his title: House *v.* Reavis, 89 Tex. 626. The existence of an easement adverse to the plaintiff is no defence: Tatum *v.* St. Louis, 125 Mo. 647; Barnet *v.* Crane, 56 N. J. L. 285.]

[2] Adams on Eject. pp. 285, 286, by Tillinghast; Hall *v.* Gittings, 2 Har. & Johns. 122; Lane *v.* Reynard, 2 S. & R. 65; *supra*, §§ 303, 304. As to the *presumption of a conveyance* from the trustee to the *cestui que trust*, see 1 Cruise Dig. tit. 12, c. 2, § 39, n. (Greenleaf's ed.). {A person in possession of land is presumed to have acquired the title which the people in their capacity of sovereign once held. But when the people are plaintiffs, it seems that this presumption is shifted to the other side, on showing that the possession has been vacant at any time within forty years: People *v.* Trinity Church, 22 N. Y. 44.}

[3] {Henry *v.* Reichert, 22 Hun (N. Y.) 394; Cobb *v.* Lavalle, 89 Ill. 331.}

[4] Adams on Eject. p. 286, by Tillinghast.

[5] Ibid. 29–31; Hunter *v.* Cochran, 3 Barr 105; [King *v.* Mullins, 171 U. S. 404; East Tenn. Iron Co. *v.* Wiggin, 37 U. S. App. 129; Reusens *v.* Lawson, 91 Va. 226;

But he cannot set up a merely equitable title or lien to defeat a legal title, under which the plaintiff claims.[6]

§ 332. **Damages; Mesne Profits.** As the *damages* given in an action of ejectment are now merely nominal, the title alone being the subject of controversy, the plaintiff is permitted to recover his real damages in an action of TRESPASS FOR MESNE PROFITS; in which he complains of his having been ejected from the possession of the premises by the defendant, who held him out, and took the rents and profits, during the period alleged in the declaration.[1] And as

Dyke *v.* Whyte, 17 Col. 296; Wagener *v.* Parrott, 29 S. E. 240, S. C.] But if he entered under a contract to purchase from the plaintiff, he is estopped to deny the plaintiff's title: Norris *v.* Smith, 7 Cowen 717; 1 Cruise's Dig. tit. 12, c. 2, § 36, n. (Greenleaf's ed.) [2d ed. 1856]; 2 Wheat. 224, n. (*a*). {But if the defendant sets up such an outstanding title, the plaintiff may show a conveyance to him of such title, and the recital in a deed from the owner of such superior title to a stranger, in which is recited a deed to plaintiff of land which answers the description of the land claimed in the action, is sufficient evidence of such a conveyance: Carter *v.* Robinett, 33 Gratt. (Va.) 429. So, the plaintiff may show that such outstanding title has become void by the statute of limitations: Humble *v.* Spears, 8 Baxt. (Tenn.) 156.}

[6] Adams on Eject. p. 32; 1 Cruise's Dig. *ubi supra;* id. § 38, n.; Roe *v.* Reed, 8 T. R. 118, 123; Jackson *v.* Sisson, 2 Johns. Cas. 321; Jackson *v.* Harrington, 9 Cowen 88; Jackson *v.* Parkhurst, 4 Wend. 369; Sinclair *v.* Jackson, 8 Cowen 543; Heath *v.* Knapp, 4 Barr 230. But in Pennsylvania, it seems that an ejectment is regarded as an equitable remedy, and judgment is rendered at law, upon any principles which would require a decree in chancery: Peebles *v.* Reading, 8 S. & R. 484; Delancy *v.* McKean, 1 Wash. C. C. 354; Thomas *v.* Wright, 9 S. & R. 87, 93. {The rule as stated by the author seems to have become greatly relaxed at the present day. The action of ejectment is now generally regarded as an equitable remedy, even in those States where it has not been declared so by statute. By thus admitting equitable defences great advantages are secured in avoiding the circuity of action resulting from the old rule under which the defendant relying on an equitable title was obliged to apply to a court of equity to obtain a perpetual injunction upon the plaintiff in the suit at law: Barton *v.* Duffield, 2 Del. Ch. 130. It also suits the procedure of some of our States, where, in lieu of courts of chancery, courts of law have very large equity jurisdiction. As stated in note 3, in Pennsylvania, the plaintiff may rely on an equitable title (Chase *v.* Irvin, 87 Pa. St. 286), and the defendant may rely on an equitable defence (Irwin *v.* Cooper, 92 id. 298), and this is also held in Kansas (Duffey *v.* Rafferty, 15 Kan. 9); and equitable rights and defences are admitted in New York (Hoppough *v.* Struble, 60 N. Y. 430); California (Pico *v.* Gallardo, 52 Cal. 206); Minnesota (Williams *v.* Murphy, 21 Minn. 534); Missouri (Nesbit *v.* Neill, 67 Mo. 275; Sims *v.* Gray, 66 id. 613; [Clyburn *v.* McLaughlin, 106 id. 521); Nebraska (Wanser *v.* Lucas, 44 Neb. 759); Florida (Johnson *v.* Drew, 34 Fla. 130); South Dakota (Goldberg *v.* Kidd, S. D., 58 N. W. 574); Washington (Moore *v.* Brownfield, 10 Wash. 439); Virginia, to a limited extent (Jennings *v.* Gravely, 92 Va. 377);] North Carolina (Stith *v.* Lookabill, 76 N. C. 415); Georgia, if stated in the pleadings (Sutton *v.* Aiken, 57 Ga. 416. Cf. Young *v.* Porter, 3 Woods C. Ct. 342); Illinois (70 Ill. 286; Herrell *v.* Sizeland, 81 id. 457). In accordance with well-settled equitable principles, the united legal and equitable titles will prevail over a bare equity: Betser *v.* Rankin, 77 Ill. 289.

But in Michigan (Harrett *v.* Kinney, 44 Mich. 457; Adams *v.* Cameron, 40 id. 506; [Moran *v.* Moran, 106 id. 8), Illinois (Hayden *v.* McCloskey, 161 Ill. 351), Mississippi (Morgan *v.* Bleuelt, 72 Miss. 903),] and Alabama (Kelly *v.* Hendricks, 57 Ala. 193; Aitheson *v.* Broadhead, 56 id. 414), the old rule seems to prevail, and in the United States courts (Foster *v.* Mora, 98 U. S. 425; Wythe *v.* Smith, 4 Sawyer C. Ct. 17); [Owens *v.* Heidbreder, 41 U. S. App. 736; Davis *v.* Hargrave, 30 id. 723. But see Berry *v.* Seawell, 31 id. 30.]

The legal title left in a mortgagee after the payment of the mortgage is enough to maintain an action of ejectment: Townsend Savings Bank *v.* Todd, 47 Conn. 190.}

[1] There is some diversity in the different American States as to the remedy for mesne profits, which it is not within the plan of this treatise to consider. See Gill *v.* Cole, 1 Har. & J. 403; Lee *v.* Cooke, Gilmer, 331; Coleman *v.* Parish, 1 McCord

this remedy is one of the incidents and consequences of an ejectment, it is usually considered under that head. We have heretofore seen,[2] that the law considers the lessor of the plaintiff, and the actual tenant, as the real parties in an action of ejectment; and therefore the action for mesne profits may be brought by the lessor of the plaintiff, as well as by the nominal plaintiff himself. The evidence on the part of the plaintiff consists of proof of his possessory title; the defendant's wrongful entry; the time of his occupation; the value of the mesne profits; and any other damages and expenses recoverable in this action.

§ 333. **Profits, prior and subsequent.** Where this action is between the parties to the prior action of ejectment, and the plaintiff proceeds only for profits accruing subsequent to the alleged date of the demise, the *record of the judgment* in that case will be conclusive evidence of the plaintiff's title and of the defendant's *entry* and *possession* from the day of the demise laid in the declaration.[1] If the plaintiff would claim for profits antecedent to that time, he must prove his title as in other cases, and the defendant will not be estopped to gainsay it.[2] So, if the suit is against a precedent occupant, the judgment in ejectment is no proof of the plaintiff's title.[3] And if the suit is against the landlord of the premises, a judgment in ejectment against the casual ejector is not evidence of the plaintiff's title, unless the landlord has notice of the ejectment.[4]

§ 334. **Plaintiff must prove Possession.** The plaintiff must also prove his *possession* of the premises.[1] If the judgment in ejectment was rendered after verdict against the tenant in possession, the *consent-rule*, if it was entered into, will be sufficient proof of possession

264; Sumter *v.* Lehie, 1 Const. 102; Cox *v.* Callender, 9 Mass. 533. See *infra*, §§ 548–552. Where provision is made by statute for an allowance to the tenant in a real action for the value of his lasting improvements, of which he avails himself at the trial, the value of the mesne profits is generally taken into the estimate by special provisions for that purpose. {Where the property was a mill-site, having a steam-mill thereon, it was held that the rent of the mill and site was mesne profits: Morris *v.* Tinker, 60 Ga. 466.

The defendant is not liable for mesne profits prior to his possession, but if he claims for improvements made by his predecessors, their liability for mesne profits must first be satisfied: Gardner *v.* Grannis, 57 Ga. 539.} [Heirs are not liable for mesne profits received by their ancestor: Hillyer *v.* Douglass, 56 Kan. 97.]

[2] *Ante*, Vol. I. § 535.

[1] Adams on Eject. 334; Dodwell *v.* Gibbs, 2 C. & P. 615; Dewey *v.* Osborn, 4 Cowen 329, 335; Van Alen *v.* Rogers, 1 Johns. Cas. 281; Benson *v.* Matsdorf, 2 Johns. 369; Chirac *v.* Reinicker, 11 Wheat. 280; Lion *v.* Burtis, 5 Cowen 408; {Kuhns *v.* Bowman, 91 Pa. St. 504. If the plaintiff has obtained possession of the premises before he sues for the mesne profits, he can still recover for the previous unlawful possession: Carman *v.* Beam, 88 Pa. St. 319.}

[2] Bull. N. P. 87; Ashlin *v.* Parkin, 2 Burr. 668; Jackson *v.* Randall, 11 Johns. 405; West *v.* Hughes, 1 Har. & J. 574; {Kille *v.* Ege, 82 Pa. St. 102.}

[3] Bull. N. P. 87.

[4] Hunter *v.* Britts, 3 Campb. 455.

[1] [Joint plaintiffs cannot recover mesne profits accruing before the last date at which the title or possession of any of them was obtained: Fraser *v.* Kaye, 26 N. S. 111.]

by the plaintiff. But if no consent-rule was entered into, the judgment being rendered against the casual ejector by default, the plaintiff's possession must be proved, either by the writ of possession and the sheriff's return thereon, or by evidence that the plaintiff has been admitted to the possession by the defendant.[2] The entry of the plaintiff, it seems, will relate back to the time when his title accrued, so as to entitle him to recover the mesne profits from that time.[3]

§ 335. **Occupancy of Defendant.** It will also be incumbent on the plaintiff to prove the duration of the *occupancy by the defendant*, or by his tenant,[1] if he be the landlord; and in the latter case, if the judgment in ejectment was against the casual ejector, by default, it must be shown that the defendant was landlord when the ejectment was brought, which may be done by proof of his receipt of rent accruing subsequent to the time of the demise. The plaintiff must also prove that the landlord had due notice of the service of the declaration in ejectment upon the tenant in possession; but if he has subsequently promised to pay rent and the costs of the ejectment, this will suffice.[2]

§ 336. **Costs.** The plaintiff in this action may recover the *costs* incurred by him in a court of error, in reversing a judgment in ejectment obtained by the defendant, as part of his damages, sustained by his having been wrongfully kept out of possession by the act of the defendant; and the jury will be instructed to consider the costs between attorney and client as the measure of this item of damages.[1] He also may recover in this form the costs of the ejectment;[2] and, also, under proper averments, the amount of any injury done to the premises, in consequence of the misconduct of the defendant or his servants, and any *extra damages* which the circumstances of the case may demand.[3]

§ 337. **Improvements.** The defendant, in this action for mesne profits, if he has in good faith made *lasting improvements* on the

[2] Bull. N. P. 87. It would seem that a judgment in ejectment recovered by the plaintiff against the defendant estops the latter from controverting the plaintiff's possession, as well as his title, of which possession is a part. See Adams on Eject. 336, n. (*q*); Calvart *v.* Horsfall, 4 Esp. 167; Brown *v.* Galloway, 1 Peters C. C. 291, 299; Jackson *v.* Combs, 7 Cowen 36.

[3] Bull. N. P. 87, 88; Adams on Eject. 335.

[1] [In Alabama, possession by the defendant's tenant will not sustain the action: Banks *v.* Spear, 23 S. 64, Ala.]

[2] Hunter *v.* Britts, 3 Campb. 455; Adams on Eject. 337.

[1] Nowell *v.* Roake, 7 B. & C. 404. And see Doe *v.* Huddart, 5 Tyrwh. 846; s. c. 2 C. M. & R. 316; Denn *v.* Chubb, 1 Coxe (N. J.) 466.

[2] Doe *v.* Davis, 1 Esp. 358; Baron *v.* Abeel, 3 Johns. 481; Symonds *v.* Page, 1 C. & J. 29; Doe *v.* Hare, 4 Tyrwh. 29. For the defendant was but nominal in the ejectment: Anon., Lofft 451. [But see Heger *v.* De Groat, 3 N. D. 354.]

[3] Goodtitle *v.* Tombs, 3 Wils. 118, 121; Adams on Eject. 337; Dewey *v.* Osborn, 4 Cowen 329; Dunn *v.* Large, 3 Doug. 335. In Maryland, the action for mesne profits is only for the use and occupation, and is no bar to an action of trespass *quare clausum fregit* for any other injuries done to the premises during the same period: Gill *v.* Cole, 1 Har. & J. 403.

land, may be allowed the value of them, against the rents and profits claimed by the plaintiff.[1] But he cannot set up any matter in defence, which would have been a bar to the action of ejectment.[2] Nor is bankruptcy a good plea in bar of this action;[3] unless the case is such that the damages were capable of precise computation, without the intervention of a jury, and might have been proved under the commission.[4]

[1] Jackson *v.* Loomis, 4 Cowen 168; Hylton *v.* Brown, 2 Wash. C. C. 165; Cawdor *v.* Lewis, 1 Y. & C. 427. But see Russell *v.* Blake, 2 Pick. 505. {But if the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, when brought by a devisee, but has his remedy against the personal representatives of the devisor: Van Alen *v.* Rogers, 1 Johns. (N. Y.) Cas. 281. See *ante*, § 332. Nor will a defendant be allowed for such improvements if his ignorance of the defect in his title was caused by his own inexcusable negligence: Foley *v.* Kirk, 33 N. J. Eq. 170. And the only improvements which he will be allowed for are those which have raised the value of the land, not valueless experiments: Noble *v.* Biddle, 81 Pa. St. 430. Nor improvements from which the plaintiff cannot get any value: Morris *v.* Tinker, 60 Ga. 466.} [Only the increased value is recoverable: Hicks *v.* Blakeman, 74 Miss. 459, 483. The matter is now generally regulated by statute.]

[2] Baron *v.* Abeel, 3 Johns. 481; Jackson *v.* Randall, 11 id. 405; Benson *v.* Matsdorf, 2 id. 369.

[3] Goodtitle *v.* North, 2 Doug. 584.

[4] Utterson *v.* Vernon, 3 T. R. 539.

EXECUTORS AND ADMINISTRATORS.

§ 338. **Suit must be as Executor or Administrator.** The evidence, under this title, relates to the official character of the parties, and to the cases and manner in which it must be proved. Where the executor or administrator is plaintiff, and sues upon a contract made with the testator, or for any other cause of action accruing in his lifetime, he makes *profert* of the letters testamentary, or of the letters of administration;[1] for he must declare in that character, in order to entitle himself upon the record to recover judgment for such a cause;[2] and if the defendant would controvert the representative character of the plaintiff, in such case, by reason of any extrinsic matter, not appearing on the face of the letters, such as the want of *bona notabilia*, or the like, he must put it in issue by a plea in abatement, or, as it seems, by a plea in bar;[3] and cannot contest it under the general issue, this being a conclusive admission of the plaintiff's title to the character in which he sues.[4] But in regard to causes of action accruing subsequent to the decease of the testator or intestate, such as in trover, for a subsequent conversion of his goods, or in *assumpsit*, for his money subsequently received by the defendant, and the like, though it is always proper for the plaintiff to sue in his representative character, wherever the money, when recovered, will be assets in his hands, yet it is not always necessary that he should do so. For where the action is upon a personal contract made with himself respecting the property of the deceased, or is for a violation of his actual possession of the assets,

[1] 1 Chitty on Plead. 420. The practice in the United States, in this respect, is not uniform; the *profert*, in some of the States, being omitted: Langdon *v.* Potter, 11 Mass. 313; Champlin *v.* Tilley, 3 Day 305; Amer. Prec. Decl. p. 91; Prettyman *v.* Waples, 4 Harringt. 299; Chapman *v.* Davis, 4 Gill 166; Thames *v.* Richardson, 3 Strobh. 484. The rule requiring *profert* of letters testamentary is itself an exception from the general rule that *profert* is required of deeds only: Gould on Pleading, p. 442, § 43.

[2] [Where the executor is the person solely interested in the property he may sue personally: Ewers *v.* White, 72 N. W. 184, Mich.]

[3] Langdon *v.* Potter, 11 Mass. 313, 316; 1 Chitty on Plead. 489 (358); 1 Saund. 274, n. (3), by Williams.

[4] Loyd *v.* Finlayson, 2 Esp. 564; Marshfield *v.* Marsh, 2 Ld. Raym. 824; Gidley *v.* Williams, 1 Salk. 37, 38; 5 Com. Dig. tit. Pleader, 2 D. 10, 14; Watson *v.* King, 4 Campb. 272; Stokes *v.* Bate, 5 B. & C. 491; Yeomans *v.* Bradshaw, Carth. 373; Hilliard *v.* Cox, 1 Salk. 37 [2 Redfield on Wills, 187].

he may sue either in his private or in his representative capacity.[5] But in other cases, where the cause of action accrued in his own time, he must sue in his representative capacity, and must prove this character, under the general issue, which raises the question of title.[6]

§ 339. **Proof of Representative Character.** The *proof* of the plaintiff's *representative character* is made by producing the probate of the will, or the letters of administration, which, *prima facie*, are sufficient evidence for the plaintiff, both of the death of the testator or intestate, and of his own right to sue.[1] Where an oath of office and the giving of bonds are made essential, by statute, to his right to act, these also must be proved. The *probate* itself is the only legitimate ground of the executor's right to sue for the personalty, and is conclusive evidence, both of his appointment and of the contents of the will;[2] and if granted at any time previous to the decla-

[5] Hunt *v.* Stevens, 3 Taunt. 113, 115; Hollis *v.* Smith, 10 East 293; Blackham's Case, 1 Salk. 290; 2 Saund. 47 *c*, n. by Williams; Heath *v.* Chilton, 12 M. & W. 632. The allegation of his representative character, in these two cases, will be regarded as surplusage, and needs not be proved: Crawford *v.* Whittal, 1 Doug. 4, n. See also Powley *v.* Newton, 6 Taunt. 453, 457; Clark *v.* Hougham, 2 B. & C. 149.

{Thus, where the administrator leases lands which he holds as administrator, he may sue for rent in his own name: Yarborough *v.* Ward, 34 Ark. 204.

When the will charges the executor with the collection of rent from the real estate, he can sue for such rent: McDowell *v.* Hendricks, 71 Ind. 286.}

[6] Smith *v.* Barrow, 2 T. R. 476, 477, per Ashhurst, J.; Crawford *v.* Whittal, 1 Doug. 4, n. (1); Hunt *v.* Stevens, 3 Taunt. 113; {Campbell *v.* U. S., 13 Ct. of Cl. 108. An administrator must sue in his representative capacity for the negligent killing of his intestate: Denver, etc. R. R. Co. *v.* Woodward, 4 Col. 1.}

[1] {Pick *v.* Strong, 26 Minn. 303; Davis *v.* Swearingen, 56 Ala. 31. The plaintiff's declaration need not set out the probate of the will and qualification of the executor in full, but it must allege that they were had in the probate court: Hurst *v.* Addington, 84 N. C. 143.

It is only to support the executor's right to sue, however, that these are *prima facie* evidence. If the claim is based on the death of the testator, it must be proved otherwise. Thus, in a suit upon a policy of insurance, where the death of the intestate is clearly in issue, letters of administration are not even *prima facie* evidence of death: Insurance Co. *v.* Tisdale, Sup. Ct. U. S. 1875, 13 Alb. L. J. 82.

It has been held that the letters of administration of another State are not sufficient evidence of the character of the executor as executor, to allow him to sue: Moseby *v.* Burrow, 52 Tex. 396.} [The testimony of the executor that he is executor is sufficient if received without objection: Alabama G. S. R. *v.* Blevins, 92 Ga. 522.] In an action on a promissory note made payable "to the executors of the late W. B.," it was held necessary for the plaintiffs to produce both the probate of the will and the grant of administration annexed to it: Hamilton *v.* Aston, 1 C. & K. 679, per Rolfe, B.

[2] {The decree of a probate court, appointing an executor or administrator, cannot be attacked collaterally, except by proving that it is void, as for want of jurisdiction, for fraud, or that it is a forgery; it cannot be attacked for irregularity; [Bradley *v.* Missouri Pac. R., 51 Neb. 653; Templeton *v.* Ferguson, 89 Tex. 47; Davis *v.* Miller, 109 Ala. 589; Mohamidu *v.* Pitchey, 1894, A. C. 437; Missouri, etc. R. *v.* McWherter, 53 P. 135, Kan.;] *e. g.* because issued on petition of one not interested in the estate. Pick *v.* Strong, 26 Minn. 303. The decrees of a probate court, as to the appointment of an administrator, made in the exercise of its jurisdiction, are conclusive, in an action by the administrator against a stranger to recover a debt due to the intestate: Emery *v.* Hildreth, 2 Gray (Mass.) 230. It would seem that where a probate court has jurisdiction of the subject-matter, the validity of its action can be tried only in the probate court, or in the appellate court sitting as the supreme court of probate: ibid. See also Bellinger *v.* Ford, 21 Barb. (N. Y.) 311; Duson *v.* Dupre, 32 La. An. 896. So, the sufficiency of the bond cannot be collaterally impeached: Huntingdon *v.* Moore, 1 New Mex. 489. But the *fact* of such appointment, not its *regularity*, may be disputed in a collateral proceeding: Denver, etc. Ry. Co. *v.* Woodward, 4 Col. 1.}

ration, it is sufficient, for the probate relates back to the death of the testator.[3] The same principle governs in the case of an administrator; whose title, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to enable him to maintain an action for an injury to the goods of the intestate, or for the price, if they have been sold by one who had been his agent.[4] But the defendant may show that the probate itself, or the letter of administration, is a forgery;[5] or that it was utterly void, for want of jurisdiction over the subject, by the court which granted it;[6] whether because the person was still living, or because he had no domicile within the jurisdiction of the court, where this is essential;[7] or for any other sufficient cause.

§ 340. **Same Subject.** The plaintiff's character as *administrator* may also be shown by an exemplified copy of the record of the grant of the letters, or by a copy of the book of acts or original minutes of the grant, as has already been stated.[1] If letters of administration have been granted to the wrong person, they are only voidable, and liable to be repealed; but if granted by the wrong court they are void.

§ 341. **When there are Several Executors.** Where the plaintiff is bound to prove his representative character of executor, under the general issue, as part of his title to sue, and it appears that there are *several executors,* some of whom have not joined in the suit, it is fatal, though all have not proved the will; unless they have renounced the trust.[1] And where the plaintiff sues as administrator *de bonis non,* it is sufficient to prove the grant of administration to himself, which recites the letters granted to the preceding administrator, without other proof of the latter.[2]

§ 342. **Statute of Limitations.** If the action is upon promises made to the deceased, to which the *statute of limitations* is pleaded, the declaration, according to the English practice, will not be supported by evidence of a new promise made to the executor or administrator; but in the American courts this rule is not universally recognized; and where the plea is *actio non accrevit infra sex annos,*

[3] Smith *v.* Milles, 1 T. R. 475, 480; Woolley *v.* Clark, 5 B. & Ald. 744; Wankford *v.* Wankford, 1 Salk. 299, 301, 306, 307; Loyd *v.* Finlayson, 2 Esp. 564; 1 Com. Dig. 340, 341, tit. Administration, B, 9, 10; Dublin *v.* Chadbourn, 16 Mass. 433. The probate will be presumed to have been rightly made: Brown *v.* Wood, 17 Mass. 68, 72; *ante,* Vol. I. § 550.

[4] Foster *v.* Bates, 12 M. & W. 226; Tharpe *v.* Stallwood, 6 Scott N. R. 715.

[5] Bull. N. P. 247; Chichester *v.* Phillips, T. Raym. 405.

[6] Bull. N. P. 143, 247; Noell *v.* Wells, 1 Lev. 235, 236; Emery *v.* Hildreth, 2 Gray 230; [Hussey *v.* Southard, 90 Me. 296.] {But this want of jurisdiction must be apparent on the record: McFeely *v.* Scott, 128 Mass. 16.} [In Nebraska, if the petition for the appointment of an administrator fails to allege the necessary jurisdictional facts, the appointment and all subsequent proceedings are void: Spencer *v.* Wolfe, 49 Neb. 8.]

[7] Harvard College *v.* Gore, 5 Pick. 370; [King's Estate, 75 N. W. 187, Iowa.]

[1] *Ante,* Vol. I. § 519. {So certified copies of the letters testamentary, and his bond, are evidence of his appointment, without the will or probate thereof: Wittman *v.* Watry, 45 Wis. 491.}

[1] Munt *v.* Stokes, 4 T. R. 565, per Buller, J.

[2] Catherwood *v.* Chabaud, 1 B. & C. 155.

the weight of argument seems in favor of admitting the evidence.[1] In both countries, leave will be granted to amend the declaration by adding a new count on a promise to the executor.

§ 343. **Executor as Defendant.** If the *defendant* is sued as *executor*, his representative character may be shown either by the evidence already mentioned as proof of that character in the plaintiff,[1] or by proof of such acts of intermeddling in the estate as estop him to deny the title, constituting him what is termed an executor *de son tort*.[2] Very slight acts of intermeddling have formerly been held sufficient for this purpose; but the material fact for the jury to find is, that the party has intruded himself into the office of executor; and this may well be inferred from such acts as are lawful for an executor alone to do, such as taking and claiming possession of the goods of the deceased or selling them, or converting them to his own use; collecting, releasing, or paying debts; paying legacies; or any other acts evincing a claim of right to dispose of the effects of the deceased. But if the acts of intermeddling appear to have been done in kindness, merely for the preservation of the goods or property, or for the sake of decency or charity, such as, in the burial of the dead, or the immediate support and care of his children, or in the feeding and care of his cattle; or, as the servant of one having the actual custody of the goods, and in ignorance of his title; or, in

[1] 2 Saund. 63, f. g., note by Williams. In Green (or Dean) *v.* Crane, 2 Ld. Raym. 1101, 6 Mod. 309, 1 Salk. 28, which is the leading case on this subject, the plea was *non assumpsit infra sex annos*, and to this issue it was held that the evidence of a new promise to the executor would not apply. So in Hickman *v.* Walker, Willes 27. In Sarell *v.* Wine, 3 East 409, Jones *v.* Moore, 5 Binn. 573, and Beard *v.* Cowman, 3 Har. & McHen. 152, the form of the issue is not stated. In Fisher *v.* Duncan, 1 Hen. & Munf. 563, and in Quarles *v.* Littlepage, 2 id. 401, the action was against the executor; and the point in question was therefore not before the court. On the other hand, in Heylin *v.* Hastings, Carth. 470, it was held, upon the issue of *non assumpsit infra sex annos*, that evidence of a new promise to the executor within six years was admissible, as well as sufficient, to take the case ont of the statute. And such also is the practice in Massachusetts, and in Maine: Baxter *v.* Penniman, 8 Mass. 133, 134; Emerson *v.* Thompson, 16 id. 428; Brown *v.* Anderson, 13 id. 201; Sullivan *v.* Holker, 15 id. 374. Where the issue is *actio non accrevit infra sex annos*, the technical reason for not admitting evidence of an acknowledgment or promise to the executor entirely fails; and, indeed, in any case, a promise to the executor amounts only to an admission that the debt due to the testator has never been paid, but is still subsisting, and therefore is not barred by the statute of limitations. See 5 Binn. 582, 583, per Breckenridge, J.; Angell on Limitations [§ 268, 6th ed.]. {A new promise [or part payment] by an executor, which revives a debt barred by the statute of limitations, will not bind the estate: [Claghorn's Estate, 181 Pa. 600; Milner *v.* Jay, 47 S. C. 430; *contra* in England, if in writing: *Re* Macdonald, 1897, 2 Ch. 181. And see Waughop *v.* Bartlett, 165 Ill. 124; Consolidated N. B. *v.* Hayes, 112 Cal. 75;] but if made on consideration and in writing, and founded on assets, will bind the executor personally: Oates *v.* Lilly, 84 N. C. 643.} [A partial payment does not render the executor personally liable: Milner *v.* Jay, *supra*. Failure of an executor to take any action within a reasonable time upon a claim presented to him does not bind the estate as upon an account stated: Schutz *v.* Morette, 146 N. Y. 137. See *ante*, Vol. I. 179.]

[1] After notice to produce the probate of the will, an office-copy and an extract from the act-book have been held admissible, without proof that the probate was in the defendant's possession, or of the signature of the registrar: Waite *v.* Gale, 9 Jur. 782.

[2] [The liability of an executor *de son tort* does not exist in Alabama: Winfrey *v.* Clarke, 107 Ala. 355.]

execution of orders received from the deceased as his agent, in favor of the vested rights of a third person; or the like, — the party will not thereby be involved in the responsibilities of an executorship.[3] So, if he, in good faith, sets up a colorable title to the possession of the goods of the deceased, though he may not be able to establish it as a completely legal title in every respect, he will not be deemed an executor *de son tort*.[4] And in all these cases the question, whether the party is chargeable as executor *de son tort*, is a mixed question of law and fact, similar to the question of probable cause, in an action for a malicious prosecution, the province of the jury being only to say whether the facts are sufficiently proved.[5]

§ 344. **Plea of Ne Unques Executor.** If the defendant would controvert the fact of the representative character, this is done by the plea of *ne unques* executor, or administrator; in which case the burden of proving the affirmative is on the plaintiff, who must prove, not only the appointment of the defendant to that office, but that he has taken upon himself the trust;[1] and this may be by his proving the will, or taking the oaths, and giving bond, or, if he is charged as executor *de son tort*, by proving acts of intermeddling with the estate. The plaintiff should always take the precaution, where this plea is pleaded, to serve the defendant with notice to produce the letters testamentary, or letters of administration, at the trial, they being presumed to be in his possession; in order to lay a foundation for the introduction of secondary evidence.[2] He must also give some

[3] Williams on Executors, pp. 136–146; 1 Dane's Abr. c. 29, art. 6; Givens *v.* Higgins, 4 McCord 286; Toller on Executors, pp. 37–41. But if the agent, after the decease of his principal, continues to deal with the property on his own responsibility, or as the agent of another, he may be charged as executor: Cottle *v.* Aldrich, 4 M. & S. 175; s. c. 1 Stark. 37; Turner *v.* Child, 1 Dever. 331. See also Mitchell *v.* Lunt, 4 Mass. 654, 658; Hobby *v.* Ruel, 1 C. & K. 716. So, if the agent continues to act as such, after the death of his principal, and in the belief that he is still alive, he has been held liable to a creditor of the deceased, as executor *de son tort:* White *v.* Maun, 13 Shepl. 361. {So, where a man died, leaving no property except some wearing-apparel, and his widow paid out of her own money his doctor's bills and funeral expenses, and gave his brother a suit of clothes of less value than the amount she had expended, she was not held as executor *de son tort:* Taylor *v.* Moore, 47 Conn. 278. The property must be such as would constitute assets in the hands of a regularly appointed executor: Goff *v.* Cook, 73 Ind. 351.}

[4] Femings *v.* Jarratt, 1 Esp. 335; Turner *v.* Child, 1 Dever. 25. The party who knowingly receives goods from an executor *de son tort*, and deals with them as his own, does not himself thereby become an executor *de son tort:* Paull *v.* Simpson, 9 Ad. & El. N. S. 365.

[5] Padget *v.* Priest, 2 T. R. 99, per Buller, J. [The complaint must charge him as executor generally: First N. B. *v.* Lewis, 12 Utah 84.]

[1] [An order of probate without an actual grant thereof is not a probate of the will which will entitle a creditor to sue the executor (Mohammidu *v.* Pitchey, 1894, A. C. 437); nor is an application for probate (ib.; McDonald *v.* Hanna, 100 Mich. 412), or joining in the payment of testator's funeral expenses, not with the funds of the estate (Ralston's Estate, 158 Pa. 645), an acceptance by the executor of the trusts of the will. Application for payment of a debt made by an executor before probate of the will, will prevent his renunciation of the executorship: *Re* Stevens, 1897, 1 Ch. 422.]

[2] 2 Saund. on Plead. & Evid. 511, 512; 2 Stark. Evid. 320; Douglas *v.* Forrest, 4 Bing. 686, 704; Atkins *v.* Tredgold, 2 B. & C. 23, 30; Cottle *v.* Aldrich, 4 M. & S. 175. *Sed quære* as to this presumption; and see Waite *v.* Gale, 2 Dowl. & Lowndes 925; 9 Jur. 782.

evidence of the identity of the party with the person described in the letters as executor or administrator. If the evidence shows the defendant liable as an executor *de son tort*, by intermeddling, he may discharge himself by proof that he delivered the goods over to the rightful executor before action brought, but not afterwards;[3] or, that he subsequently took out letters of administration, and has administered the estate according to law.[4] If he has received the money of third persons, *assumpsit* for money had and received will lie against him, without declaring against him as executor.[5]

§ 345. **Effect of Plea Ne Unques.** By pleading *ne unques executor*, the defendant, if the issue is found against him, will be charged with the whole debt;[1] without being allowed to retain the amount of a debt due from the deceased to himself, even if it is of a higher nature, and he has the assent of the rightful executor, after action brought.[2] But an executor *de son tort* is, in general, liable to creditors only for the amount of the assets in his hands at the time of the action;[3] and, therefore, if he pleads *plene administravit*, he may give in evidence payment of the just debts of the deceased, to any creditors in the same or a superior degree;[4] or, as we have just seen, he may show that, before action brought, he had delivered over the goods in his hands to the rightful executor or administrator.[5]

§ 346. **Plea of Plene Administravit.** If the plaintiff traverses the plea of *plene administravit*, in its material allegation of the want of assets in the defendant's hands, the burden of proof will be on the plaintiff to show that the defendant had assets in his hands at the commencement of the action.[1] If the assets have come to his hands since the pendency of the suit, this should be specially replied, or

[3] Curtis *v.* Vernon, 3 T. R. 587; Vernon *v.* Curtis, 2 H. Bl. 18; Andrews *v.* Gallison, 15 Mass. 325.

[4] Shillaber *v.* Wyman, 15 Mass. 322; Andrews *v.* Gallison, ib. 325.

[5] Waite *v.* Gale, 9 Jur. 782; 2 Dowl. & L. 925.

[1] Anon., Cro. El. 472; Mitchell *v.* Lunt, 4 Mass. 658; Hob. 49 *b*, n. by Williams; Bull. N. P. 144.

[2] Ireland *v.* Coalter, Cro. El. 630; Curtis *v.* Vernon, 3 T. R. 587; 2 H. Bl. 18.

[3] {By statute in Indiana he is liable for the assets which have come into his hands and ten per cent interest thereon: Goff *v.* Cook, 73 Ind. 351.}

[4] Mountford *v.* Gibson, 4 East 441, 445; Toller, Ex'rs, p. 474; [Roggenkamp *v.* Roggenkamp, 32 U. S. App. 453.] And it seems that he may make his defence even against the rightful administrator: Weeks *v.* Gibbs, 9 Mass. 74, 77.

[5] Anon., 1 Salk. 313; Hob. 49 *b*, n. by Williams; Curtis *v.* Vernon, 3 T. R. 587; Vernon *v.* Curtis, 2 H. Bl. 18; Andrews *v.* Gallison, 15 Mass. 325. {When one collected certain notes due the estate, and applied the proceeds to payment of debts due by the estate, and it appeared that the estate had suffered no harm, he was held not liable to the executor for conversion of the notes: Portman *v.* Klemish, 54 Iowa 198. So if he shows that the assets were applied as they would be in regular administration: Brown *v.* Walter, 58 Ala. 310. If the plea is *plene administravit*, or no assets, the plaintiff, in Maine, may have judgment for assets when they shall come into the hands of the administrator: Brown *v.* Whitmore, 71 Me. 65. [An action of debt may be maintained on such a judgment for assets subsequently coming into the defendant's hands: Willis *v.* Tozer, 44 S. C. 1.] When an executor takes, as assets, goods which belong to a third party, he is liable to him as executor: Simpson *v.* Snyder, 54 Iowa 557.}

[1] Bentley *v.* Bentley, 7 Cowen 701. And see Fowler *v.* Sharp, 15 Johns. 323; 2 Phil. Evid. 295; {McKeithan *v.* McGill, 83 N. C. 517.}

the proof will not be admissible.[2] If the action is *debt*, the plea of *plene administravit* is an admission of the whole debt, which therefore the plaintiff will not be bound to prove; but if the action is *assumpsit*, this plea is only an admission that something is due, but not the amount; and therefore the plaintiff must come prepared to prove it.[3]

§ 347. **Assets.** The fact of *assets* in the hands of a defendant, executor or administrator, may be shown by the inventory returned by him under oath, pursuant to law; which devolves on him by the burden of discharging himself from the items which it contains.[1] So, if he has repeatedly paid interest on a bond, or on a legacy, this is *prima facie* evidence of assets.[2] So, if he has given his own promissory note for a debt of the deceased.[3] So, if he has submitted to arbitration, without protesting at the time against its being so taken.[4] So, if he confess judgment, or suffer it to go by default, or it be rendered against him on demurrer to the declaration; or, if he plead a judgment, without averring that he has no assets *ultra;* or plead payment without also pleading *plene administravit,* — this is an admission of assets, and may be used against him in a subsequent action on the judgment, suggesting a *devastavit.*[5] But an award in favor of the estate is no evidence that the executor has received the money;[6] nor is a judgment assets, until the amount is levied and paid.[7] And if there are several executors, and some

[2] Mara *v.* Quin, 6 T. R. 1, 10, 11.

[3] Bull. N. P. 140; Saunderson *v.* Nicholl, 1 Show. 81; Shelley's Case, 1 Salk. 296.

[1] Weeks *v.* Gibbs, 9 Mass. 74; Bull. N. P. 142, 143; Hickey *v.* Hayter, 1 Esp. 313; s. c. 6 T. R. 384; Giles *v.* Dyson, 1 Stark. 32; [Fitch *v.* Randall, 163 Mass. 381.] But the schedule or inventory offered by the executor in the ecclesiastical court, for the purpose of obtaining probate, is not generally any evidence that he has received the effects therein mentioned: Stearn *v.* Mills, 4 B. & Ad. 657.

[2] Corporation of Clergymen's Sons *v.* Swainson, 1 Ves. 75; Cleverly *v.* Brett, 5 T. R. 8, n.; Campbell's Case, Lofft 68; Attorney-Gen. *v.* Higham, 2 Y. & C. 634. But it is not conclusive: Savage *v.* Lane, 6 Hare 32; 17 Law J. Ch. 89; Postlethwaite *v.* Mounsey, 6 Hare 33, n. Whether the probate stamp on a will is admissible, in England, as *prima facie* evidence of assets in the hands of the executor to the amount indicated by the stamp, is not clearly agreed: see Foster *v.* Blakelock, 5 B. & C. 328; Curtis *v.* Hunt, 1 C. & P. 180; Stearn *v.* Mills, 4 B. & Ad. 647; Mann *v.* Lang, 3 Ad. & El. 699.

[3] Bank of Troy *v.* Hopping, 13 Wend. 575; Holland *v.* Clark, 2 Y. & C. 319.

[4] Barry *v.* Rush, 1 T. R. 691; Worthington *v.* Barlow, 7 id. 453; Riddle *v.* Sutton, 5 Bing. 200. But see Pearson *v.* Henry, 5 T. R. 5, *contra.*

[5] Skelton *v.* Hawling, 1 Wils. 258; 1 Saund. 219, n. (8), by Williams; Roberts *v.* Woods, 3 Dowl. P. C. 797; Ewing *v.* Peters, 3 T. R. 685; Rock *v.* Layton, 1 Ld. Raym. 589, better reported in 3 T. R. 690–694, from Lord Holt's own notes.

[6] Williams *v.* Innes, 1 Campb. 364.

[7] Jenkins *v.* Plume, 1 Salk. 207. {Where there is sufficient real estate liable to be sold by due authority, to pay all debts, legacies, and charges, the proceeds of which when sold would be assets, and the owners of the estate, to prevent the sale, offer to pay the amount in money, to pay which it is proposed to be sold, and such offer is accepted and the money paid, especially if done with the approbation of the court giving leave to sell the same, the amount thus received is assets of the estate, to be accounted for and paid as assets: Fay *v.* Taylor, 2 Gray 160. Salary voted to a person after his decease, and paid to his executor, is assets of the estate, to be accounted for by the executor: Loring *v.* Cunningham, 9 Cush. (Mass.) 87. See also Wheelock *v.* Pierce, 6 id. 288; Foot *v.* Knowles, 4 Met. (Mass.) 586.}

are shown to have assets in their hands, and others are not, the latter will be entitled to a verdict.[8]

§ 347 *a.* **Devastavit.** A *devastavit* may be proved by evidence of any act of direct abuse, by the executor or administrator, of the funds intrusted to his management, such as selling, embezzling, or converting them to his own use; or by releasing a claim without payment, or selling property below its known value; or by improperly submitting a claim to arbitration or improperly compounding a debt,[1] having no authority by law so to do; or by payment of usury; or the like; or by proof of any other act, showing maladminstration or negligence, whereby a loss or deterioration of assets has ensued.[2]

§ 348. **Defence under Plene Administravit.** Under the issue of *plene administravit*, the defendant may *rebut the proof of assets*, by showing that he has exhausted them in the payment of other debts of the deceased, not inferior in degree to that of the plaintiff, before the commencement of the action.[1] And if debts of an inferior degree

[8] Parsons *v.* Hancock, 1 M. & Malk. 330.

[1] [McNulty *v.* De Saussure, S. C., 19 S. E. 926.]

[2] See Toller, Ex'r, b. 3 c. 9; 3 Bac. Abr. tit. Executors and Administrators, L; 2 Kent Comm. 416, notes (*a*), (*b*), 5th ed. And see Cooper *v.* Taylor, 8 Jur. 450; Stroud *v.* Dandridge, 1 C. & K. 445. {So where he distributes the estate to the legal heirs before the time allowed by statute for the creditors to put their claims in: Fleece *v.* Jones, 71 Ind. 340. [This rule is not an absolute one: *Re* Kay, 1897, 2 Ch. 518.] But not if he waits that time, and then without notice of any claims against the estate, distributes it: Crane *v.* Moses, 13 S. C. 561.

So if by his negligence a debt becomes uncollectible: Coco's Succession, 32 La. An. 325; Tanner *v.* Bennett, 33 Gratt. (Va.) 251; [Fraley *v.* Thomas, 98 Ga. 375.]

But an executor who distributes an estate, under order of a probate court, and without knowledge of a claim which had not yet accrued, is not liable for a *devastavit*, because he did not require a bond from the distributees: Davis *v.* Van Sands, 45 Conn. 600.

An executor does not commit a waste by failing to keep the fund separate from his own money and ear-marked, unless he fails to meet his liabilities to the estate: State *v.* Cheston, 51 Md. 352; Kirby *v.* State, ib. 383. Cf. Adair *v.* Brimmer, 74 N. Y. 539.

The burden of proving a *devastavit* is on the party alleging it. The personal representative of the deceased, in accounting, is not obliged to show diligence in collecting a debt, until those objecting to the account have shown evidence of negligence: Ritter's Estate, 11 Phila. (Pa.) 12; Johnson's Estate, ib. 83; Kirby *v.* State, 51 Md. 383.}

[The executor or administrator is chargeable on the theory of relation for a *devastavit* committed by him prior to his appointment: Jones *v.* Jones, 118 N. C. 440.

Ignorance of the law will not excuse a *devastavit:* Jones *v.* Jones, *supra.*

It is a *devastavit* for an executor to pay a debt on which judgment has been rendered in favor of the estate on a plea of the statute of limitations filed by a co-executor: Midgley *v.* Midgley, 1893, 3 Ch. 282.]

[1] 6 T. R. 388, per Lawrence, J.; Smedley *v.* Hill, 2 W. Bl. 1105. In the United States, provision is made by statutes for the settlement of insolvent estates, by a liquidation of all the claims, and a *pro rata* distribution of the assets. The application of the plea *plene administravit* to such cases is thus stated by Mr. Justice Story: "It does not appear to me, that upon principle, any special plea of *plene administravit* is necessary, where the assets have been in fact paid according to the directions of the statute of insolvency; for if the assets are rightfully applied, the mode is matter of evidence, and not of pleading. A special *plene administravit* can only be necessary, where the administrator either admits assets to a limited extent, or he sets up a right of retainer for the payment of other debts, to which they are legally appropriated, or he has paid debts of an inferior nature, without notice of the plaintiff's claim. And so is the doc-

have been paid before the commencement of the action, or if debts of a superior degree have been paid while the action was pending, this also may be shown under a special plea; but in the former case, it must be averred and proved that the payment was made without notice of the plaintiff's claim.[2] By the common law, an executor or administrator will be presumed to have notice of judgments of a court of record, and all other debts of record; but of other debts, actual notice must be proved.[3] Where *plene administravit* is pleaded to an action of debt on bond, the defendant must prove that the debts paid were due by bonds sealed and delivered, or that they were of higher degree, and entitled to priority of payment; but where this issue arises in an action for a debt due by simple contract, it is sufficient to prove the prior payment of a debt of any sort, without proof of the instrument by which it was secured; for it is a good payment in the course of administration.[4] In either case, the creditor is a competent witness, to prove both the existence of his debt and the payment of the money;[5] but where the debt is said to have been due by bond, which has been destroyed, it has been thought that the attesting witnesses, or some other evidence of the existence of the bond, ought to be produced.[6]

§ 349. **Same Subject.** Under this issue, the defendant, by the

trine of the common law, according to the better authorities. In the next place, it seems to me that there may be cases where the estate may be insolvent, and yet the administrator would not be bound to procure a commission, and proceed under the statute of insolvency. If, for example, the assets were less than the privileged or priority debts, a commission of insolvency would be utterly useless to the other creditors; and surely the law would not force the administrator to nugatory acts. In such a case, it seems to me that a general *plene administravit* would be good, if the administrator had in fact applied the assets in discharge of such debts. If he had not so applied them, then he might specially plead these debts and no assets *ultra*. Other cases may be put of an analogous nature, and unless some stubborn authority could be shown, founded in our local jurisprudence (and none such has been produced), I should not be bold enough to overrule what I consider a most salutary doctrine of the common law. Judgments, bonds, and some other debts at the common law are privileged debts, and are entitled to a priority of payment. And yet, if the administrator have no notice, either actual or constructive, of such privileged debts, he will be justified in paying debts of an inferior nature, provided a reasonable time has elapsed after the decease of the intestate. And in principle, there cannot be any just distinction, whether such payment be voluntary or compulsive. But in such case, if he be afterward sued for such privileged debt, he cannot plead *plene administravit*, generally, but is bound to aver, that he had fully administered before notice of such debt:" U. S. *v.* Hoar, 2 Mason 317, 318.

[2] Sawyer *v.* Mercer, 1 T. R. 690; Anon., 1 Salk. 153; Toller, Ex'r, 269. But where the executor, more than a year after the decease of the testator, had paid all the debts and legacies, and paid over the remainder of the estate to the residuary legatee, without notice of any other claim, this was held admissible and sufficient, under the *plene administravit:* Gov., etc. of Chelsea Waterworks *v.* Cowper, 1 Esp. 275, per Ld. Kenyon.

[3] 1 Com. Dig. 352, tit. Administration, C, 2; Dyer, 32 *a*. By statute 4 & 5 W. & M. c. 20, all judgments not docketed, or abstracted and entered in a book kept for that purpose, are reduced to the footing of simple contract debts: Hickey *v.* Hayter, 6 T. R. 384; Toller, Ex'r, 268.

[4] Bull. N. P. 143; Saunderson *v.* Nicholl, 1 Show. 81.

[5] Bull. N. P. 143; Kingston *v.* Gray, 1 Ld. Raym. 745.

[6] Gillies *v.* Smither, 2 Stark. 528; *ante*, Vol. I. § 84, n. 2, *ad calc.* [Also Vol. I. §§ 563 *a*, *et seq.*]

common law, may in certain cases give in evidence a *retainer* of assets to the amount of a debt of the same or a higher degree, due to himself;[1] or, to the amount of the expenses of administration, for which he has made himself personally responsible;[2] or, to the amount of debts of the same or a higher degree, which he has paid out of his own money, before the commencement of the action.[3] But if the payment was made to a co-executor, to be paid over to the plaintiff, which he has not done, it is no defence; the receiver being in that case made the agent of the defendant himself, and not of the plaintiff.[4] But in most of the United States, the right of an executor or administrator to retain for a debt due to himself or for moneys which he has paid for expenses of administration, has been qualified by statutes, not necessary here to be stated;[5] so that, ordinarily, he cannot retain for his own debt, until it has been proved and allowed in the court where the estate is settled, and then only under its decree, upon the settlement and allowance of his account of administration.

§ 350. **Plea of Retainer.** In order to sustain the claim of *retainer*, it is necessary for the party to show that he has been rightfully constituted executor or administrator; and for this cause, as well as to prevent strife among creditors, an *executor de son tort* cannot retain for his own debt, even though it be of higher degree, unless he has since duly received letters of administration. But under the plea of *plene administravit*, he may show that he has paid other debts, in their order; or that, before action brought, he had delivered all the assets in his hands to the rightful executor or administrator.[1]

§ 351. **Special Pleas.** If the defendant would give in evidence the existence of outstanding *debts of a higher nature*, entitled on that account to be preferred, but not yet paid, he can do this only under special plea. If the debts are due by obligations already forfeited, the penalties are ordinarily to be taken as the amount of the debt; unless, by a proper replication, it is made to appear that the penalty is kept on foot by fraud. But if the obligation is not yet forfeited, the sum in the condition is to be regarded as the true debt, and assets can be retained only to that amount; for the executor, by payment of this sum, may save the penalty; and if he does not, it will be a *devastavit*.[1] In these cases, when the defendant seeks to

[1] Bull. N. P. 140, 141; Co. Lit. 283 *a*; Plumer *v.* Marchant, 3 Burr. 1380; 1 Saund. 333, n. (8), by Williams; [*Re* Giles, 1896, 1 Ch. 956; Lillard *v.* Noble, 159 Ill. 311.]

[2] Gillies *v.* Smither, 2 Stark. 528.

[3] Bull. N. P. 140; Smedley *v.* Hill, 2 W. Bl. 1105.

[4] Crosse *v.* Smith, 7 East 246, 258.

[5] [As to the effect of the statute of limitations on claims of the executor against the decedent's estate, see Kuhlman's Estate, 180 Pa. 109, 178 id. 43; Glover *v.* Patten, 165 U. S. 394.]

[1] Bull. N. P. 143; Chitty's Prec. p. 301; Curtis *v.* Vernon, 3 T. R. 587, 590; Anon., 1 Salk. 313; Oxenham *v.* Clapp, 3 B. & Ad. 309.

[1] U. S. *v.* Hoar, 2 Mason 311; Bull. N. P. 141; 1 Saund. 333, notes (7), (8), by Williams; id. 334, n. (9); Parker *v.* Atfield, 1 Salk. 311 If a bond creditor, after forfeiture, would have taken less than the penalty, and the executor had assets

retain the assets in his hands to meet debts of a higher nature, whether by bond or judgment, though the plea, in point of form, contains an averment of the precise value of the goods in his hands, yet the substance of the issue is, that the value of the goods, whatever it be, is not greater than the amount actually due on the bond or judgment.[2] And where an outstanding judgment is pleaded, with a replication of *per fraudem*, the judgment creditor is not a competent witness for the defendant to disprove the fraud.[3] If several judgments or debts are pleaded, and the plea is falsified as to any of them, the plaintiff will be entitled to recover.[4]

§ 352. **Admission by one of Several Executors.** Where there are *several* executors or administrators, an *admission by one of them* that the debt is still due is held not sufficient to enable the plaintiff to recover against the others; though it may be properly admissible, as a link in the chain of testimony against them.[1] Nor is such admission by one sufficient to take the case out of the statute of limitations as to all.[2]

to the amount required, which he did not pay, it is evidence of fraud: ibid. And if a judgment is confessed for more than is actually due, this is *prima facie* evidence of fraud; but the defendant may rebut it by proof that it was done by mistake: Pease *v.* Naylor, 5 T. R. 80.

[2] Moon *v.* Andrews, Hob. 133; 1 Saund. 333, n. (7), by Williams.

[3] Campion *v.* Bentley, 1 Esp. 343.

[4] Ibid.; Bull. N. P. 142; Parker *v.* Atfield, 1 Salk. 311; 1 Ld. Raym. 678. But see 1 Saund. 347, n. (1), by Williams.

[1] James *v.* Hackley, 15 Johns. 277; Forsyth *v.* Ganson, 5 Wend. 558; Hammon *v.* Huntley, 4 Cowen 493.

[2] Tullock *v.* Dunn, Ry. & M. 416; *ante*, Vol. I. §§ 176, [179]; [Midgley *v.* Midgley, 1893, 3 Ch. 282.] But see Hammon *v.* Huntley, 4 Cowen 493.

HEIR.

§ 353. **Evidence of Heirship.** The rules of evidence, applicable to the proof of *pedigree* in general, having been considered in the preceding volume,[1] the present title will be confined to the evidence of heirship, where this fact is particularly put in issue, as the foundation of a claim of right, or of liability.

§ 354. **Same Subject.** Where A claims as the heir of B, it will be necessary to establish, first, affirmatively, their relationship through a common ancestor; and, secondly, negatively, that no other descendant from the same ancestor exists, to impede the descent to A.[1] Thus, in ejectment, where it was incumbent on the lessor of the plaintiff to prove that a younger brother of the person last seised, from whom he deduced his title, was dead, without issue, the testimony of an elderly lady, a member of the family, that the younger brother had many years before gone abroad when a young man, and according to repute in the family had died abroad, and that she never had heard in the family of his having been married, was held *prima facie* evidence of his having died without issue.[2] But where the death is only proved in such case, without some negative proof of the existence of issue, it is not sufficient; the plaintiff being bound to remove every possibility of title in another, before he can recover against the person in possession.[3] Thus, also, if it were requisite to

[1] See *ante*, Vol. I. §§ 103–107, 131–134, [114 *b*–114 *g*].

[1] [Metheny *v.* Bohn, 160 Ill. 263; Davidson *v.* Wallingford, 88 Tex. 619.]

[2] Doe *v.* Griffin, 15 East 293.

[3] Richards *v.* Richards, 15 East 293, n.; [Still *v.* Hutto, 48 S. C. 415; Posey *v.* Hanson, 10 App. D. C. 496.] {By statute in most of the United States, the laws of descent by primogeniture, as they existed at common law, have been abrogated, and several may be co-heirs, as, for instance, in those States where all the children are heirs. In such cases, although the mode of proof is somewhat changed, yet the principle remains, that any one who asserts that he and others are heirs must prove that others who might also be heirs are not.

Thus, where one sues as heir, he must show that the widow of the ancestor, if she is by law a co-heir, has either received the share to which she is entitled or has waived her right to it, so as to make him the only claimant: Schneider *v.* Piessner, 54 Ind. 524.

So where several joined in claiming as heirs of a deceased person, and proved that the deceased originally came from a certain place in Ireland and that he often, among his friends, had spoken by name of his father and brothers, half-brothers, and a sister, as still residing in that place, and the claimants then proved that their father lived in the same locality, that it was common repute in their family that they had an uncle in America of the same name as the deceased, that their father had brothers, and a half-brother, and a sister, and that their names corresponded with the names mentioned by the deceased, and that the name of their paternal grandfather corresponded with that of the father of the deceased, as given by him, and that the claimants were

establish the title of A, as heir-at-law to his cousin-german, B, it would be necessary to prove the marriage and death of their common grandparents, and of their respective parents, through whom the title was deduced; that these were the legitimate children of the common ancestor; and that A and B were also the lawful issue of their parents; with evidence to show that no other issue existed, who would take the preference to A. But in *charging* one as heir, general evidence of heirship will be sufficient to be adduced on the part of the plaintiff, it being a matter more peculiarly within the defendant's own knowledge.[4] Thus, if he is in possession of the property of the deceased, or has received rents from his tenants, it is to be presumed that he claims them as heir.[5]

§ 355. **Death.** After a *long lapse of time* since the death of one who might have been entitled without any adverse claim, it may be presumed that he died without issue.[1] The fact of the death of a party, but not the time of it, will be presumed after the expiration of *seven years* from the time when he was last known to be living.[2] And it may be inferred from the grant of *letters of administration* on his estate, in the absence of any controlling circumstances; since it is not the course to grant administration, without some evidence of the death.[3]

§ 356. **Liability of Heir.** The *liability of an heir* generally arises upon the obligation of the ancestor by deed, in which the heir is expressly bound. He is liable, at common law, to an action of debt on the bond of his ancestors, if specially named;[1] and in England, by statute, to an action of covenant. The like remedies have also been given against devisees, by statutes. But the remedy in effect is rather against the lands of the obligor, in the hands of the heir, than against the person of the heir; and it cannot be extended beyond the value of the assets descended, unless the heir, by neglecting to show the certainty of them, should render himself personally liable.[2] For if he should plead that he has nothing by descent, and the jury

the sole surviving descendants of their father, and that all his brothers, sisters, and half-brothers were dead and had no descendants surviving, it was held that these facts constituted a sufficient proof of the heirship of the claimants: Cuddy *v.* Brown, 78 Ill. 415.] [Testimony that the ancestor was married and that the claimants are his only living descendants is sufficient: Western Union Beef Co. *v.* Thurman, 30 U. S. App. 516.]

[4] See *ante*, Vol. I. § 79.

[5] Derisley *v.* Custance, 4 T. R. 75.

[1] Doe *v.* Wolley, 8 B. & C. 22; s. c. 3 C. & P. 402.

[2] Doe *v.* Jesson, 6 East 85, per Ld. Ellenborough; *ante*, Vol. I. § 41. The time of the death is to be inferred from the circumstances: Doe *v.* Nepean, 5 B. & Ad. 86; Rust *v.* Baker, 8 Sim. 443; *supra*, tit. Death. [A mere failure to hear from the heir at the residence of the ancestor, no inquiries having been made at the place of the heir's last known residence, is not proof that the heir died without issue after the lapse of seven years: McRee *v.* Copelin, Cir. Ct. St. Louis, Mo., 2 Cent. L. J. 813.]

[3] See *ante*, Vol. I. § 550; Succession of Hamblin, 3 Rob. (La.) 130. [But see *ante*, § 339, n.]

[1] Co. Lit. 209 *a*; [Pyatt *v.* Waldo, 85 F. 399.]

[2] 2 Saund. 7, n. (4), by Williams.

should find that he has anything, however small in amount, the plea will be falsified, and the plaintiff will be entitled to a general judgment for his entire debt; whereas if he should confess the debt, and show the amount of the assets in his hands, he will be answerable only to this amount.[3]

§ 357. **Estate a Trust Fund.** In the United States, the entire property of the deceased, real as well as personal, constitutes a *trust fund* for the payment of his debts. The modes in which this trust is carried into effect are various, and are usually prescribed by statutes, but in some States the forms of remedy are left at common law. The general feature, that the personalty must first be resorted to, is uniformly preserved; and in several of the States, the executor or administrator is empowered by license from the courts, after exhausting the personal assets to enter upon and sell the real estate, whether devised or not, to an amount sufficient to discharge the debts. Ordinarily, therefore, in the first instance, the creditor must resort to the personal representative, and not to the heir, for the payment of the debt;[1] unless the cause of action, as in the case of a covenant of warranty, not previously broken, did not accrue until all remedy against the executor or administrator was barred by the statute of limitations.[2]

[3] 2 Saund. 7, n. (4), by Williams; Plowd. 440; 2 Roll. Abr. 71; Buckley *v.* Nightingale, 1 Stra. 665. The plea of *non est factum*, if found against the heir, is not such a false plea as will render him liable *de bonis propriis:* 2 Saund. 7, n. (4); Jackson *v.* Rosevelt, 13 Johns. 97.

[1] [Minter *v.* Burnett, 90 Tex. 245; Prefontaine *v.* McMicker, 16 Wash. 16; Hamlin *v.* Mansfield, 88 Me. 131; Majorowicz *v.* Payson, 153 Ill. 484; Steinback *v.* Harris, 115 N. C., 100. See also next note. But it is not necessary for an administrator *de bonis non* to show that the bond of the first administrator has been exhausted: Monger *v.* Kelly, 115 N. C. 294; Buel's Appeal, 60 Conn. 63.]

[2] 4 Kent Comm. 421, 422; Hutchinson *v.* Stiles, 3 N. H. 404; Webber *v.* Webber, 6 Greenl. 127; Royce *v.* Burrell, 12 Mass. 395; Hall *v.* Bumstead, 20 Pick. 2; Roe *v.* Swazey, 10 Barb. 247; [Gillespie *v.* Hauenstein, 72 Miss. 838. Ordinarily if the action against the personal representative is barred, the creditor cannot resort to the real estate in the hands of the heir: Woods *v.* Ely, 7 S. D. 471; Bullard *v.* Perry, 66 Vt. 479.]

{It has been decided in some States that in an action of this sort brought against an heir there should be proof that the estate of the deceased has been settled in the probate court: Grow *v.* Dobbins, 128 Mass. 271; Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

But the more general rule seems to be that it is enough to prove that the personal assets are insufficient to pay the debts: Blossom *v.* Hatfield, 24 Hun (N. Y.) 275; Laughlin *v.* Heer, 89 Ill. 119; McLean *v.* McBean, 74 id. 134; Hinton *v.* Whitehurst, 71 N. C. 66.

The heir is not liable for debts contracted by the administrator of the ancestor in the course of administration: Allen *v.* Poole, 54 Miss. 323.

When the action is against the heir, to subject lands descended to him, to debts of the ancestor, a previous judgment on suit brought against the executor by the heir on the same cause of action is not evidence against the heir: Lehman *v.* Bradley, 62 Ala. 31.

As between the creditors of the ancestor and the creditors of the heir, it has been held that when the heir to whom lands have descended becomes insolvent, his creditors can only take what surplus remains after his liability for debts of the ancestor has been satisfied up to the value of the land descended: Ryan *v.* McLeod, 32 Gratt. (Va.) 367. If the heir has aliened the lands he is liable for their value, that is, their value at the time he received them, and he is not liable for rents and profits, nor for

§ 358. **Sale of Land by Executor.** Wherever the executor or administrator, by the statutes alluded to, is authorized to apply to the courts for leave to sell the land of the deceased, for the payment of his debts, the heir takes the land subject to that right and contingency; and when the land is thus sold, the title of the heir is defeated, and he has nothing by descent, and may well plead this plea in bar of an action, brought against him by a creditor, upon the bond of his ancestor.[1]

§ 359. **Plea of Riens per Descent.** The plea of *riens per descent* admits the obligation; but the proof of assets is incumbent on the plaintiff.[1] And the substance of this issue is, whether the defendant had assets or not. The place, therefore, is not material to be proved; nor is it material whether the land was devised by the ancestor, or not, nor whether it was charged with the payment of debts or legacies, or not, provided the heir takes the same estate which would have descended to him without the will, its nature and quality not being altered by the devise.[2] But it is material for the plaintiff, where he declares against the defendant as the immediate heir of the obligor, to show that the assets came to the defendant as heir of the obligor, and not of another person, for where the obligor died seised of the lands, leaving issue, and the issue died without issue, where-

increased value arising from improvements which he has made on the land, neither can he deduct anything for repairs: Fredericks *v.* Isenman, 41 N. J. L. 212; Hopkins *v.* Ladd, 12 R. I. 279: [But see § 359, n. 6.] In any event the heir is only liable to the extent of the value of the property which has come to him from the ancestor: Branger *v.* Lacy, 82 Ill. 91; Williams *v.* Erving, 31 Ark. 229; Sauer *v.* Griffin, 67 Mo. 654. In Arkansas it is said that no action at law will lie against an heir, for his ancestor's debt, but the suit should be in equity: Hendricks *v.* Keesee, 32 Ark. 714.}

[1] Covel *v.* Weston, 20 Johns. 414. And see Gibson *v.* Farley, 16 Mass. 280. {The heir is entitled to the rents and profits of the land till the sale, and is not accountable for them to the creditors of his ancestor: Draper *v.* Barnes, 12 R. I. 156; Hopkins *v.* Ladd, ib. 279; Fredericks *v.* Isenman, 41 N. J. L. 212; Harrington *v.* Barfield, 30 La. An. Pt. II. 1297. [Nor is a purchaser accountable for rents collected by the heir without notice of such collection: Jackson *v.* Wilson, 76 Md. 567.] Where the land of one deceased is taken for a railroad, the heir, and not the administrator, is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator has previously represented the estate to be insolvent, and afterwards obtains a license to sell the intestate's real estate for the payment of debts: Boynton *v.* Peterboro', etc. Ry. Co., 4 Cush. (Mass.) 467. The case was this: Oliver Page died intestate, seised of real estate, leaving one daughter, his heir-at-law. His whole real and personal estate was insufficient to pay his debts. His administrator obtained a license to sell the real estate. After the death of the intestate, but before the license was obtained, the railroad corporation filed the location of their road, by which a part of said real estate was taken for the railroad. The question was, whether the heir or the administrator should have the damages for the land thus taken; and the court held, that, as the right to damages for land taken for public use accrues at the time of taking, and as in the case of railroads that time is *prima facie*, and in the absence of other proof, the time of filing the location, and as the heir-at-law was seised and possessed of the estate taken at the time of the taking, subject only to be defeated by a sale, not then made, nor authorized and licensed by competent authority to be made, the heir was entitled to the damages: ibid. See also Wilson *v.* Wilson, 13 Barb. (N. Y.) 252; Vansyckle *v.* Richardson, 13 Ill. 171.}

[1] [Bacon *v.* Thornton, 16 Utah 138.]

[2] Bull. N. P. 175; Allam *v.* Heber, 2 Stra. 1270; {Ellis *v.* Paige, 7 Cush. (Mass.) 161; Gilpin *v.* Hollingsworth, 3 Md. 190; Buckley *v.* Buckley, 11 Barb. (N. Y.) 43.}

upon the lands descended to the defendant as heir, not of the obligor, but of the obligor's son, the plea of *riens per descent* directly from the obligor was held maintained.[8] And where the ancestor of the obligor died seised of a reversion expectant on a lease for years, leaving the obligor his heir, but no rent was paid to the obligor, the lands being supposed to have passed to a stranger by devise from the ancestor; yet it was held that the possession of the tenant was in law the possession of the heir, and so the obligor was seised in fact, and the land became assets in the hands of his heir, whose plea of *riens per descent* from the obligor was therefore falsified.[4] But if the intermediate heir was never seised, his successor in the same line of descent would take as heir to the obligor, who was last seised, and be liable accordingly.[5] Under this plea, by the common law, the heir might show that, prior to the commencement of the suit, he had in good faith aliened the lands; but this has been changed by statute.[6]

§ 360. **Assets.** In *proof of assets*, it will be sufficient for the plaintiff to show that the defendant is entitled, as heir, to a reversion in fee after a mortgage or lease for years; or to a reversion expectant upon an estate tail, provided the limitation in tail has expired, and the reversion has vested in possession, in the heir. But a reversion after a mortgage in fee is not assets at law, though it is in equity.[1] A reversion expectant upon an estate for life is also assets; but it must be pleaded specially.[2]

§ 361. **Same Subject.** Whether lands lying in a *foreign state* or country can be regarded as assets, so as to charge the heir, is a point not perfectly clear. In one American case it has been decided that they were not. No reasons were given for the decision; but cogent arguments were urged by the learned counsel for the creditor, showing that upon principle, as well as by analogy of law, the heir was chargeable.[1]

[8] Jenks's Case, Cro. Car. 151; Kellow *v.* Rowden, 2 Mod. 253; Chappell *v.* Lee, 3 Mod. 256; Duke *v.* Spring, 2 Roll. Abr. 709, pl. 62.

[4] Bushby *v.* Dixon, 3 B. & C. 298.

[5] Kellow *v.* Rowden, 2 Mod. 253; s. c. 1 Show. 244.

[6] 2 Saund. 7, n. (4), by Williams; Bull. N. P. 175; {Ticknor *v.* Harris, 14 N. H. 272.} [In some States the common-law rule remains, and the land alone is liable, so that the heir is not bound to refund when he has sold the lands (Armstrong *v.* Loomis, 97 Mich. 577); nor when they have been taken on execution against him for his individual debt (Muldoon *v.* Moore, 55 N. J. L. 410). This rule has been changed by statute in New Jersey: Ransom *v.* Brinkerhoff, 38 A. 919, N. J. Eq.]

[1] 2 Saund. 7, n. (4), by Williams; Plunkett *v.* Penson, 2 Atk. 294; Bushby *v.* Dixon, 3 B. & C. 298.

[2] Bull. N. P. 176; Kellow *v.* Rowden, 3 Mod. 253; s. c. Carth. 126; Anon., Dyer 373 (*b*). {Where a person makes a deed which conveys no estate, the land descends to his heir, who takes it unconditionally, and he is not obliged to restore the consideration received by his ancestor: Flanders *v.* Davis, 19 N. H. 139.}

[1] Austin *v.* Gage, 9 Mass. 395. See Dowdale's Case, 6 Co. 46; Covell *v.* Weston, 20 Johns. 414. The reference in 1 Vern. 419, to Evans *v.* Ascough, Latch 234, that lands in Ireland were assets against the heir in England, but that lands in Scotland

were not, is erroneous; no such point being mentioned in that case, which was only a question of chancery jurisdiction. The mistake has arisen from a misprint of *and* for *as*. {Where land in Ohio descended to a resident in Kentucky, and it did not appear that by the laws of Ohio a descent of lands to an heir were assets which rendered him liable to the debts of his ancestor, the heir was held not to be liable to a creditor of his ancestor for the lands so descended as assets: Brown *v.* Brashford, 11 B. Mon. (Ky.) 67.} [Lands in different jurisdictions are liable to contribute *pari passu:* Lewis *v.* Doerle, 28 Ont. 412.]

INFANCY.

§ 362. **Infancy a Personal Privilege.** Infancy is a personal privilege or exception, to be taken advantage of only by the person himself; and the *burden of proof* rests on him alone, even though the issue is upon a ratification of his contract, after he came of age.[1] The trial by common law is either upon inspection by the court, or, in the ordinary manner of other facts, by the jury; but in the United States the latter course only is practised.[2]

§ 363. **Proof of Age.** The *fact of the party's age* may be proved by the testimony of persons acquainted with him from his birth; or, by proof of his own *admissions;* for these are receivable, even in criminal cases, the infant being regarded as competent to confess the truth in fact, though he may lack sufficient discretion to make a valid contract.[1] An entry of his *baptism* in the register is not of itself proof of his *age;* but if it is shown to have been made on the information of the parents, or others similarly interested, it may be admitted as a declaration by them; and in the ecclesiastical courts, it is strong adminicular evidence of minority.[2] If the action is against the acceptor of a bill, the defendant upon the issue of infancy must distinctly prove not only his real age, but also the day on which he accepted the bill; unless he is proved to have been under age at the commencement of the action; for otherwise it does not appear that he was an infant at the time he entered into the contract, the date of the bill not being even presumptive evidence of the time of acceptance.[3]

§ 364. **Infancy as a Defence.** The defence of *infancy,* to an action of assumpsit, is *avoided* by showing, either (1) that the consideration of the promise was *necessaries* furnished to him;[1] or (2) a ratifi-

[1] Borthwick *v.* Carruthers, 1 T. R. 648; Leader *v.* Barry, 1 Esp. 253; Jenne *v.* Ward, 2 Stark. 326.

[2] Silver *v.* Shelback, 1 Dall. 165. [See *ante*, Vol. I. §§ 14 *l*, 113 *c*. 430 *k*.]

[1] Haile *v.* Lillie, 3 Hill (N. Y.) 149; McCoon *v.* Smith, ib. 147; Mather *v.* Clark, 2 Aikens 209; {O'Neill *v.* Read, 7 Ir. L. 434.} But his admission should be weighed cautiously, with reference to his age and understanding: State *v.* Guild, 5 Halst. 163, 189, 190.

[2] Wihen *v.* Law, 3 Stark. 63; Burghart *v.* Angerstein, 6 C. & P. 690; Agg *v.* Davies, 2 Phil. 345; Jenne *v.* Ward, 2 Stark. 326; Rex *v.* Clapham, 4 C. & P. 29. In the United States, where births are required by law to be recorded, a copy of the record is usually received as sufficient evidence of the facts it recites, which it was the officer's duty to record.

[3] Israel *v.* Argent, 1 Chitty's Prec. 314, n. (*b*); Blyth *v.* Archbold, ib.

[1] [In England and Rhode Island contracts for an infant's benefit are binding on him: Evans *v.* Moore, 1892, 3 Ch. 502; Clements *v.* London, etc. R., 1894, 2 Q. B. 482;

cation of the contract, by a *new promise* after he came of age.[2] Upon the issue of necessaries or not, when specially pleaded, no evidence of minority is requisite, it being admitted by the course of pleading. The burden of proving the issue of necessaries is on the plaintiff.

§ 365. **What are Necessaries.** *Necessaries* are such things as are useful and suitable to the party's state and condition in life, and not merely such as are requisite for bare subsistence.[1] And of this the jury are to judge, under the advice and control of the court.[2] It has been held, that *money lent* to an infant, to supply himself with necessaries, is not recoverable;[3] but if the necessaries were previously specified and were actually purchased, it seems that an action for the goods, as furnished by the plaintiff through the agency of the infant himself, may be maintained.[4] And payments of wages to an infant, in order to purchase necessaries, have been held valid payments.[5] Regimentals for an infant member of a volunteer military

Pardey *v.* American Ship-Windlass Co., 37 A. 706, R. I. The more general doctrine in this country is that an infant's contracts for necessaries are voidable, but that he is liable in quasi-contract for the value of the necessaries: Gregory *v.* Lee, 64 Conn. 407; Keener on Quasi-Contracts, 20; Harriman on Contracts, 232.]

[2] {It is not a sufficient answer to a plea of infancy in an action on a contract, that the infant fraudulently represented himself to be of full age: Merriam *v.* Cunningham, 11 Cush. (Mass.) 40; Burley *v.* Russell, 10 N. H. 184;} [Sims *v.* Everhardt, 102 U. S. 300; Studwell *v.* Shapter, 54 N. Y. 249; Wieland *v.* Kobick, 110 Ill. 16; Carpenter *v.* Carpenter, 45 Ind. 142; *contra*, Pemberton, etc. Assn. *v.* Adams, 53 N. J. Eq. 258. This rule is changed by statute in some States.]

[1] Peters *v.* Fleming, 6 M. & W. 42; Burghart *v.* Angerstein, 6 C. & P. 690; Wharton *v.* Mackenzie, 5 Ad. & El. N. S. 606, 611. {"It (necessaries) is a flexible and not an absolute term, having relation to the infant's condition in life, to the habits and pursuit of the place in which, and the people among whom, he lives, and to the changes in those habits and pursuits occurring in the progress of society." By Thomas, J., Breed *v.* Judd, 1 Gray (Mass.) 458.}

[2] Ibid.; Harrison *v.* Fane, 4 Jur. 508; 1 Scott N. R. 287; S. C. 1 M. & G. 550; Brayshaw *v.* Eaton, 5 Bing. N. C. 231; Peters *v.* Fleming, 6 M. & W. 42; Stanton *v.* Wilson, 3 Day 57; Beeler *v.* Young, 1 Bibb 519. If, upon the trial of this issue, any part of the articles are proved to be necessaries, the evidence ought to be left to the jury: Maddox *v.* Miller, 1 M. & S. 738. {It is the province of the court to determine whether the articles sued for are within the class of necessaries, and it is the proper duty of the jury to pass upon the questions of the quantity, quality, and their adaptation to the condition and wants of the infant: Merriam *v.* Cunningham, 11 Cush. (Mass.) 40. See Swift *v.* Bennett, 10 id. 437.}

[3] Probart *v.* Knouth, 3 Esp. 472, n.; Bull. N. P. 154. An infant is liable for such goods furnished to him to trade with as were consumed as necessaries in his own family: Tuberville *v.* Whitehouse, 1 C. & P. 94.

[4] Ellis *v.* Ellis, 1 Ld. Raym. 344; 3 Salk. 197, pl. 11; 12 Mod. 197; Marlow *v.* Pitfield, 1 P. Wms. 558; Earle *v.* Peale, 1 Salk. 386; Crantz *v.* Gill, 2 Esp. 472, n. (1), by Mr. Day; Randall *v.* Sweet, 1 Denio 460, per Bronson, J. It has been recently decided in New York, that *money* lent for the purchase of necessaries, and actually so applied, may be recovered in an action for money lent: Smith *v.* Oliphant, 2 Sandf. S. C. 306. Money advanced to procure his liberation from lawful arrest on civil process is necessary: Clarke *v.* Leslie, 5 Esp. 38. An infant widow is bound by her contract for the expenses of her husband's funeral, he having left no assets: Chappel *v.* Cooper, 13 M. & W. 252. {So is an infant bride for legal expenses in preparing a marriage settlement: Helps *v.* Clayton, 16 C. B. N. S. 553. Or an infant for defending him in a bastardy suit, if it is reasonable to defend: Barker *v.* Hibbard, 54 N. H. 539.}

[5] Hedgley *v.* Holt, 4 C. & P. 104. {An infant is liable for money paid at his request by the plaintiff to a third person for necessaries furnished the infant: Swift *v.* Bennett, 10 Cush. (Mass.) 436. If one who is a surety on a note given by an infant for necessa-

company;[6] and a livery for a minor captain's servant;[7] and a horse for an infant nearly of age, advised by his physician to take exercise on horseback; have been held necessary.[8] A chronometer, ordered by a lieutenant in the navy, has been held otherwise.[9]

§ 366. **What are not Necessaries.** The evidence of necessaries may be *rebutted* by proof that the party lived under the roof of his parent, who provided him with such things as in his judgment appeared proper;[1] or, that he had already supplied himself with the like necessaries, from another quarter;[2] or, that a competent allowance was made to him by his guardian for his support;[3] or, that he was properly supplied by his friends.[4] It is ordinarily incumbent on the tradesman, before he trusts an infant for goods apparently necessary for him, to inquire whether competent provision has not already been made for him by others;[5] but there is no inflexible rule of law, rendering inquiries into the infant's situation and resources absolutely indispensable, as a condition precedent to the right to recover.[6] And the necessity for any inquiry, where otherwise it would be incumbent on the tradesman, may be done away by the conduct of the other parties; as, for example, if the goods were delivered with the knowledge of the parent, and without objection from him.[7]

§ 367. **Ratification of Contract.** Upon the issue of a subsequent ratification of the contract by a *new promise*, the burden of proof is

ries pays the money, the infant must reimburse him: Conn *v.* Coburn, 7 N. H. 368. Where a negotiable note is given by an infant, the promisee, if he brings an action thereon, may show that it was given in whole, or in part, for necessaries, and may recover thereon as much as the necessaries for which it was given were really worth: Earle *v.* Reed, 10 Met. (Mass.) 387;} [Trainer *v.* Trumbull, 141 Mass. 527. This doctrine seems peculiar to Massachusetts.]

[6] Coates *v.* Wilson, 5 Esp. 152.

[7] Hands *v.* Slaney, 8 T. R. 578.

[8] Hart *v.* Prater, 1 Jur. 623. But, generally, a horse is not necessary: Rainwater *v.* Durham, 2 Nott & McC. 524. {Wine suppers are not necessaries for Oxford undergraduates: Cripps *v.* Hills, 5 Q. B. 606.}

[9] Berolles *v.* Ramsay, Holt's Cas. 97. And see Charters *v.* Bayntum, 7 C. & P. 52. {An infant is not liable for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father: Mason *v.* Wright, 13 Met. (Mass.) 306. Nor can he be held to pay for repairs put upon his dwelling-house under a contract made by him, although the repairs were necessary to prevent immediate and serious injury to the house: Tupper *v.* Cadwell, 12 id. 559. The board of four horses for six months, the principal use of which by the infant was in the business of a hackman, is not within the class of necessaries, although the horses were occasionally used to carry his family out to ride: Merriam *v.* Cunningham, 11 Cush. (Mass.) 40.}

[1] Borrinsale *v.* Greville, 1 Selw. N. P. 128; Bainbridge *v.* Pickering, 2 W. Bl. 1325; Cook *v.* Deaton, 3 C. & P. 114.

[2] Burghart *v.* Angerstein, 6 C. & P. 690.

[3] Mortara *v.* Hall, 6 Sim. 465; Burghart *v.* Hall, 4 M. & W. 727.

[4] Story *v.* Pery, 4 C. & P. 526; Angell *v.* McLellan, 16 Mass. 31; Wailing *v.* Toll, 9 Johns. 141.

[5] Ford *v.* Fothergill, Peake's Cas. 229; s. c. 1 Esp. 211; Cook *v.* Deaton, 3 C. & P. 114.

[6] Brayshaw *v.* Eaton, 5 Bing. N. C. 231; s. c. 7 Scott 183; 3 Jur. 222.

[7] Dalton *v.* Gib, 5 Bing. N. C. 198; s. c. 7 Scott 117; 3 Jur. 43.

on the plaintiff, the fact of infancy being admitted by the pleadings. But proof of the promise is sufficient, without proof that the party was then of full age.[1] The contracts and acts of an infant are in general voidable, and capable of confirmation when he comes of age; those alone being treated as absolutely void which are certainly and in their nature prejudicial to his interest.[2] Thus, his negotiable promissory note, though formerly considered void, is now held voidable only;[3] and his statement of an account is also now held capable of ratification after he comes of age.[4] There is, however, a distinction between those acts and words which are necessary to ratify an executory contract and those which are sufficient to ratify an executed contract. In the latter case, any act amounting to an explicit acknowledgment of liability will operate as a ratification; as, in the case of a purchase of land or goods, if, after coming of age, he continues to hold the property and treat it as his own.[5] But, in order

[1] Hartley *v.* Wharton, 11 Ad. & El. 934; s. c. 3 P. & D. 539; Borthwick *v.* Carruthers, 1 T. R. 648.

[2] {On the meaning of the words "void" and "voidable," see State *v.* Richmond, 26 N. H. 262; Pearsoll *v.* Chapin, 44 Pa. St. 9; Person *v.* Chase, 37 Vt. 648.} [It is probable that no contract of an infant will be held *void* except by statute.]

[3] Goodsell *v.* Myers, 3 Wend. 479; Reed *v.* Batchelder, 1 Met. 559; Lawson *v.* Lovejoy, 8 Greenl. 405; Fisher *v.* Jewett, 1 Burton (New Bruns.) p. 35; Story on Contr. § 38; Boody *v.* McKenney, 10 Shepl. 517.

[4] Williams *v.* Moor, 11 M. & W. 256, 265. An infant's bond has been held voidable only, and not void: Conroe *v.* Birdsall, 1 Johns. Cas. 127; Fant *v.* Cathcart, 8 Ala. 725. But see *contra*, Baylis *v.* Dineley, 3 M. & S. 477; Hunter *v.* Agnew, 1 Fox & Smith 15.

[5] Hubbard *v.* Cummings, 1 Greenl. 11; Lawson *v.* Lovejoy, 8 id. 405; Dana *v.* Coombs, 6 id. 89; Chitty on Contr. p. 125 *a*; 1 Roll. Abr. 731, l. 45; Evelyn *v.* Chichester, 3 Burr. 1719; Tucker *v.* Moreland, 10 Pet. 75, 76; Jackson *v.* Carpenter, 11 Johns. 542; Boston Bank *v.* Chamberlain, 15 Mass. 220; Boyden *v.* Boyden, 9 Met. 519; Armfield *v.* Tate, 7 Ired. 258; Van Dorens *v.* Everett, 2 South. 460; Boody *v.* McKenney, 10 Shepl. 517. This case was assumpsit upon a promissory note, given by an infant for personal property, which, after coming of age, he had sold; and he was held liable, as having thereby affirmed the contract. Shepley, J., in delivering the judgment of the court, reconciled the apparently conflicting decisions upon the liability of an infant on his contracts, by reference to the different situations and circumstances in which he was placed, in regard to the subject-matter; classifying them as follows:—

"1. When he has made a conveyance of real estate during infancy, and would affirm or disaffirm it, after he becomes of age. In such case, the mere acquiescence for years to disaffirm it affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is that, by his silent acquiescence, he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him, as a duty towards others, to act speedily. Language, appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by an entry, or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy: Jackson *v.* Carpenter, 11 Johns. 539; Curtis *v.* Patton, 11 S. & R. 311; Tucker *v.* Moreland, 10 Pet. 58. {It has been held that a neglect for fourteen years after coming of age, to bring an action to disaffirm a sale of land made during the minority, was not of itself, under the circumstances, equivalent to an affirmance of the sale: Urban *v.* Grimes, 2 Grant's (Pa.) Cases 96.}

"2. When, during infancy, he has purchased real estate, or has taken a lease of it subject to the payment of a rent, or has granted a lease of it upon payment of a rent. In such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate, after he becomes of age, for years, and then disaffirm the purchase, and refuse to pay for it, or claim the consideration paid; or

to ratify an executory agreement made during infancy, there must be not only an acknowledgment of liability, but an express confirmation or new promise, voluntarily and deliberately made by the infant, upon his coming of age, and with the knowledge that he is not legally liable.[6] An explicit acknowledgment of indebtment,

thus enjoy the leased estate, and then avoid payment of the stipulated rent; or receive rent on the lease granted, and then disaffirm the lease. When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time after he arrives at full age, or the benefits so received will be satisfactory proof of a ratification: Ketsey's Case, Cro. Jac. 320; Evelyn *v.* Chichester, 3 Burr. 1765; Hubbard *v.* Cummings, 1 Greenl. 11; Dana *v.* Coombs, 6 id. 89; Barnaby *v.* Barnaby, 1 Pick. 221; Kilne *v.* Beebe, 6 Conn. 494; {Baker *v.* Kennett, 54 Mo. 82.} In the case of Benham *v.* Bishop, 9 Conn. 330, it appeared that the defendant and his mother and sisters were in possession and owned land in common, and that defendant, while an infant, made his note to another sister for a conveyance to him of her undivided share of the same estate, and that they continued to occupy the land in the same manner several years after he became of age; and it was decided not to amount to a ratification of the note. This case can only be regarded as correctly decided by considering the defendant as having occupied only by virtue of his own previous title as a tenant in common.

"3. When he has, during his infancy, sold and delivered personal property. When the contract was executed by his receiving payment, it is obvious that he can receive no benefit by acquiescence; and it alone does not confirm the contract. When the contract remains unexecuted, and he holds a bill or note taken in payment for the property, if he should collect or receive the money due upon it or any part of it, that would affirm the contract. Should he disaffirm the contract and reclaim the property, the bill or note would become invalid. He cannot disaffirm it until after he becomes of age. {But see Corey *v.* Burton, 32 Mich. 30.} And if he then does it, there are cases which assert, when the contract has become executed, that he must restore the consideration received: Badger *v.* Phinney, 15 Mass. 363; Roof *v.* Stafford, 7 Cowen 179. {An infant may disaffirm, without restoring what he may have received: Brown *v.* Hartford Fire Ins. Co., 117 Mass. 479; Dunton *v.* Brown, 31 Mich. 182; Carpenter *v.* Carpenter, 45 Ind. 142; [MacGreal *v.* Taylor, 167 U. S. 688;] *post*, § 369, n., as to void and voidable contracts of insane persons.}

"4. When he has purchased and received personal property during infancy. When the contract has been executed by a payment of the price, if he would disaffirm it, he should restore the property received. [This is not in accord with the best authorities. It is not a condition precedent to rescission that the infant should place the other party *in statu quo:* MacGreal *v.* Taylor, 167 U. S. 688.] When the contract remains unexecuted, the purchase having been made upon credit, he may avoid the contract by plea during infancy, or after he becomes of age, before he has affirmed it. It has been asserted in such case, that he should be held to refund the consideration received for the contract avoided: Reeve's Dom. Rel. 243. He admits, however, that the current of English authorities is otherwise. If he had received property during infancy, and had spent, consumed, wasted, or destroyed it; to require him to restore it or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him. There might be more ground to contend for the right to reclaim specific articles remaining in his hands unchanged at the time of the avoidance of the contract. When he continues to retain the specific property, or any part of it, after he becomes of full age, it becomes his duty within a reasonable time to make his election. If such were not the rule, he might continue to use for years a valuable machine until nearly worn out, and thus derive benefit from it, and yet avoid the contract, and refuse to pay for it. And when after a reasonable time he continues to enjoy the use of the property, and then sells it, or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract; and he cannot afterwards avoid payment of the consideration. This, as before shown, is the well-settled rule in relation to real estate purchased or leased; and the principles applied in those decisions appear to be equally applicable here. Such was the decision in Lawson *v.* Lovejoy, 8 Greenl. 405; Chesire *v.* Barrett, 4 McCord 241; Dennison *v.* Boyd, 1 Dana 45; Delano *v.* Blake, 11 Wend. 85." See 10 Shepl. 523–526. See also 1 Hare & Wallace's Am. Leading Cases, pp. 109–115, where the cases on this subject are cited and classified.

[6] {But such acts must be voluntary on the part of the minor, and must make mani-

whether in terms, or by a partial payment, is not alone sufficient; for he may refuse to pay a debt which he admits to be due. But an express confirmation of the agreement, as still obligatory, is sufficient.[7] And if the promise be express to pay when he is able, the plaintiff must prove the defendant's ability to pay, or, at least, that ostensibly he is so; but he is not bound to prove that the payment can be made without inconvenience.[8] The new promise must, in all cases, be shown to have been made prior to the commencement of the action.[9]

§ 368. **Infancy no Defence in Action ex Delicto.** Infancy is no defence to an action *ex delicto;* but an action in that form cannot be maintained, where the foundation of it appears to have been a contract, which the infant has tortiously violated. Thus, if he hired a horse which he injured by treating negligently, or by riding immoderately, the plaintiff cannot charge the infant in tort, by a mere change of the form of action, where he would not have been chargeable in *assumpsit.* To such an action, the plea of infancy in bar is held good.[1] But if the contract was wholly abandoned by the infant,

fest his intention to keep the property when he has the power to keep it, or relinquish it at his election. Thus where goods, not necessaries, were bought by an infant, and the vendor, three days before he became of age, brought his action against the infant for the price, and attached the goods on the writ, and the goods remained in the officer's hands up to and at the time of the trial of the action, and the defendant gave no notice, after he became of age, to the plaintiff, of his intention not to be bound by the contract of sale, it was held to be no ratification of the contract of sale: Smith *v.* Kelley, 13 Met. (Mass.) 309; Tibbets *v.* Gerrish, 5 Foster (N. H.) 41; Stokes *v.* Brown, 4 Chand. (Wis.) 39. The special contract of a minor to labor is ratified by his continuance in it for a month after he comes of age, and he cannot afterwards avoid it: Forsyth *v.* Hastings, 1 Williams (Vt.) 646.} [Knowledge that he is not legally liable on the contract ratified is not essential to a ratification: Morse *v.* Wheeler, 4 Allen 570; Anderson *v.* Soward, 40 Ohio St. 325; American Mtg. Co. *v.* Wright, 101 Ala. 658; Clark *v.* Van Court, 100 Ind. 113; Bestor *v.* Hickey, 41 A. 555, Conn.; Harriman on Contracts, 267; *contra,* Hinely *v.* Margaritz, 3 Pa. St. 428.]

[7] Story on Contracts, § 49; Chitty on Contr. 124 (4th Am. ed.), and cases there cited; Smith *v.* Mayo, 9 Mass. 62; Ford *v.* Phillips, 1 Pick. 202; Whitney *v.* Dutch, 14 Mass. 457, 461; Thrupp *v.* Fielder, 2 Esp. 628; Harmer *v.* Killing, 5 id. 102. By Stat. 9 Geo. IV., c. 14, § 5, it is now necessary, in England, that the new promise or ratification be in writing, and signed by the party to be charged. And it is held that any written instrument, signed by the party, which, if signed by a person of full age, would have amounted to an adoption of the act of a party acting as an agent, will, in the case of an infant who has attained his majority, amount to a ratification of his promise: Harris *v.* Wall, 1 Exch. 122. And see Hartley *v.* Wharton, 11 Ad. & El. 934; {Mawson *v.* Blane, 26 Eng. Law & Eq. 560. An admission of an infant as to the amount of a claim may be used to show the amount due, although it may not be sufficient to render him liable: Ackerman *v.* Runyon, 1 Hilton (N. Y.) 169. Where the property-rights of infants are in question, courts will exercise the greatest vigilance in protecting their interests, especially against the frauds of guardians, or others managing their affairs: Howell *v.* Mills, 53 N. Y. 322.}

[8] Thomson *v.* Lay, 4 Pick. 48; Cole *v.* Saxby, 3 Esp. 160. And see Davies *v.* Smith, 4 id. 36; Besford *v.* Saunders, 2 H. Bl. 116.

[9] Thornton *v.* Illingworth, 2 B. & C. 824; s. c. 4 D. & R. 525. {If the contract be void as against the policy of the law, there can be no ratification: Embry *v.* Morrison, 7 Sneed (Tenn.) 304.}

[1] Jennings *v.* Rundall, 8 T. R. 337. {So, an infant is liable to an action *ex delicto* for fraudulent representations as to his age in procuring a contract which he subsequently avoids by the defence of infancy: Fitts *v.* Hall, 9 N. H. 441; Eaton *v.* Hill,

as in he hire a horse to go to a certain place, and goes to a different place, or wantonly beats the animal to death, he is liable in trover or trespass.[2] On the other hand, if the action is brought in *assumpsit*, but the foundation is in tort, as for money which he has fraudulently embezzled, the plea of infancy is not a good bar.[3]

50 N. H. 235. [This is unsound. "The rule in regard to such cases is that there can be no liability in tort if to enforce an action of the kind would virtually fix upon the incompetent party liability for breach of contract:" Bigelow on Torts (6th ed.) 27.] In Texas it seems that fraudulent representations as to age are a good reply to the plea of infancy: Carpenter *v.* Pridgen, 40 Tex. 32; [Pemberton, etc. Ass'n *v.* Adams, 53 N. J. Eq. 258. But the better rule is *contra:* Sims *v.* Everhardt, 102 U. S. 300; Merriam *v.* Cunningham, 11 Cush. 40; Studwell *v.* Shapter, 54 N. Y. 249; Carpenter *v.* Carpenter, 45 Ind. 142; Wieland *v.* Kobick, 110 Ill. 16; Alt *v.* Groff, 65 Minn. 191.] An infant is liable in assumpsit for money stolen by him, or the proceeds of property stolen by him: Shaw *v.* Coffin, 58 Me. 254. But *quære.* See Merriam *v.* Cunningham, 11 Cush. (Mass.) 40; Price *v.* Hewett, 18 Eng. Law & Eq. 522 and n.}

[2] Vasse *v.* Smith, 6 Cranch 226; Campbell *v.* Stakes, 2 Wend. 137; {Towne *v.* Wiley, 23 Vt. (8 Washb.) 355. See Eaton *v.* Hill, 50 N. H. 235, for some criticisms upon the cases before cited in this and the preceding note, and important distinctions in the torts for which an infant may be held liable. See also Hall *v.* Corcoran, 107 Mass. 51.}

[3] Bristow *v.* Eastman, 1 Esp. 172; Vasse *v.* Smith, 6 Cranch 226. See Story on Contracts, § 45; [Ford *v.* Phillips, 1 Pick. 202; Hale *v.* Gerrish, 8 N. H. 374; *contra*, Buchanan *v.* Hubbard, 119 Ind. 187.] {In an action against an infant on a promissory note given by an infant for a chattel which he had obtained by fraud, and which he refused to deliver on demand, the infant prevailed, on the plea of infancy. Subsequently an action of tort for the conversion of the chattel was brought against him, and he was held liable therein, he having sold the chattel before the demand was made upon him: Walker *v.* Davis, 1 Gray (Mass.) 506. A verbal contract with an infant for his services for three years, being void by the statute of frauds, is not even *prima facie* evidence of the value of the services in an action on a *quantum meruit:* Galvin *v.* Prentice, 45 N. Y. 162; Wm. Butcher Steel Works *v.* Atkinson, 68 Ill. 421.}

INSANITY.

§ 369. **Insanity no Bar when Contract is executed.** Whether lunacy, or insanity of mind, is in all cases a valid bar, *per se*, to an action on the contract of the party, has been much controverted, both in England and America. The rule that a man shall not be permitted to stultify himself is now entirely exploded; and the question is reduced to this, namely, whether a person *non compos mentis* can make any contract which shall bind him. This has led to a distinction, taken between contracts executed and contracts executory;[1] and it seems now to be generally agreed, that the *executed contract* of such person is to be regarded very much like that of an infant; and that, therefore, when goods have been supplied to him which were necessaries, or were suitable to his station and employment, and which were furnished under circumstances evincing that no advantage of his mental infirmity was attempted to be taken, and which have been actually enjoyed by him, he is liable, in law as well as equity, for the value of the goods.[2] Thus, a person of un-

[1] [The distinction between executory and executed contracts is of little or no value. Insanity is no defence to an action on a contract unless the other party knew, or had reason to know, of the insanity: Imperial Loan Co. *v.* Stone, 1892, 1 Q. B. 599; Creekmore *v.* Baxter, 121 N. C. 31.]

[2] Chitty on Contr. 108–112; Story on Contr. §§ 23–25; Stock on Non Compotes Mentis, pp. 26–30, and cases there cited; Thompson *v.* Leach, 3 Mod. 310; Seaver *v.* Phelps, 11 Pick. 304; Neill *v.* Morley, 9 Ves. 478; Stiles *v.* West, cited 1 Sid. 112. {So where a note was discounted for a lunatic, without notice of the lunacy, the contract is executed by the bank, and insanity is no defence: Lancaster Co. Bank *v.* Moore, 78 Pa. St. 407. But see Musselman *v.* Cravens, 47 Ind. 1.} A question has been made whether the deed of a person of unsound mind conveying land is void, or only voidable. It was held to be voidable only, and not void, in Allis *v.* Billings, 6 Met. 415. [Although the grantee knew of the grantor's insanity: McAnan *v.* Tiffin, 143 Mo. 667.] The question was very fully considered in Arnold *v.* Richmond Iron Works, 1 Gray 437, and, in delivering the opinion of the court, Shaw, C. J., spoke as follows: —

"The present case is so like the recent case of Allis *v.* Billings, 6 Met. 415, in all its essential features, that it seems hardly necessary to do more than cite that case. It was there held, that when a deed conveying land had been duly signed, sealed, delivered, and acknowledged, and placed in a condition to be put on record, by one of unsound mind, and cash and notes had been given by the grantee in security and satisfaction for the price, such deed was voidable, and not void; and that if, afterwards, and after the grantor was restored to his right mind, he did acts deliberately, manifesting an intention to ratify and confirm the transaction of sale and conveyance, he could not afterwards avoid that deed by alleging that he was insane when he made it. Such a deed, to many purposes, is equivalent to a feoffment with livery of seisin; and we believe it has long been held, by the rules of the common law, that such a feoffment would pass a seisin *de facto* and vest the estate in the feoffee, subject to be avoided by matter of record, entry, or by some of the modes allowed by law for avoiding and

sound mind has been held liable in *assumpsit* for work and labor,[3] and for carriages suitable to his rank and condition.[4]

annulling the effect of such a conveyance. To this extent, the rule would seem to be founded on the plainest principles of justice, as well as law. In such case, the conveyance of an estate by bargain and sale on the one side, and by the payment or contract for the payment on the other, constitutes one entire transaction, mutually conditional and dependent. It must be affirmed or avoided, as a whole. It cannot be affirmed in part, so as to hold the price, and disaffirmed in part, so as to avoid the conveyance: Badger *v.* Phinney, 15 Mass. 359.

"If, then, the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must restore the price, if paid, or surrender the contract for it, if unpaid. In short, he must place the grantee, in all respects as far as possible, *in statu quo*. To that extent the case of Allis *v.* Billings does go, and we think it is well sustained by the authorities cited. We say nothing here of a bond, covenant, or other instrument purely executory, where the obligation arises solely from the act of a disposing mind, binding a person to some obligation or duty, and under which no estate or property has passed or been transferred; nor if such a contract would be voidable, and not void, do we consider here what acts, either of record or *in pais*, would be sufficient on the part of the party contracting, after being restored, to avoid or to confirm such contract. Such a case may depend upon its own peculiar circumstances, to be judged of as they arise. The case of Allis *v.* Billings is one where a party, restored to his right mind, having a full *jus disponendi*, and full capacity to judge an act in the conduct of his affairs, finding what had occurred whilst his mind was under a cloud, balancing the advantages to himself of reclaiming his land or holding the price, prefers the latter. By doing this, he necessarily affirms the deed by which he in terms alienated his land.

"In the very full argument offered by the counsel for the plaintiff in this case, it was suggested, rather than distinctly proposed, to the court, to revise the case relied on, on the ground that there were authorities, deserving of consideration, leading to a contrary result. Undoubtedly there have been various views taken of this difficult subject, and there may be some discrepancy in the cases, especially whilst the maxim prevailed, that no man could stultify himself, or, in other words, could plead his own insanity to avoid his acts and contracts, — a maxim founded mainly on considerations of policy, from the danger that men might feign past insanity, and be tempted to procure false testimony to establish it, in order to avoid and annul their solemn obligations and contracts. But on a re-examination of the authorities, we see nothing to raise a doubt that the law, as it now stands, is correctly declared in that case.

"It was urged that the terms 'void and voidable,' as applied to the deed of a person *non compos*, do not express the true distinction, but that there may be an intermediate class of deeds confirmable; that is, deeds made by one having no capacity to contract, and so void until confirmed by the party after being restored. To say nothing of the practical inconvenience of making the operation of a deed to transfer an estate depend on some act, done months, perhaps years, after it has been delivered and recorded, some acceptance of payment, or other act *in pais*, passing between the parties without record or other means of notoriety; it would afford no more means of security to the rights of the party under disability than the power of refusing to ratify and actually disaffirming the deed, when the powers of his mind and his disposing capacity are fully restored. We are therefore of opinion that the deed of the plaintiff, made whilst in an unsound state of mind, was voidable, and not absolutely void, and, as a necessary legal consequence, that it was capable of being ratified and confirmed by him, after his mind was restored.

"The acts necessary to be done, to affirm and ratify a prior voidable act, or to annul it and set it aside, may be various, according to the nature of the act to be thus affirmed or disaffirmed, and to the condition and capacity of the party doing the act. In Tucker *v.* Moreland, 10 Pet. 58, it was held, that, in the analogous case of an infant, he might avoid his act, deed, or contract, by different means, according to the nature of the act or the circumstances of the case. One of the cases put is where an infant

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[3] Brown *v.* Joddrell, 3 C. & P. 30.

[4] Baxter *v.* Earl of Portsmouth, 5 B. & C. 170; s. c. 7 D. & R. 614; s. c. 2 C. & P. 178.

§ 370. **Generally a Bar, when Contract is executory.** On the other hand, insanity of mind is generally admitted, as a valid bar to an action upon an *executory contract* of the party;[1] though in England it has in some cases been held insufficient as a defence, *per se*, but admissible evidence to support a defence grounded upon undue advantage taken or fraud practised upon the party, by reason of his want of common discernment.[2]

§ 371. **Proof of Insanity.** The state and condition of mind of the party is proved, like other facts, to the jury; and evidence of the state of his mind, both before and after the act done, is admissible.[1]

makes a lease: the receipt of rent, after he comes of age, is a ratification: Bac. Ab. Infancy and Age, I, 8.

"In the present case, after the plaintiff was restored to the full possession of his reason, he found that he had executed a conveyance of his estate, that the defendants were in possession under his deed; also, that he held certain notes for part of the purchase-money. His forbearing to enter, his giving no notice of his election to disaffirm the conveyance, would be negative acts, and perhaps equivocal; but his demanding and receiving payment of the notes was affirmative, significant, and decisive. It was inconsistent with any just purpose to disaffirm the conveyance. Payment and acceptance of the compensation are decisive of an election to affirm: Butler *v.* Hildreth, 5 Met. 49; Norton *v.* Norton, 5 Cush. 530."

[1] Sentance *v.* Poole, 3 C. & P. 1; Stock on Non Compotes Mentis, p. 30; Mitchell *v.* Kingman, 5 Pick. 431; Seaver *v.* Phelps, 11 Pick. 304; Chitty on Contracts, p. 112; Story on Contracts, §§ 23–25; {Musselman *v.* Cravens, 47 Ind. 1.} [But see § 369, n. 1.] {A judgment recovered against a person admitted at the time to have been *non compos mentis*, and who had no guardian, will be reversed on a writ of error brought by his administrator after his decease, unless perhaps for necessaries: Leach *v.* Marsh, 47 Me. 548.}

[2] Ibid.; Dane *v.* Kirkwall, 8 C. & P. 679. There is a material difference between insanity and idiocy, in respect to the evidence, and its effect. Many acts of business may be done by a lunatic, and the lunacy not be detected; but it is scarcely possible to predicate the same of an idiot, or an imbecile person. Such acts, therefore, are strong evidence on an issue of idiocy, but not on an issue of insanity: Bannatyne *v.* Bannatyne, 16 Jur. 864; 14 Eng. Law & Eq. 581, 590.

[1] Grant *v.* Thompson, 4 Conn. 203. {The question of insanity, or not, is mainly one of fact, and is said by the court in a Massachusetts case to be one upon which courts have been increasingly unwilling to lay down sweeping rules: Wright *v.* Wright, 139 Mass. 177. The court generally leaves the question of sanity to the jury, to find whether the party in question was sane or not: Wright *v.* Wright, *supra*. It was held in People *v.* Mills, 98 N. Y. 181, that a charge of the judge in reference to legal responsibility for actions in the following terms was proper: "If a man is sane he is bound to control his passions, and is held responsible for any acts he may commit under their exercise; if he is insane he is not responsible." This, together with instructions to the effect that if the defendant was so insane as to prevent his distinguishing between right and wrong or acting from deliberation or premeditation, that he then is not responsible, was held to cover the case sufficiently. In cases of wills, the best test has been held to be the question whether the testator had sufficient capacity to understand and carry in his mind the nature and situation of his property, and his relations to those about him, to those who would naturally have some claim to his remembrance, and to those persons and things in which he has been most interested: Whitney *v.* Twombly, 136 Mass. 145. The evidence of insanity may be offered in various ways; for instance, on the question of the validity of a will, a physician who attended the deceased a few days before he committed suicide was asked what the act of suicide would indicate as to the soundness of a person's mind, and answered that suicide was an insane act; and it was held that suicide is evidence tending to prove insanity: Frary *v.* Gusha, 59 Vt. 257. On the question of insanity of a grantor of a deed, or the testator of a will, evidence of his declarations as to his intentions, made at a time when his understanding was unquestionable, and previous to the execution of the deed or will, is admissible: Rice *v.* Rice, 127 Pa. St. 183. In a criminal trial where the defence is insanity, it is held that declarations of the accused to his physi-

An *inquisition*, taken under a commission of lunacy, is admissible

cian, made to the physician out of court and relating to the condition of the accused at a time previous to the time when the declarations were made, are not admissible evidence of the mental state of the accused, being merely narrative of past transactions: People *v.* Hawkins, 109 N. Y. 408. The question of insanity may have an important bearing upon the question of motive in criminal cases. Thus, where the defence of insanity is asserted in a criminal proceeding, and the defendant to support the defence puts in evidence of irrational or insane acts and conduct on his own part, the prosecution may go further and put in evidence facts which show adequate reasons and origin for such irrational and insane conduct: People *v.* Wood, 126 id. 249. So, when on an indictment for murder no motive is shown, and the defence is that the accused was of epileptic tendency, and committed the act under the influence of epileptic furor, and that the act was the unconscious and uncontrollable result of the epileptic mania, the evidence as to the motive becomes important, and a charge from the trial judge, which, in substance, tells the jury that it is not necessary for the prosecution to show what motive induced the act, and in effect excludes consideration of the lack of motive by the jury as bearing upon the question of sanity, is erroneous: People *v.* Barber, 115 id. 475. It has been held that in the trial of a criminal case in which the defendant absents himself from the trial during a portion of the introduction of evidence, and also when the verdict is rendered, the fact that his absence was caused by his insanity is competent to be introduced to rebut the presumption that his absence arises from a sense of guilt. This evidence goes to controvert the inference which the jury might draw from the flight of a sane defendant from the court after he had heard the evidence against him, and before the conclusion of the trial. State *v.* Peacock, 50 N. J. L. 36, 655.] Insanity is shown by the proof of acts, declarations, and conduct, inconsistent with the character and previous habits of the party. [See Vol. I. § 14 *l.*] The opinions of the witnesses as to the sanity or insanity of the person are not admissible, unless they are medical men, or experts: McCurry *v.* Hooper, 12 Ala. 823; *ante*, Vol. I. § 440; [Wyman *v.* Gould, 47 Me. 159. So held in Com. *v.* Fairbanks, 2 Allen (Mass.) 511, though the opinion is based upon the witness's own knowledge of facts. But in Cram *v.* Cram, 33 Vt. 15, it is held that, when a person's mental capacity is in question, the opinion of a non-professional witness in relation thereto, derived from personal observation of and conversation with such person, is admissible in evidence in connection with the facts upon which the opinion is based, and that non-experts may give their opinions based upon observation as to the mental condition of a person, must now be considered as the doctrine supported by the great weight of authority and reason. See the very able and exhaustive opinion of Mr. Chief Justice Foster, in Hardy *v.* Merrill, 56 N. H. 227, overruling the prior decisions of that State to the contrary. See also Pidcock *v.* Potter, 68 Pa. St. 342; Beavan *v.* McDonnell, 26 Eng. L. & Eq. 540; *ante*, Vol. I. §§ 430 *p*, 440, 441, 441 *f*; Dennis *v.* Weekes, 51 Ga. 24. Skilful physicians, although not strictly experts upon the one subject of insanity, have, nevertheless, from their general medical training and experience, been uniformly held to be competent to give their opinion of the mental condition of their patients when they have adequate opportunity to observe and judge of their mental qualities. This, however, would not include the case where the physician made a single examination of the patient to qualify himself as a witness in a pending litigation: Fayette *v.* Chesterville, 77 Me. 28. The question as to the burden of proof of insanity is one of some difficulty. The better opinion is that it is upon the party who relies upon it to support his case and upon whom the affirmation of the issue is thrown. If the plaintiff relies upon the fact of insanity, he can make out a *prima facie* case by proof of insanity at the time of the action in question, but if this proof is met by proof of sanity at the time of the action in question, the burden remains upon the plaintiff, and he must show by preponderance of evidence that insanity existed at the time in question: Wright *v.* Wright, 139 Mass. 182. The rule is laid down in a New Jersey case, Graves *v.* State, 45 N. J. L. 207, and the same case, page 347, that the defence of insanity in a criminal proceeding is a substantive defence, imposing upon the defendant the burden of proof, and that it is not sufficient for the jury to have reasonable doubt of the sanity of the person at the time he committed the act. This case is opposed in principle to the recent cases in New York, which hold that the defence of an alibi is sufficiently made out if it raises a reasonable doubt in the minds of the jury as to the commission of the offence by the accused. See *ante*, Vol. I. § 81 and notes. In deciding the question of insanity of one accused of crime by preliminary inquiry, a special jury is only ordered where the court investigates

evidence, but not conclusive in the party's own favor.[2] It has, however, been held conclusive against other persons subsequently dealing with the lunatic, instead of dealing with his guardian, who seek collaterally to avoid the guardian's authority, by showing that the lunatic has been restored to his reason.[3] Insanity, once proved to have existed, is presumed to continue, unless it was accidental and temporary in its nature; as, where it was occasioned by the violence of disease.[4]

§ 371 *a*. **Insanity in Civil Cases.** *What constitutes insanity* of mind is a question which has been very much discussed, especially of late years; and the opinions of learned judges seem at first view to be conflicting. But much of the apparent discrepancy may be reconciled, by adverting to the nature of the cases respectively in judgment. The degree of unsoundness or imbecility of mind sufficient to invalidate the acts of the party in some cases may not suffice in others. But in regard to insanity, where there is no frenzy or raving madness, the legal and true character of the disease is *delusion*, or, as the physicians express it, illusion or hallucination. And this insane delusion consists in a belief of facts which no rational person would believe.[1] It is distinguished from *moral* insanity, which consists in the perversion or disordered state of the affections or moral powers of the mind, in contradistinction to the powers of the understanding or intellect. This latter state of the mind is held not sufficient to invalidate a will, unless it is accompanied by that delusion in matters of fact which is the test of legal insanity.[2]

§ 372. **Insanity in Criminal Cases.** In *criminal cases*, in order to absolve the party from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts. In these cases, the rule of law is understood to be this: that "a man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in

the question of the insanity of the prisoner at the time of the trial, and even in such a case the court may, in its discretion, leave the question of sanity to be tried by the jury who are to try the indictment: Webber *v.* Com., 119 Pa. St. 223.]

[2] Faulder *v.* Silk, 3 Campb. 126; Dane *v.* Kirkwall, 8 C. & P. 679.

[3] Leonard *v.* Leonard, 14 Pick. 280; *ante*, Vol. I. §§ 551, 556.

[4] See *ante*, Vol. I. § 42; Hicks *v.* Whittemore, 4 Met. 545; 1 Collinson on Lunacy, 55; Shelford on Lunatics, 275; Swinburne on Wills, Part II., § iii. 5, 6, 7; 1 Hal. P. C. 30.

[1] Dew *v.* Clark, 3 Addams Eccl. 79.

[2] Ibid.; Frere *v.* Peacocke, 1 Rob. Eccl. 442, 445. And see Pritchard on Insanity in Relation to Jurisprudence, pp. 16, 19, 30; Com. *v.* Mosler, 4 Pa. St. 264. See further, as to *monomania*, *ante*, Vol. I. § 365; R. *v.* Hill, 14 Jur. 470; 5 Eng. Law & Eq. 547; s. c. 5 Cox Cr. C. 259; Waring *v.* Waring, 12 Jur. Priv. C. 947; Best's Prin. of Ev. § 134.

which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If, then, it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that, for the time being, it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it." [1]

[1] See The Trial of Abner Rogers, pp. 276, 277, per Shaw, C. J. The whole of this lucid exposition of the criminal law of insanity, by the learned Chief Justice, was as follows: "The great object of punishment by law is to afford security to the community against crimes, by punishing those who violate the laws; and this object is accomplished by holding out the fear of punishment, as the certain consequences of such violation. Its effect is to present to the minds of those who are tempted to commit crime, in order to some present gratification, a strong counteracting motive, in the fear of punishment.

"But this object can only be accomplished when such motive acts on an intelligent being, capable of remembering that the act about to be committed is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment. It might, in some respects, be more accurate to say, that the party thus acting under a temptation, must have memory and intelligence to recollect and know that the act he is about to commit is a violation of the law of the land. But this mode of stating the rule might lead to a mistake of another kind, inasmuch as it would seem to hold up the idea, that, before a man can be justly punished, it must appear that he knew that the act was contrary to the law of the land. But the law assumes that every man has knowledge of the laws prohibiting crimes, — an assumption not strictly true in fact, but necessary to the security of society, and sufficiently near the truth for practical purposes. It is expressed by the well-known maxim, 'Ignorantia legis neminem excusat,' — ignorance of the law cannot be pleaded as an excuse for crime. The law assumes the existence of the power of conscience in all persons of ordinary intelligence; a capacity to distinguish between right and wrong, in reference to particular actions; a sense of duty and of right. It may also be safely assumed that every man of ordinary intelligence knows that the laws of society are so framed and administered as to prohibit and punish wrong acts, violation of duty towards others, by penalties in some measure adapted to the nature and aggravation of the wrong and injurious acts thus done.

"If, therefore, it happens to be true in any particular case, that a person, tempted to commit a crime, does not know that the particular act is contrary to positive law, or what precise punishment the municipal law annexes to such act; yet if the act is palpably wrong in itself, if it be manifestly injurious to the rights of another, as by destroying his life, maiming his person, taking away his property, breaking into or burning his dwelling-house, and the like, there is no injustice in assuming that every man knows that such acts are wrong, and must subject him to punishment by law; and therefore it may be assumed, for all practical purposes, and without injustice, that he knows the act is contrary to law. This is the ground upon which the rule has been usually laid down by judges, when the question is, whether a person has suffi-

§ 373. **Same Subject.** In all such cases, the jury are to be told that every man is to be presumed to be sane, and to possess a suffi-

cient mental capacity to be amenable for the commission of a crime; that he must have sufficient mental capacity to distinguish between right and wrong, as applied to the act he is about to commit, and to be conscious that the act is wrong; instead of saying that he must have sufficient capacity to know that it is contrary to the law of the land; because this power to distinguish between right and wrong, as applied to the particular act, — a power which every human being who is at the same time a moral agent and a subject of civil government is assumed to possess, — is the medium by which the law assumes that he knows that the same act which is a violation of high moral duty is also a violation of the law of the land. Whereas, if it were stated that a person must have sufficient mental capacity to know and understand that the act he is about committing is a violation of the law of the land, it might lead to a wrong conclusion, and raise a doubt in regard to persons ignorant of the law. There is no doubt that many a man is held responsible for crime, and that rightfully, who might not know that the act he was about committing was contrary to the law of the land, otherwise than as a moral being he knows that it is wrong, a violation of the dictates of his own natural sense of right and wrong.

"To recur, then, to what has been already stated: In order that punishment may operate by way of example, to deter others from committing criminal acts, when under temptation to do so, by presenting a strong counteracting motive, the person tempted must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand, that if he commits the act, he will be subject to the punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it.

"A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts, under like circumstances, must have sufficient memory, intelligence, reason, and will to enable him to distinguish between right and wrong, in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it.

"This is necessary on two grounds: —

"1st. To render it *just* and reasonable to inflict the punishment on the accused individual; and

"2d. To render his punishment, by way of example, of any utility to deter others in like situation from doing similar acts, by holding up a counteracting motive in the dread of punishment, which they can feel and comprehend."

With more immediate reference to the case, the Chief Justice proceeded as follows: —

"In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

"But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: [Here follows the passage already quoted in the text.]

"The character of the mental disease relied upon to excuse the accused in this case is partial insanity, consisting of *melancholy*, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion by which the mind is perverted. The most common of these cases is that of monomania, when the mind broods over *one idea*, and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes; either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man killed him in supposed self-defence. A common instance is where he fully believes that the

cient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[1] The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not deemed so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong with respect to the very act with which he is charged.[2]

act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature: or,

"2d. This state of delusion indicates to an experienced person that the mind is in a diseased state, that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in acts of homicide, or other violent acts, toward friend or foe indiscriminately, so that, although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character that, for the time being, it must have overborne memory and reason; that the act was the result of the disease, and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will:" id. pp. 273–279. This case is reported in a more condensed form in 7 Met. 500. The test of insanity is delusion. See Freer *v.* Peacocke, 11 Jur. 247; Com. *v.* Mosler, 4 Pa. St. 264; State *v.* Spicer, 3 Amer. Law Jur. N. S. 128.

[1] {As to the legal test of insanity, see also, further, State *v.* Pike, 49 N. H. 393; U. S. *v.* Shultz, 6 McLean C. Ct. 121; People *v.* Sprague, 2 Parker Cr. (N. Y.) 43; People *v.* Robinson, 1 id. 649; U. S. *v.* M'Glue, 1 Curtis C. Ct. 1; McAllister *v.* State, 17 Ala. 434; and *post*, Vol. III. §§ 5, 6, and notes. The decisions on the question upon whom the burden of proving insanity rests are far from uniform. When insanity is used as a defence in a criminal trial, three views of the burden of proof have been adopted by different courts; some holding that proof of insanity, in order to acquit of a crime, should be as free from doubt as proof of sanity in order to convict (McNaghten's Case, 10 C. & F. 200; State *v.* Spencer, 1 Zab. (N. J.) 202); others holding that it should be made out by a preponderance of evidence only (Loeffner *v.* State, 10 Ohio St. 598; Fisher *v.* People, 23 Ill. 283. See also People *v.* McCann, 16 N. Y. 58; State *v.* Hundley, 46 Mo. 414; State *v.* Lawrence, 57 Me. 574; Com. *v.* Ortwein, 76 Pa. St. 414; People *v.* Coffman, 24 Cal. 230; State *v.* Felter, 32 Iowa, 50); and still others holding that the prosecution must prove sanity beyond a reasonable doubt (Com. *v.* Pomeroy, 117 Mass. 143; People *v.* Garbutt, 17 Mich. 9; State *v.* Bartlett, 43 N. H. 224; State *v.* Jones, 50 N. H. 369). For a fuller citation of the authorities on this point, see *post*, Vol. III. §§ 5, 6, and notes, and *ante*, Vol. I. § 81 and notes.}

[2] Per Tindal, C. J., in McNaghten's Case, 10 Clark & Fin. 210. In that case the following questions were propounded to the learned judges by the House of Lords:—

"1st. What is the law respecting alleged crimes, committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

"2d. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or

§ 374. **Insanity from Drunkenness.** In regard to *drunkenness*, it is now settled that incapacity from that cause is a valid defence to an

persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence ?

"3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

"4th. If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused ?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law; or whether he was laboring under any, and what, delusion at the time ? "

The joint opinion of all the judges, except Mr. Justice Maule, was delivered by Lord Chief Justice Tindal, as follows: "My Lords, her Majesty's judges, with the exception of Mr. Justice Maule, who has stated his opinion to your Lordships, in answering the questions proposed to them by your Lordships' House, think it right in the first place to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing arguments of counsel thereon. They deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given them by your Lordships' questions; they have therefore confined their answers to the statements of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary in this particular case to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships. In answer to the first question, assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, — by which expression we understand your Lordships to mean the law of the land. As the third and fourth questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told, in all cases, that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances

action upon the contract of the party, made while under its influence, as well where it was voluntary, and by the fault of the defendant, as where it was caused by the fraud or procurement of the plaintiff.[1] In criminal cases, though *insanity*, as we have just seen, is *ordinarily an excuse*, yet an *exception* to this rule is when the crime is committed by a party while in a fit of intoxication; the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime, to be within the exception, and therefore punishable, must take place and be the *immediate result* of the fit of intoxication, and *while it lasts*, and not the result of insanity, remotely occasioned by previous habits of gross indulgence in spirituous liquors. The law looks to the immediate and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it.[2]

of each particular case may require. The answer to the fourth question must of course depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. In answer to the last question, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right:" ibid. 200–212.

[1] Chitty on Contracts, p. 112 (4th Am. ed.); Story on Contracts, § 27, and cases there cited.

[2] U. S. *v.* Drew, 5 Mason 28, per Story, J.; 1 Russell on Crimes, pp. 7, 8 (3d ed.). See Ray on the Medical Jurisprudence of Insanity, c. 24. In the jurisprudence of continental Europe, drunkenness is generally distinguished into three kinds: (1) *Intentional*, voluntarily induced in order to the commission of a crime while in that state; (2) *Culpable*, by drinking without any intention to become drunken, but where the party might easily have foreseen that he would naturally become so; (3) *Inculpable*, where such consequence could not easily have been foreseen, or where the party took due precautions against any injurious effects, as by directing his servants to confine him if he should become drunk, or where the drunkenness was justly attributable to others or was the result of disease. In the first case, it is no excuse; in the second, it reduces the degree of criminality and mitigates the punishment; in the third, the liability to punishment ceases. See Professor Mittermaier's learned Treatise on the Effect of Drunkenness upon Criminal Responsibility, §§ vi.–ix. [And see People *v.* Fellows, 54 P. 830, Cal.] {In Com. *v.* Hawkins, 3 Gray (Mass.) 466, which was an indictment for murder, the jury were thus instructed: "The rule of law is that, although the use of intoxicating liquors does to some extent blind the reason and exasperate the passions, yet as a man voluntarily brings it upon himself, he cannot use it as an excuse or justification or extenuation of crime. A man, because he is intoxicated, is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him if sober:" Rafferty *v.* People, 66 Ill. 118. Intoxication brought on by taking laudanum, and excessive drinking for several days, producing a disordered

state of the mind, may reduce the killing from that of deliberate premeditation, which constitutes murder of the most heinous character: Cluck *v.* State, 40 Ind. 263; People *v.* Williams, 43 Cal. 344; Jones *v.* Com., 75 Pa. St. 403. It is now generally held that evidence of drunkenness is admissible in behalf of the prisoner on a trial for homicide, in order to show that the killing was not of that malicious kind which constitutes murder in the first degree, but only on this point is such evidence admitted. For a citation of the authorities, see *post*, Vol. III. § 6 and notes. Moral insanity is not recognized by the courts. See Wharton on Homicide, § 583 and cases there cited.]

INSURANCE.

§ 375. **Subject-matters of the Contract.** The ordinary subjects of the contract of insurance are (1) Marine Risks; (2) Losses by Fire; (3) Lives, — all which will be considered in their order.

§ 376. **Declaration.** In an action on a policy of insurance, whatever may be the subject, the declaration[1] contains the following alle-

[1] The following forms of counts, in the simplest cases arising upon marine policies, established in Massachusetts, are well adapted to the brevity of modern practice at common law in any of the United States: —

1. On a SHIP for a TOTAL LOSS. "In a plea of the case, for that on —— the plaintiff was owner of the ship John, then lying in the harbor of —— aforesaid; and the said —— Company, in consideration of a premium therefor paid to them by the plaintiff, made a policy of insurance upon the said ship for a voyage from the said —— to Cadiz in Spain, and at and from said Cadiz to her port of discharge in the United States; and thereby promised to insure for the plaintiff ten thousand dollars upon the said ship for the said voyage against the perils of the seas, and other perils in the said policy mentioned; (*a*) and the plaintiff avers that the said ship did on —— sail from said —— on the voyage described in said policy, and, whilst proceeding therein, was, by the perils of the seas, wrecked and totally lost; of which the said insurance company, on ——, had notice, and were bound to pay the same on demand (or in sixty days); yet they have never paid the said sum of ten thousand dollars, though requested (or though sixty days have elapsed). To the damage," etc.

2. Count for a PARTIAL LOSS, and for CONTRIBUTION TO A GENERAL AVERAGE. [State the plaintiff's interest, the voyage, and the insurance, as in the last precedent, to (*a*), and proceed as follows: —]

"—— and the same company did in and by the same policy further promise, that, in case of any loss or misfortune to the said ship, it should be lawful for the plaintiff and his agents to labor for and in the defence and recovery of the said ship, and that the said company would contribute to the charges thereof, in proportion as the said sum assured by them should be to the whole sum at risk; and the plaintiff avers, that the said ship did, on ——, sail from said —— on the voyage aforesaid; and whilst proceeding therein, was, by the perils of the seas, dismasted, and otherwise damaged in her hull, rigging, and appurtenances; insomuch that it was necessary, for the preservation of the said ship and her cargo, to throw over a part of the said cargo; and the same was accordingly thrown over for that purpose; by means of all which the plaintiff was obliged to expend two thousand dollars in repairing the said ship at ——, and also (*or*, and is also liable to pay) the sum of five hundred dollars as a contribution to and for the loss occasioned by the said throwing over of a part of the said cargo; and the said ship also suffered much damage that was not repaired in said Cadiz; of all which the said company on —— had notice, and became bound to pay the same in sixty days; yet, though said sixty days have elapsed, they have never paid the said sum of ten thousand dollars, nor any part thereof. To the damage," etc.

3. Count for a TOTAL LOSS OF CARGO BY FIRE. "In a plea of the case, for that on ——, a certain brigantine called The William was lying at ——, and the plaintiff was the owner of the cargo (or of certain goods), then laden or about to be laden on board of the said vessel; and the said C. D., in consideration of a certain premium therefor paid to him by the plaintiff, made a certain policy of insurance in writing upon the said cargo (or goods), at and from said —— to Hamburg, or any other port or ports in the north of Europe, and at and from thence to said ——, or her port of discharge

gations, which must be proved by the plaintiff, if not admitted by the pleadings: (1) The policy; (2) The plaintiff's interest in the subject insured, and the payment of the premium; (3) The inception of the risk; (4) The performance of any precedent condition, or warranty, contained in the policy; and (5) The loss, within the terms and meaning of the policy.

§ 377. **Proof of Policy.** And, FIRST, as to MARINE INSURANCE. In an action by the assured, the *first* step in the trial is the *proof of the policy.* The instrument itself, being the best evidence, must be produced and proved; or its loss must be accounted for, and its contents proved by secondary evidence.[1] If it was signed by another

in the United States; and the said C. D., by said policy, promised to insure for the plaintiff —— dollars on the said cargo (or goods) for the voyage aforesaid, against the perils of fire, and other perils in said policy specified; and the plaintiff avers, that the said vessel, with the said cargo (or goods) on board, did on —— sail from said —— on the voyage aforesaid; and afterwards, during the said voyage, whilst the said vessel, with the said cargo on board, was lying at the port of Altona, in the north of Europe, the said cargo (or goods) was burned, and wholly destroyed by fire, of which the said C. D. on —— had notice, and became bound to pay the same in sixty days; yet he has not paid the sum of —— dollars, nor any part thereof. To the damage," etc.

4. Count for a TOTAL LOSS OF FREIGHT, BY RESTRAINT, DETAINMENT, etc.: "—— for that on —— the plaintiff was interested in the freight of a vessel called The George, then bound on a voyage hereinafter described; and the said insurance company, in consideration of a premium therefor, paid to them by the plaintiff, made a policy of insurance, upon the said freight for the voyage from —— to one or more ports beyond the Cape of Good Hope, one or more times, for the purpose of disposing of her outward, and procuring a return, cargo, and at and from thence to ——, and thereby promised to insure for the plaintiff three thousand dollars upon the said freight for the voyage aforesaid, against the perils of enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, or peoples, of what nation or quality soever, and against other perils in the said policy mentioned; and the plaintiff avers, that the said vessel did on —— sail from said —— on the voyage aforesaid, and afterwards, during said voyage, was forcibly taken on the high seas (or, at the Island of Sumatra, in the Indian Ocean) by certain persons to the plaintiff unknown, and detained and prevented from performing the said voyage, and thereby the said freight was wholly lost to the plaintiff; of all which the said insurance company," etc.

[1] See *ante*, Vol. I. §§ 557, 558, *et seq.* [It was held in the earliest cases in the law of Insurance that an oral contract of insurance is valid, if it is made in conformity with the common-law rules in respect to such contracts, and this continues to be the law at the present day, though the ordinary method of insurance is by a written contract called the policy. Not only is an oral contract of insurance valid, but, when the insurer is an organized company, the regulations in the charter governing the mode of execution of the policy do not by implication prevent the company from making an oral contract of insurance, nor establish rules for its execution; nothing short of a direct statutory provision will make an oral contract invalid. The ordinary cases of oral contracts at the present day are contracts to protect the insured property till the time of issuing the policy, or verbal contracts to take the risk, followed by a loss before the policy is issued. If the contract is complete, in such cases, it may be enforced, though verbal: Putnam *v.* Home Ins. Co., 123 Mass. 324; Patterson *v.* Benjamin Franklin Ins. Co., 81 Pa. St. 454; People's Ins. Co. *v.* Paddon, 8 Ill. App. 447; Westchester Fire Ins. Co. *v.* Earle, 33 Mich. 143; Union, etc. Ins. Co. *v.* Connecticut, etc. Ins. Co. 19 How. (U. S.) 318; Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448; Cooke *v.* Etna Ins. Co., 7 Daly (N. Y.) 555; May, Ins. §§ 14-23; [Firemen's Ins. Co. *v.* Kuessner, 164 Ill. 275; King *v.* Cox, 63 Ark. 204; Stickley *v.* Mobile Ins. Co., 37 S. C. 56.]

A contract of renewal, though it is not under seal, may be a valid renewal of a sealed policy: Lockwood *v.* Middlesex Mut. Ins. Co., 47 Conn. 553.

In England it has now been enacted by statute that a contract for marine insurance is void unless it is contained in a formal policy: 30 Vict. c. 23, §§ 7, 9; Ionides *v.*

person, as the agent of the defendant, his agency must be proved.[2] And proof of the signature by an agent will satisfy an allegation of signature by the defendant himself.[3] Parol evidence of what passed at the time of making the policy is, as we have heretofore shown, inadmissible to affect the written agreement.[4] But the general usage of merchants may be shown to explain ambiguities or define the terms of the policy, though not to contradict its plain language.[5] The general usage of trade, in the city where the insurance is effected, may also be proved for this purpose; but not the usage or practice in a particular office, or among a particular class of underwriters, where or to whom the party was not in the habit of resorting to effect insurance,[6] and which, therefore, cannot be presumed to have been known and referred to by both parties as the basis of the contract; for it is on this ground only that evidence of usage is admitted.[7]

§ 378. **Proof of Interest.** *Secondly*, as to the *proof of interest.* The plaintiff's interest in a *ship* may be shown, *prima facie*, by proof of possession, and acts of ownership; which may be made by the captain or other officer, or by any person having competent knowledge of the facts, without the production of any documentary evidence.[1] But whenever the title to a ship comes strictly in ques-

Pacific Ins. Co., L. R. 6 Q. B. 674, 7 Q. B. 517; Fisher *v.* Liverpool Marine Ins. Co., L. R. 8 Q. B. 469, 9 Q. B. 418.

The recital in a premium note that a policy has issued is *prima facie* evidence of that fact, as against the maker of the note: N. E. M. F. Ins. Co. *v.* Belknap, 7 Cush. (Mass.) 140. So this giving of the note is evidence of the organization of the company: Williams *v.* Cheney, 3 Gray (Mass.) 215. So the recital in a policy of the receipt of the premium is *prima facie*, and only *prima facie*, evidence of that fact: May on Ins. § 581. See also *ante*, § 162, n.]

[2] For the proof of agency, see *supra*, tit. Agency, §§ 59–67. See also *ante*, Vol. I. §§ 416, 417; Brockelbank *v.* Sugrue, 5 C. & P. 21. Proof of a general agency is sufficient proof of authority to effect insurance on behalf of the assured: Barlow *v.* Leckie, 4 J. B. Moore 8.

[3] See *supra*, tit. Bills of Exchange, § 158; Nicholson *v.* Croft, 2 Burr. 1188.

[4] See *ante*, Vol. I. §§ 275–305; [Franklin Fire Ins. Co. *v.* Martin, 40 N. J. L. 568. Parol evidence is however admissible when the question is on the sufficiency or truth of the answers of the insured in his application for insurance, to show that the agent of the company who took down the answers, omitted or misstated some of the answers without the knowledge of the insured: Texas Banking, etc. Co. *v.* Stone, 49 Tex. 4; Planters' Ins. Co. *v.* Sorrels, 57 Tenn. 352.

But not to show that the policy was intended to cover a different interest from that which it purports to protect (Bishop *v.* Clay, etc. Ins. Co., 45 Conn. 430), or to show different stipulations (Hartford, etc. Ins. Co. *v.* Davenport, 37 Mich. 609).

Parol evidence is also admissible to show that the company waived a forfeiture, though this contradicts the statements in the receipts for the premiums: McLean *v.* Piedmont, etc. Ins. Co., 29 Gratt. (Va.) 361.

The recitals of the premium notes are *prima facie* evidence of the facts stated therein: New England, etc. Ins. Co. *v.* Belknap, 7 Cush. (Mass.) 140; Williams *v.* Cheney, 3 Gray (Mass.) 215; May on Ins. § 581; *ante*, § 162, n.]

[5] See *ante*, Vol. I. §§ 292–294; Robertson *v.* Money, Ry. & M. 75; Uhde *v.* Walter, 3 Campb. 16.

[6] Gabay *v.* Lloyd, 3 B. & C. 793; Astor *v.* Union Ins. Co., 7 Cowen 202; Coit *v.* Commercial Ins. Co., 7 Johns. 385.

[7] Eager *v.* Atlas Ins. Co., 14 Pick. 141.

[1] Robertson *v.* French, 4 East 130; Sutton *v.* Buck, 2 Taunt. 302; Wendover *v.* Hogeboom, 7 Johns. 308; Amery *v.* Rogers, 1 Esp. 207; Thomas *v.* Foyle, 5 Esp. 88.

tion, no claim can be received in opposition to the modes of conveyance required by the statutes.[2] Thus, where the plaintiff claimed for a total loss as sole owner of a ship, whose *register* stood in the names of himself and another, parol evidence, offered to show that she was in fact purchased by himself, as sole owner, was held inadmissible.[3] Where the interest is derived from a *bill of sale*, this document must be produced and proved as in other cases;[4] accompanied by evidence of the registry, where this is required by statute, in order to render the other evidence admissible.[5] But the certificate of registry is not alone sufficient to prove the plaintiff's interest in the ship, without proof of some correspondent act of ownership.[6] Whether it is conclusive against the legal ownership of persons claiming title, but whose names are not found therein, seems to depend on the registry acts. In England it has been held conclusive; but in the United States, an insurable interest has been held sufficiently proved by evidence of a title at common law, in a plaintiff whose name did not appear in the register.[7] This document, however, is not of itself evidence to charge a defendant as owner of the ship, without proof that he sanctioned and adopted it.[8] Where the registry of a ship is required by law to be recorded in the custom-house, a certified copy of the record is, as we have seen, admissible in evidence.[9]

§ 379. **Interest, legal and equitable.** It is not material whether the interest of the assured be *legal* or *equitable*. The interest of a trustee, *cestui que trust*, mortgagor, mortgagee, and of the owner of a qualified property, or of a lien, is sufficient for this purpose. So, of a lender on bottomry; or of the borrower, so far as regards the surplus value; or of a captor; or of one entitled to freight, or commissions; or of the owner, notwithstanding the charterer has covenanted either to return the ship or pay her value.[1] And under a

[2] Abbott on Shipping, p. 78, by Shee.
[3] Ohl *v.* Eagle Ins. Co., 4 Mason 172.
[4] Woodward *v.* Larkin, 3 Esp. 287.
[5] 4 Taunt. 657, per Gibbs, J.
[6] Pirie *v.* Anderson, 4 Taunt. 652; 2 Phillips on Ins. p. 487; Flower *v.* Young, 3 Campb. 240.
[7] Camden *v.* Anderson, 5 T. R. 709; Abbott on Shipping, p. 63, n. (1) by Story, J.; id. p. 34, n. (2); Bixby *v.* Franklin Ins. Co., 8 Pick 86; Lamb *v.* Durant, 12 Mass. 54; Taggard *v.* Loring, 16 Mass. 336; 2 Phillips on Ins. p. 488; Sharp *v.* United Ins. Co., 14 Johns. 201.
[8] Abbott on Shipping, p. 63 (Story's ed.); Frazer *v.* Hopkins, 2 Taunt. 5; Smith *v.* Fuge, 3 Campb. 456; Sharp *v.* United Ins. Co., 14 Johns. 201.
[9] *Ante*, Vol. I. § 484.
[1] Marshall on Ins. pp. 101–116, 719–721 (3d ed.); Higginson *v.* Dall, 13 Mass. 96; Oliver *v.* Greene, 3 id. 133; Gordon *v.* Mass. Ins. Co., 2 Pick. 249, 259; Rider *v.* Ocean Ins. Co., 20 id. 259; Bartlett *v.* Walter, 13 Mass. 267; Kenny *v.* Clarkson, 1 Johns. 385; Locke *v.* N. Amer. Ins. Co., 13 Mass. 61; Strong *v.* Manuf. Ins. Co., 10 Pick. 40; Holbrook *v.* Brown, 2 Mass. 280; Smith *v.* Williams, 2 Caines Cas. 110. The interest of a *respondentia* or bottomry creditor must be specially insured as such: Glover *v.* Black, 3 Burr. 1394; Pouverin *v.* Louisiana State Ins. Co., 4 Rob. (La.) 234; Putnam *v.* Mercantile Ins. Co., 5 Met. 386. [So the interest of one who has entered

general averment of interest, the assured may prove any species of interest, either in the whole or in any part, and recover accordingly.[2]

§ 380. **Interest in Goods.** The interest of the assured in the *goods* may be proved by any of the usual mercantile documents of title, such as bills of sale, or of parcels; bills of lading, whether the holder be the shipper or the indorsee; invoices, with proof that the goods were on board; bills of charges of outfit, clearances, and the like.[1] Evidence of possession also, and of other acts of ownership, may be received in proof of interest in the goods on board, as well as of interest in the ship.[2] And it is sufficient that the plaintiff was interested when the risk commenced, though he had no interest when the policy was effected.[3] If the defendant *pays money into court*, this is a conclusive admission of the contract and of the plaintiff's interest as alleged.[4]

§ 381. **Interest; Open or Valued Policy.** Where the insurance is effected by an *open policy*, the value of the plaintiff's interest must be proved *aliunde;* but if it be a *valued policy*, the policy alone is *prima facie* evidence of the value of the property insured.[1] The usual recital in the policy, of payment of the premium, is also sufficient proof of that fact; but in the absence of such recital, the plaintiff must prove it by other evidence.[2]

§ 382. **Inception of the Risk.** *Thirdly*, as to the *Inception of the Risk.* This applies to insurance upon a voyage named, and is proved by any competent evidence, that the *ship* actually sailed, within

into an oral contract to buy the ship is a sufficient interest to enable him to make a valid contract of insurance: Amsinck *v.* American Ins. Co., 129 Mass. 185.

If there is in the policy a stipulation declaring the policy void if the interest of the assured is less than the entire unincumbered interest, it has been held that a breach of this stipulation is waived if the agent who issues the policy knows that the insured is not the sole owner: Mark *v.* National Fire Ins. Co., 24 Hun (N. Y.) 565.

In accordance with the general rule concerning the burden of proof, that he who relies on the existence of any fact must prove its existence, the burden of proving the interest of the plaintiff, in an action on a policy, is generally on the insured, since the fact of his interest is a material fact in his case: *ante*, § 376. It sometimes, however, happens that the burden of proving no interest is on the insurer. Thus, in an action to recover a loss which has already been paid to the insured by the insurer, on the ground that the insured had no interest, the burden of proof of this fact is on the plaintiff: Hooper *v.* Robinson, 98 U. S. 528.

[2] Marshall on Ins. p. 179 (3d ed.). See also Crowly *v.* Cohen, 3 B. & Ad. 478.

[1] Marshall on Ins. pp. 718, 724 (3d ed.); Russell *v.* Boehm, 2 Str. 1127; Dickson *v.* Lodge, 1 Stark. 226; McAndrew *v.* Bell, 1 Esp. 373; 2 Phillips on Ins. pp. 449–491. See, as to the indorsee of a bill of lading, Newsom *v.* Thornton, 6 East 41, per Ld. Ellenborough. But a bill of lading of the outward cargo is not sufficient proof of interest in the return cargo: Beal *v.* Pettit, 1 Wash. C. C. 241. Nor is a bill of lading, "contents unknown," any evidence of the quantity of goods, or of property in the consignee: Haddow *v.* Parry, 3 Taunt. 303. An authenticated copy of an official report of the cargo of a ship, made pursuant to law, by an officer of the customs, is evidence of the shipment: Flint *v.* Fleming, 1 B. & Ad. 45, 48; Johnson *v.* Ward, 6 Esp. 47.

[2] *Supra*, § 378; 2 Phillips on Ins. p. 489.

[3] Rhind *v.* Wilkinson, 2 Taunt. 237.

[4] See *ante*, Vol. I. § 205; Bell *v.* Ansley, 16 East 141, 146.

[1] Marshall on Ins. p. 719 (3d ed.); 2 Phillips on Ins. pp. 206–223, 491; Lewis *v.* Rucker, 2 Burr. 1171; Alsop *v.* Commercial Ins. Co., 1 Sumner 451.

[2] De Gaminde *v.* Pigou, 4 Taunt. 246; Dalzell *v.* Mair, 1 Campb. 532; *ante*, § 377.

a reasonable time, upon the voyage intended.[1] If the insurance is for one voyage, but the ship actually sails upon another, the course of both voyages being the same to a certain point, the policy is discharged, though the loss happened before the ship reached the dividing point.[2] But if the ship sails on the voyage insured, a deviation meditated, but not carried into effect, will not vitiate the policy.[3] And the sailing must be voluntary; for if the ship, before the lading is completed, be driven from her moorings by a storm, and be lost, the averment of sailing is not considered as proved.[4] The risk on *goods* does not commence until goods are put on board, at the place named;[5] but the risk on *freight* may be shown to have commenced, by evidence of a contract to put the goods on board, the performance of which was prevented by some of the perils insured against.[6] If the risk never commenced, the plaintiff, in an action upon the policy, and in the absence of fraud, may recover back the premium, upon the common counts.[7]

§ 383. **Warranties.** *Fourthly*, as to the performance of *precedent Conditions* and compliance with *Warranties*.[1] 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. Such are warranties that the property is neutral; that the ship sailed at the time specified; that she departed with convoy; that she was of the force named; and the like. The first of these, namely, the *neutral character* of the property, being partly negative in its nature, is proved *prima facie* by general evidence, leaving the contrary to be shown by the defendant.[2] The acts of the captain in carrying neutral colors, and in addressing himself to the neutral consul while in port, and the like, are also admissible for the shipper, as *prima facie* evidence of the neutral character of the ship.[3] If the warranty is that the ship shall *sail on or before a*

[1] Koster *v.* Inness, Ry. & M. 336; Cohen *v.* Hinckley, 2 Campb. 51.

[2] Woolridge *v.* Boydell, 1 Doug. 16; Marsden *v.* Reid, 3 East 572; 2 Phillips on Ins. p. 148; Seamens *v.* Loring, 1 Mason 127.

[3] Foster *v.* Wilmer, 2 Stra. 1249; Hare *v.* Travis, 7 B. & C. 14. See 2 Phillips on Ins. c. 11, 12; Marshall on Ins. pp. 260, 278 (3d ed.); Lee *v.* Gray, 7 Mass. 349; Coffin *v.* Newburyport Ins. Co., 9 id. 436; Hobart *v.* Norton, 8 Pick. 159.

[4] Abithol *v.* Bristow, 6 Taunt. 464.

[5] Marshall on Ins. pp. 244, 245, 278, 724 (3d ed.). {In the absence of a distinct statement in the policy of the port whence the voyage is to be made, the risk will commence from a port where the vessel lay when the policy was made, and where the property insured was taken on board: Folsom *v.* Merchants', etc. Ins. Co., 38 Me. 414. A risk on goods to be shipped between two certain days does not cover goods shipped on either of those days: Atkins *v.* Boylston, etc. Ins. Co., 5 Met. (Mass.) 439.}

[6] Flint *v.* Fleming, 1 B. & Ad. 45; Davidson *v.* Willasey, 1 M. & S. 313.

[7] Penson *v.* Lee, 2 B. & P. 330; Penniman *v.* Tucker, 11 Mass. 66; Foster *v.* United States Ins. Co., 11 Pick. 85.

[1] See *post*, §§ 399–401, 406.

[2] Marshall on Ins. pp. 722, 723 (3d ed.); 2 Phillips on Ins. pp. 498–502.

[3] Archangelo *v.* Thompson, 2 Campb. 620. And see Bernardi *v.* Motteaux, 2 Doug. 575.

certain day, stress of weather, or an embargo by the order of government, is no excuse for non-compliance with the engagement.[4] It must also appear that the ship actually set forward on the voyage, in complete readiness for sea. Therefore, an attempt to sail, and proceeding a mile or two and then putting back, by reason of unfavorable weather; or proceeding with only part of the crew, the remainder being engaged and ready to sail; or dropping a few miles down the river, — is no compliance with this warranty.[5]

§ 384. **Warranty to sail with Convoy.** Compliance with a warranty to *sail with convoy* may be proved by the official letters of the commander of the convoy; or, by the log-book of the convoying ship of war.[1] And where the non-performance of this warranty would have involved a breach of law, it will be *presumed* that the law has been obeyed, until the contrary has been shown.[2] *Sailing orders* are generally necessary to the performance of this warranty, if, by due diligence on the part of the master, they could have been obtained.[3] But the state of the weather is not a sufficient excuse for not joining the convoy.[4]

§ 385. **Loss.** *Fifthly*, as to the *Loss*. The plaintiff must also prove that the property insured was lost, and that the loss was not remotely but *immediately caused* by one of the *perils insured against*. Whether the loss which is proved will satisfy the averment, is a question for the court, but the averment itself must be proved.[1] The certificate of a vice-consul abroad is no evidence of the amount of the loss;[2] nor is the protest of the captain admissible as original evidence of the fact of loss, though it may be read to contradict his testimony.[3] If there is no proof of the amount of the loss, the plaintiff will be entitled to nominal damages only.[4]

§ 386. **Loss.** The loss of a ship may be shown not only by direct proof, but by evidence of any circumstances inconsistent with the hypothesis of her safety; such as that, having sailed upon the voy-

[4] Nelson *v.* Salvador, 1 M. & Malk. 309; Sanderson *v.* Busher, 4 Campb. 54, n.; Hore *v.* Whitmore, Cowp. 784. If the averment is that the ship sailed after making the policy, and the proof is that she sailed before, the variance is not material, provided the avernment does not arise out of the contract: Peppin *v.* Solomons, 5 T. R. 406. An embargo at the place of rendezvous of a convoy, after the ship has actually sailed from her port, saves the warranty: Earle *v.* Harris, 1 Doug. 357.

[5] Moir *v.* Royal Ex. Ass. Co., 4 Campb. 84, 6 Taunt. 241; Graham *v.* Barras, 3 N. & M. 125; 5 B. & Ad. 1011; Pettigrew *v.* Pringle, 3 B. & Ad. 514; Bowen *v.* Hope Ins. Co., 20 Pick. 275; Robinson *v.* Manufacturing Ins. Co., 1 Met. 143.

[1] Watson *v.* King, 4 Campb. 275; D'Israeli *v.* Jowett, 1 Esp. 427.

[2] Thornton *v.* Lance, 4 Campb. 231.

[3] Webb *v.* Thompson, 1 B. & P. 5; Hibbert *v.* Pigon, 3 Doug. 224; Anderson *v.* Pitcher, 2 B. & P. 164; Sanderson *v.* Busher, 4 Campb. 54, n.

[4] Sanderson *v.* Busher, 4 Campb. 54, n.

[1] Abithol *v.* Bristow, 6 Taunt. 464. {The time at which the loss is deemed in law to take place is when the injury is received which ultimately causes the destruction of the vessel: Duncan *v.* Great Western Ins. Co., 1 Abb. (N. Y.) App. Dec. 5, 62.}

[2] Waldron *v.* Combe, 3 Taunt. 162.

[3] Senat *v.* Porter, 7 T. R. 158; Christian *v.* Combe, 2 Esp. 489.

[4] Tanner *v.* Bennett, Ry. & M. 182.

age insured,[1] no intelligence has been received concerning her, either at her port of departure, or at her port of destination, both of which should be resorted to,[2] although a reasonable time has elapsed; in which case the jury will be advised to presume that she foundered at sea.[3] If it has been reported that she foundered, but that the crew were saved, yet it will not be necessary to call any of the crew.[4]

§ 387. **Immediate and Remote Cause.** It must be shown that the peril insured against was the *immediate*, and not the remote, *cause of the loss.* "Causa proxima non remota spectatur." The loss must directly arise from, and not remotely be occasioned or brought about by, the peril.[1] Thus, where a peril of the sea occasioned damage to the ship, which rendered repairs necessary, and funds to provide these repairs, and in order to raise funds the master, having no

[1] Koster *v.* Jones, Ry. & M. 333; Cohen *v.* Hinckley, 2 Campb. 51.

[2] Twemlow *v.* Oswin, 2 Campb. 85. But see Marshall on Ins. p. 25 (3d ed.).

[3] Newby *v.* Read, Park on Ins. 106; Houstman *v.* Thornton, Holt's Cas. 242; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

[4] Koster *v.* Reed, 6 B. & C. 19.

[1] Marshall on Ins. 491 (3d ed.); 1 Phillips on Ins. 283–290; 2 id. 194, 195; Peters *v.* Warren Ins. Co., 14 Peters 99; Columbian Ins. Co. *v.* Lawrence, 10 id. 507; Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. 356. {The same rule applies when the insured relies upon some exception in the policy, and the words in an excepting clause "caused by," referring to the cause of the loss or accident, are in like manner construed to mean proximate cause. Thus, where a clause in the policy of life insurance provided that the policy should be void "if the death shall be caused by the use of intoxicating drink or opium," and the physician certified that the death was caused proximately by mental anxiety and remotely by drink, it was held that the meaning of this proviso was, that the death must be caused proximately by the things prohibited: Mutual Life Ins. Co. *v.* Stibbe, 46 Md. 302. Where, however, that which is apparently the proximate cause is really the result of a higher controlling cause, this controlling cause will be regarded as the proximate cause, as where buildings insured caught fire from buildings which had been set on fire by the United States troops, in defence of the town when attacked by rebel forces, there the attack of the rebels and the defence by the Union soldiers was considered the proximate cause of the loss, so as to exempt the company from liability under a clause in the policy exempting the company from any liability from loss occurring by invasion, insurrection, military power, etc.: Insurance Co. *v.* Boon, 95 U. S. 117.

So where a boat was driven ashore by a storm, and the ice formed around her and prevented her being floated off, and she subsequently sank, it was held that the storm which drove her ashore was the proximate cause, and not the ice: Brown *v.* St. Nicholas Ins. Co., 61 N. Y. 332. [Where the policy covers loss by fire only, if the ship is driven ashore and burned while stranded, the assured can recover, if at the time the vessel was capable of being floated and repaired, though at an expense which would exceed her value when repaired: Woodside *v.* Globe Ins. Co., 1896, 1 Q. B. 105.]

It is not, however, necessary for the party who relies on any cause to prove conclusively that that cause must have been the operating cause of the loss. It is enough, until rebutted, if he makes out a *prima facie* case of probable cause. For instance, where a river steamboat springs a leak without apparent cause and founders, it is not necessary for the insured to show conclusively what caused the leak. It is enough for them to show that there were causes which might have produced the leak, and a *prima facie* case is made out by showing some probable cause. To do this, experts in such navigation may testify as to the damaging effect on a heavy laden boat of the swells made by other steamers, but evidence of other specific cases of loss of steamers from that cause is not admissible. The statements of the captain, made while the boat was sinking, giving the reason of her sinking, are admissible also to prove this cause: Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.}

other resource, sold part of the goods on board, it was held that the underwriter on the goods was not liable as for a loss by a peril of the sea; the want of funds, and not the peril of the sea, being the immediate cause of the loss.[2] On the other hand, underwriters against perils of the sea are liable for any loss immediately arising from those perils, such as shipwreck, or collision, though it were remotely occasioned by the mismanagement, negligence, or barratry of the master or mariners;[3] or by the negligent loading of the cargo.[4] And if a ship, by stress of weather, be driven ashore upon an enemy's coast, and there captured, it is a loss by capture, as the immediate cause, and not by perils of the sea.[5]

§ 388. **Loss by Capture.** A loss by *capture* is proved by first showing a capture in fact, and then producing the sentence of condemnation; the latter generally not being admissible until the former is proved.[1] And if it appear that the capture was by collusion between the master of the ship and the enemy, so that a charge of barratry might be supported, yet it is still also a loss by capture.[2]

[2] Powell *v.* Gudgeon, 5 M. & S. 431, 437. So the extraordinary expense of provisions, occasioned by delay during the making of repairs, or during an embargo, is not recoverable against underwriters on the ship only: Marshall on Ins. 730 (3d ed.); Robertson *v.* Ewer, 1 T. R. 127. Yet a direct loss of provisions would be covered by a policy on the ship, of which they are ordinarily deemed a part: Marshall on Ins. 731; 1 Phillips on Ins. 71; 2 id. 218.

[3] Walker *v.* Maitland, 5 B. & Ald. 171; Smith *v.* Scott, 4 Taunt. 126; Bishop *v.* Pentland, 7 B. & C. 214; Heyman *v.* Parish, 2 Campb. 149; Columbian Ins. Co. *v.* Lawrence, 10 Peters 507; Patapsco Ins. Co. *v.* Coulter, 3 id. 222; [Orient, etc. Ins. Co. *v.* Adams, 123 U. S. 67; Liverpool, etc. Co. *v.* Phenix Ins. Co., 129 id. 397; Trinders *v.* North Queensland Ins. Co., 77 L. T. N. S. 80.] As to what constitutes a loss by perils of the sea, see Marshall on Ins. 487–494 (3d ed.); 1 Phillips on Ins. 245–256; 2 id. 189–191; Montoya *v.* London Assur. Co., 4 Eng. L. & Eq. Exch. 500. The exception of "perils of the river," in inland navigation, is equivalent to that of perils of the sea in commerce on the ocean; and is held to include losses occasioned by running on hidden snags and sawyers, and by collisions rendered inevitable by the narrowness of the channel: Eveleigh *v.* Sylvester, cited in 1 Harp. Law 263, 266; Charleston & Col. Boat Co. *v.* Bason, ib. See also Gordon *v.* Little, 8 S. & R. 533; Gordon *v.* Buchanan, 5 Yerg. 71; Smyrl *v.* Niolon, 2 Bailey 421; Williams *v.* Grant, 1 Conn. 487; Turner *v.* Wilson, 7 Yerg. 340. {Underwriters, insuring a vessel against the perils of the sea, are bound to pay the insured the amount paid by him to the owners of another vessel for damages suffered in a collision with the vessel insured, occasioned by the negligence of the master and crew of the latter vessel: Nelson *v.* Suffolk Ins. Co., 8 Cush. (Mass.) 477; Hale *v.* Washington Ins. Co., 2 Story C. Ct. 176; Mathews *v.* Howard Ins. Co., 13 Barb. (N. Y.) 234. But see *contra*, General Mut. Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351.}

[4] Redman *v.* Wilson, 14 M. & W. 476.

[5] Green *v.* Elmslie, Peake's Cas. 212.

[1] Marshall *v.* Parker, 2 Campb. 69; Visger *v.* Prescott, 2 Esp. 184. Lloyd's books are evidence of a capture, though not alone proof of notice to the assured: Abel *v.* Potts, 3 Esp. 242.

[2] Archangelo *v.* Thompson, 2 Campb. 620. See also Goldschmidt *v.* Whitmore, 3 Taunt. 508. {A warranty by the insured in a policy of insurance, that the vessel shall be free from capture, seizure, or detention, does not include a mutinous taking possession of the vessel by the mariners: Greene *v.* Pacific Mut. Ins. Co., 9 Allen (Mass.) 217. In this case, Bigelow, C. J., says: "Upon careful consideration we are of opinion that the exception of a loss by seizure does not include the risk of mutiny of the mariners and the forcible taking of the ship from the control of the officers; or, in other words, that it does not properly exclude from the operation of the policy a loss by barratry. Certainly the word 'seizure' cannot be applied to any barratrous

An averment of loss by capture by enemies unknown is not supported by proof of seizure for breach of the revenue laws of a foreign government.[3] But a general averment of loss by seizure and confiscation by a foreign government is proved by evidence of the seizure by the officers of the government, without putting in the sentence of condemnation.[4] And in the case of seizure of the goods by a foreign government for a cause not affecting the ship, the incidental and consequent detention of the ship is not provable against the underwriters on the ship only, as a loss by capture and detention.[5]

§ 389. **Licensed Voyage.** If the voyage was legalized or protected by a *license*, the license, if existing, must be produced and proved, and shown to apply to the voyage in question.[1] If this document is lost, it may be proved by secondary evidence, as in other cases.[2] If it was granted upon condition, the plaintiff must show that the condition has been performed.[3] And if it was a foreign license, it is a necessary part of the secondary evidence not only to show that the party had a paper purporting to be such a document, but to give some circumstantial proof that it was genuine; such as, that it was received from the hands of a proper officer, or that it had been seen and respected by the officers of the government which issued it.[4]

§ 390. **Barratry.** A loss by *barratry* is proved by evidence of any species of fraud, knavery, or criminal conduct, or wilful breach of duty in the master or mariners, by which the freighters or owners are injured.[1] If the master should proceed on his voyage in the face of inevitable danger of capture, it is barratry.[2] It is sufficient for the plaintiff, in proof of barratry by the master, to prove that the misconduct was that of the person who acted as master, and was

act of the master." In Kleinwort *v.* Shepard, 1 El. & El. 447, it was held that a forcible dispossession of the master and mariners by passengers acting "piratically and feloniously" might properly be deemed a seizure. In Dole *v.* New Eng. Mut. Mar. Ins. Co., 6 Allen (Mass.) 373, it was held that a capture by a cruiser of the so-called Confederate States was included in a warranty that the vessel shall be free from capture, seizure, or detention.}

[3] Matthie *v.* Potts, 3 B. & P. 23.

[4] Carruthers *v.* Gray, 3 Campb. 142.

[5] Bradford *v.* Levy, 2 C. & P. 137; Ry. & M. 331.

[1] Barlow *v.* McIntosh, 12 East 311.

[2] *Ante*, Vol. I. §§ 84, 509, 560, 575; Rhind *v.* Wilkinson, 2 Taunt. 237; Kensington *v.* Inglis, 3 East 273; Eyre *v.* Palsgrave, 2 Campb. 605.

[3] Camelo *v.* Britten, 4 B. & Ald. 184.

[4] Everth *v.* Tunno, 1 Stark. 508.

[1] Vallejo *v.* Wheeler, Cowp. 156, per Aston, J.; Lockyer *v.* Offley, 1 T. R. 259, per Willes, J.; Marshall on Ins. c. 12, § 6; 1 Phillips on Ins. 258; Stone *v.* National Ins. Co., 19 Pick. 34, 36, 37, per Putnam, J.; Wiggin *v.* Amory, 14 Mass. 1; American Ins. Co. *v.* Dunham, 15 Wend. 9. Barratry may be committed by the general owner, as against the freighter: Vallejo *v.* Wheeler, *supra*. {Mere negligence of the pilot in charge is not barratry: Levy *v.* New Orleans, etc. Ins. Co., 2 Woods C. Ct. 63. There must be some fraudulent or wrongful intent on the part of the master or mariners: Atkinson *v.* Great Western Ins. Co., 65 N. Y. 531. See Lawton *v.* Sun Mutual Ins. Co., 2 Cush. (Mass.) 500, and cases there cited: Patapsco Ins. Co. *v.* Coulter, 3 Pet. (U. S.) 222, 234.}

[2] Earle *v.* Rowcroft, 8 East 126; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 117.

in fact treated as such, without either showing, negatively, that he was not the owner, or affirmatively, that some other person was the owner.[3] But it must appear that the act was done from a fraudulent motive, or with a criminal intent, or in known violation of duty; for if it was well intended, though injudicious and disastrous in its results, it is not barratry.[4] If the property was barratrously carried into an enemy's blockaded port, and lawfully condemned as enemy's property, it does not disprove the allegation that the loss was occasioned by the barratry of the master in carrying the property to places unknown, whereby it was confiscated.[5]

§ 391. **Stranding.** A loss by *stranding* is proved by evidence that the ship has been forced on shore, or on rocks or piles, by some unforeseen accident, and not in the ordinary course of navigation, and there rested, or was fixed, so that the voyage was interrupted. A mere temporary touching of the ground in passing over it, or grounding in a tide harbor in the place intended, is not a stranding, even though damage ensues from some hard substance on the bottom.[1] And where a ship was run aground by collision with two others, in the Thames, this is said to have been held no stranding.[2] If the stranding is complete, the degree of damage, and the duration of the time of the vessel's remaining on shore, are not material.[3]

§ 392. **Amount of Loss.** The *amount of the loss*, if it is total, may be shown, as we have already seen, by the policy, with proof of *some* interest, if it is a valued policy; or by any other competent evidence, if it is not.[1] *Shipwreck* is often, but not necessarily, evidence of a total loss of the ship. It depends upon the nature and extent of the injury or damage thereby occasioned. If the loss is not actually total, but the enterprise or voyage insured is defeated, or if the property insured specifically remains, but is damaged to a fatal extent, as, for example, to more than one-half of its value, this, though in fact it may be but a partial loss, may be made constructively total by an *abandonment* of the property by the assured

[3] Ross *v.* Hunter, 4 T. R. 33.

[4] Marshall on Ins. 521 (3d ed.); Phyn *v.* Royal Exch. Ass. Co., 7 T. R. 505. Gross malversation is evidence of fraud: ibid.; Heyman *v.* Parish, 2 Campb. 150; Earle *v.* Rowcroft, 8 East 126. See also Hucks *v.* Thornton, Holt's Cas. 30; Wiggin *v.* Amory, 14 Mass. 1.

[5] Goldschmidt *v.* Whitmore, 3 Taunt. 508.

[1] Harman *v.* Vaux, 3 Campb. 429; McDougle *v.* Royal Exch. Ass. Co., 4 M. & S. 503; Kingsford *v.* Morshall, 8 Bing. 458; Wells *v.* Hopwood, B. & D. 20; Bishop *v.* Pentland, 7 B. & C. 224; 2 Phillips on Ins. 330–335; Marshall on Ins. 232, 233 (3d ed.). {See Corcoran *v.* Gurney, 16 Eng. L. & Eq. 215; Lake *v.* Columbus Ins. Co., 13 Ohio 48 (1844); and Potter *v.* Suffolk Ins. Co., 2 Sumner C. Ct. 197 (1835).}

[2] Baring *v.* Henkle, Marshall on Ins. 232 (3d ed.). *Sed quære.*

[3] Harman *v.* Vaux, 3 Campb. 430; Baker *v.* Towry, 1 Stark. 436.

[1] See *supra*, § 381; 3 Mason 71. The value of goods, in an open policy, is made up of the invoice price, together with the premium and commissions: Marshall on Ins. 629 (3d ed.). [Where the valuation clause is left blank, a statement of the amount of insurance at the bottom of the policy cannot be treated as the valuation: Asfar *v.* Blundell, 1895, 2 Q. B. 196.]

to the underwriter.[2] When, therefore, the assured goes for a constructively total loss, he must prove, first, the extent of the loss in

[2] Marshall on Ins. 566, 567, 592 (3d ed.); 1 Phillips on Ins. 382–388, 401–406, 441–449; 3 Kent Comm. 318–335; Bradlie *v.* Maryland Insurance Co., 12 Peters 378; [Insurance Co. *v.* Canada, etc. Co., 87 F. 491, U. S. App.] The law of abandonment was fully discussed, and all the cases reviewed, by Mr. Justice Story, in his learned opinion in Peele *v.* Merchants' Ins. Co., 3 Mason 27–65. The general principle, extracted from all the cases, in regard to ships, he thus states: "The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in cases of embargoes, blockades, and arrests by sovereign authority; where there is a present total loss of the physical possession and use of the ship, as in case of submersion; where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value. None of these cases will, I imagine, be disputed. If there be any general principle that pervades and governs them, it seems to be this, that the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefits and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost." See 3 Mason 65. See also Am. Ins. Co. *v.* Ogden, 15 Wend. 532. {Though the policy is worded "against total loss only," a constructive total loss is covered by it: O'Leary *v.* Stymest, 6 Allen (N. B.) 289; Adams *v.* Mackenzie, 13 C. B. N. S. 442.

In the United States the right to abandon depends on the actual state of facts on which the abandonment is based, and, if it appears that a sufficient ground existed for an abandonment, a subsequent restitution will not affect the right of the insured to recover for a total loss, unless the restitution takes place before the abandonment. In the English law, on the contrary, any recovery of the vessel before the trial of the case will prevent the insured from recovering a total loss: Arnould, Marine Insurance, vol. ii. p. 294. In a recent case, the effect of a restoration on a previous abandonment is clearly stated by Gray, C. J., as follows: —

"But if the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she was insured, the right to abandon and recover for a constructive total loss still remains without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the entire value of the vessel:" Snow *v.* Union Ins. Co., 119 Mass. 592. And to the same effect, Bigelow, C. J., in the earlier case of Green *v.* Pacific Marine Ins. Co., 9 Allen (Mass.) 223.}

Whether an abandonment is necessary, where the ship or goods have been necessarily sold by the master, *quære;* and see Roux *v.* Salvador, 1 Bing. N. C. 526, that it is; and Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249, 261, 267, and cases there cited, approved in Patapsco Ins. Co. *v.* Southgate, 5 Peters 623, that it is not. {On this point, Mr. Arnould in his work on Marine Insurance, vol. ii. p. 593, says: "It is also established in our jurisprudence (*i. e.* in England), that although the damage be somewhat short of a complete wreck, yet if it be so great as to make it wholly impossible for the master by any means in his power to repair the vessel so as to keep the sea as a ship, or to do so except at a cost that would exceed the ship's value when repaired, or if she be stranded in such a position that her recovery for the purposes of the adventure is beyond all hope, and the master is consequently acting *optima fide* for the benefit of all concerned, and sells the ship, where she lies, as the only chance of saving anything from disaster, the assured may treat this as an absolute total loss of the ship, and recover the whole amount of the insurance without giving notice of abandonment." And this is now settled law: Cambridge *v.* Anderton Ry., Mood. 60; McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 506; Butler *v.* Murray, 30 id. 88; The Amelie, 6 Wall. 30. But cf. Stephenson *v.* Piscataqua, etc. Ins. Co., 54 Me. 55. It is said that Lord Campbell never could be reconciled to it, and uniformly held that a notice of abandonment was

fact, as exceeding half the value, or as being destructive of the enterprise;[3] and, secondly, his abandonment of the property to the underwriters. And in estimating the cost of repairs, in order to ascertain the right to abandon, if, by reason of the perils insured against, it has become necessary to replace some decayed timbers with new ones, which, but for the injury, were strong enough for the voyage, the expense of such repairs is to be taken into the estimate; the rule in this respect being, that, when the injury which the insurers are obliged to make good is the cause of the decayed parts requiring repairs, then the insured may abandon.[4] And, more generally speaking, the rule is stated to be, that "if the vessel is so injured by a peril insured against as to be useless to the owner, except at an expense that no prudent man, if uninsured, would incur, — an expense far exceeding her value when repaired, — this is, to all intents and purposes, a total loss."[5] But if the abandonment has been accepted, this supersedes the necessity of proof of the loss;[6] and long acqui-

necessary in all cases where the vessel still existed *in specie*. In a similar case in New Brunswick, Wood *v.* Stymest, 5 Allen (N. B.) 314 (1862), it was held, in accordance with the view of Lord Campbell (who is quoted largely by the judge in delivering the opinion of the court), that though the wreck may be justifiably sold there must still be notice of abandonment. The facts of this case, however, did not constitute that urgent necessity for a sale which is admitted on all hands to be the only justification of a sale and claim for a total loss without abandonment, and, although the language of the court is very strong, it may be doubted whether the case impugns at all the authority of the cases which settle the English doctrine.}

[3] {The proof of a loss exceeding half the value gives a right to abandon only because it is presumptive proof of such a state of facts as constitutes a constructive total loss. If, therefore, it is shown that the vessel has arrived at her port of destination, though she is damaged to that extent, and the master sells because he cannot get funds to repair, the owners cannot abandon: Allen *v.* Commercial Ins. Co., 1 Gray (Mass.) 154. But if she is at a port of refuge and the master sells for the same reason, the owners may claim a constructive total loss: ib.

Where the policy is upon cargo, after any considerable portion of the goods insured, though less than half the value (in this case thirty-eight per cent), has arrived at the port of destination, and been landed in a perfect state, the insured cannot abandon and recover as for a total loss: Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 88. Cf. Merchants' Marine Ins. Co. *v.* New Orleans Marine Ins. Co., 24 La. An. 305. Whether the arrival of a small portion of the goods at the port of destination in a totally valueless condition will prevent an abandonment is a nice question. It was decided in the negative, in Wallerstein *v.* Columbian Ins. Co., 3 Robt. 528, and 44 N. Y. 204 (1865). If the portion of the goods saved arrive at the port of destination before any abandonment is made, the burden will be on the plaintiff to show that it was of no value, and no proof which falls short of this will be sufficient to prove a total loss: Young *v.* Pacific Marine Ins. Co., 34 N. Y. Sup. Ct. 341 (1872); Forbes *v.* Manufac. Ins. Co., 1 Gray (Mass.) 371;} [Monroe *v.* British Ins. Co., 5 U. S. App. 179.]

[4] Hyde *v.* Louis. State Ins. Co., 1 Mart. N. s. 410; 2 Phil. on Ins. 291, cited and affirmed in Phillips *v.* Naire, 11 Jur. 455. {The abandonment transfers all the interest of the insured to the insurers, so far as the interest is covered by the policy, and relates back to the time of the loss. The underwriters are not bound to pay over the money on the loss before they bring suit to recover against third parties for the loss of the vessel. Their title is perfect when a valid abandonment has been made and accepted: Graham *v.* Ledda, 17 La. Ann. 45; Mills *v.* Mary E. Perew, 15 Blatchf. C. Ct. 58; The Manistee, 7 Biss. C. Ct. 35.}

[5] Irving *v.* Manning, 2 M. G. & Sc. 784, 788, per Pollock, C. B.

[6] 1 Phillips on Ins. 449, 450; Smith *v.* Robertson, 2 Dow 474; Brotherston *v.* Barber, 5 M. & S. 418. {An abandonment once accepted estops the insurer from setting up as a defence the fact that the assured had broken certain clauses in the policy: Leduc *v.* Provincial Ins. Co. of Canada, 19 L. Can. Jurist, 281.}

escence without objection, under circumstances calling for some action on the part of the underwriters, is evidence from which an acceptance may be inferred by the jury.[7]

§ 393. **Adjustment.** The amount of a loss may be proved by an *adjustment*, signed by the underwriters, which is usually indorsed on the back of the policy. But the form of it is not material; for the acceptance of an abandonment is an admission of the loss as total.[1] In whatever form the adjustment may be, it is an admission of all the facts necessary to be proved by the assured to entitle him to recover in an action on the policy. It is not, however, conclusive; but, like other *prima facie* evidence, it throws the burden of proof on the other party, to impeach it; which he may do by showing that it was made under a mistake of fact, or procured by fraud in the assured or his agent.[2] In cases proper for general average, it is the duty of the master, on his arrival at the foreign port of destination, to have the loss adjusted by a competent person, according to the usage and law of the port; and, being thus fairly made, it is conclusive and binding upon all the parties concerned.[3]

§ 394. **Preliminary Proof.** The clause usually inserted in policies, that the money is to be paid in a certain number of days, *after preliminary proof of loss*, is liberally expounded, requiring only the best evidence of the fact in possession of the party at the time. Proof, in the strict and legal sense, is not required. Thus, the protest of the master,[1] or a copy of the letter from him to the correspondents of the owner transmitted by them to the owner, and stating the loss,[2] or the report by a pilot of the capture of the ship,[3] have been held suffi-

[7] Hudson *v.* Harrison, 3 B. & B. 97; s. c. 3 Moore 288; Smith *v.* Robertson, 2 Dow 474. The observation of Story, J., in Peele *v.* Merchants' Ins. Co., 3 Mason 81, that the silence of the underwriter is not, *per se*, proof of his acceptance, is not conceived to impugn the rule in the text. See *ante*, Vol. I. § 197; Peele *v.* Suffolk Ins. Co., 7 Pick. 254; Reynolds *v.* Ocean Ins. Co., 22 id. 191; 1 Met. 160. {A general average loss upon the subject insured is to be paid in full by the insurer, without deduction, and without reference to the question whether the vessel, if it happen to be a vessel, can or cannot be repaired, and at what cost in reference to her value. The distinguishing characteristic of such a loss is, that it is voluntarily incurred by the owner of one of the subjects at risk, for the benefit of all. The cutting away the masts of a vessel, and the consequent damages, are general average charges, although the vessel is in ballast, and there is therefore neither freight nor cargo to contribute: Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415.}

[1] Bell *v.* Smith, 2 Johns. 98. An award of arbitrators is an adjustment: Newburyport Ins. Co. *v.* Oliver, 8 Mass. 402.

[2] See *ante*, Vol. I. §§ 209, 212; 3 Kent Comm. 339; 1 Phillips on Ins. 500–502; Marshall on Ins. 642–647 (3d ed.), and cases there cited; Dow *v.* Smith, 1 Caines 32; Bilbie *v.* Lumley, 2 East 469; Faugier *v.* Hallett, 2 Johns. Cas. 233; Haigh *v.* De la Cour, 3 Campb. 319. An agent who has authority to subscribe a policy has also authority to sign an adjustment of loss: Richardson *v.* Anderson, 1 Campb. 43, n.; Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268.

[3] Strong *v.* New York Firem. Ins. Co., 11 Johns. 323; Simonds *v.* White, 2 B. & C. 805; 4 Dowl. & Ry. 375; Daglish *v.* Davidson, 5 Dowl. & Ry. 6; Loring *v.* Neptune Ins. Co., 20 Pick. 411. But it does not bar the ship-owner from claiming of the underwriter a loss not included in the foreign adjustment: Thornton *v.* United States Ins. Co., 3 Fairf. 150; 3 Kent Comm. 224.

[1] Lenox *v.* United Ins. Co., 3 Johns. Cas. 224.

[2] Lawrence *v.* Ocean Ins. Co., 11 Johns. 241.

[3] Munson *v.* New Eng. Ins. Co., 4 Mass. 88.

cient, that being the best evidence the party possessed.[4] Under a policy containing this clause, proof of the loss alone has been held sufficient, without any proof of interest;[5] but if evidence of interest is required, the production of the usual mercantile documents, such as the bill of lading, invoice, bill of parcels, and the like, is sufficient.[6] And whatever be the nature of the preliminary proof, if the underwriter does not object to its sufficiency at the time it is exhibited, but refuses to pay the loss on some other specified ground, the objection of insufficiency in the proof is waived.[7]

§ 395. **Defences.** The specific *defences* usually made to an action on a marine policy are of two classes; namely, (1) Misrepresentation or Concealment of material facts, by the assured, during the time of treating for the policy; (2) Breach of Warranty.

§ 396. **Misrepresentation; Concealment.** And, first, as to *Misrepresentation* and *Concealment*. As this contract requires the highest degree of good faith, and the most delicate integrity, the assured is held bound to communicate to the underwriter, at the time of the treaty, every fact which is in truth material to the risk, and within his knowledge, whether he deems it material to the risk or not; and all the information he possesses in regard to material facts, though he does not know or believe it to be true, and it proves to be false.[1] And where there are successive underwriters on the same policy, a misrepresentation to the first has been held a misrepresentation to all.[2] Nor does innocency of intention, or mistake, on the part of the assured, make any difference; for the underwriter is equally injured, whether he was misled through ignorance or fraud, and the policy, in either case, is void.[3] But a representation, though untrue, will not avoid the policy, if the underwriter is not

[4] Munson *v.* New Eng. Ins. Co., 4 Mass. 88. See also Barker *v.* Phenix Ins. Co., 8 Johns. 307; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348.

[5] Talcott *v.* Marine Ins. Co., 2 Johns. 130.

[6] Johnston *v.* Columbian Ins. Co., 7 Johns. 315.

[7] Voss *v.* Robinson, 9 Johns. 192; Martin *v.* Fishing Ins. Co., 20 Pick. 389; *post*, § 406; {Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 53. So, if a particular defect be pointed out, silence as to others is a waiver: Phillips *v.* Prot. Ins. Co., 14 Mo. 220. And a refusal to pay on grounds which render preliminary proof unnecessary is a waiver of such proof: Blake *v.* Exch. Ins. Co., 12 Gray (Mass.) 265. The affidavits and accounts of loss offered as preliminary proofs are only evidence of compliance with the requirements of the policy in that respect, and not proof for the insured of the amount of his loss: Newmark *v.* Liverpool Ins. Co., 30 Mo. 160. But see Moor *v.* Protection Ins. Co., 29 Me. 97. They are *prima facie* evidence for the insurer against the insured: Insurance Co. *v.* Newton, 22 Wall. (U. S.) 32.}

[1] Lynch *v.* Hamilton, 3 Taunt. 37; Marshall on Ins. 449–478 (3d ed.); 1 Phillips on Ins. c. 7; Alston *v.* Mechanics' Ins. Co., 4 Hill (N. Y.) 329; Bryant *v.* Ocean Ins. Co., 22 Pick. 200; Curry *v.* Com'th Ins. Co., 10 Pick. 535; Seton *v.* Low, 1 Johns. Cas. 1.

[2] Barber *v.* Fletcher, 1 Doug. 305; Marsden *v.* Reid, 3 East 573; 1 Phillips on Ins. 84; Pawson *v.* Watson, Cowp. 787; Marshall on Ins. 454 (3d ed.). But not as to an underwriter on a different policy, though on the same risk: Elting *v.* Scott, 2 Johns. 157. The doctrine of the text, however, has been questioned: See Forrester *v.* Pigou, 1 M. & S. 9; Brine *v.* Featherstone, 4 Taunt. 871.

[3] Bryant *v.* Ocean Ins. Co., 22 Pick. 200; Clark *v.* Manuf. Ins. Co., 2 W. & M. 472; s. c. 8 How. S. C. 235.

deceived by it; as, where a ship is cleared for one port, with liberty to touch at an intermediate port, but intending to go direct to the port of ultimate destination, such being the known and uniform course of trade at the time, for the sake of avoiding the operation of certain foreign regulations.[4] And it is in all cases sufficient if the representation be true in substance. If it is made by an agent, he also is bound to communicate all material facts within his own knowledge, and all the information he has received, in the same manner as if he were the principal; and this, whether the principal had knowledge or information of the facts or not.[5]

§ 397. **Opinions; Silence.** On the other hand, the assured is *not bound* to state his *opinions*, or belief, or conclusions, respecting the facts communicated; nor to communicate matters which lessen the risk; or which are known, or ought to be known, to the underwriter; or which are equally open to both parties; or which are general topics of speculation; or are subjects of warranty.[1] And mere silence concerning a material fact known to the underwriter is not a culpable concealment, if no inquiry is made on the subject.[2] The question whether the facts not disclosed were material to the risk is for the jury to determine;[3] and to this point the opinions of others, however experienced in sea risks, are not admissible,[4] unless, perhaps, where the materiality is purely a question of science.[5]

§ 398. **Burden of Proof.** The defence of concealment being nearly allied to the charge of fraud, the *burden of proof* is upon the underwriters, to establish both the existence of the fact concealed and its materiality to the risk; but the latter may be inferred from the nature of the fact itself.[1] If the fact concealed was 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.[2]

399. **Warranties.** Secondly, as to *breach of warranty*. Besides the *express warranties*, frequently inserted in policies of insurance, — such as, that the ship was *safe*, or *sailed*, or was *to sail*, on a given day, or should sail with *convoy*, or that the property was *neutral*, — there

[4] Planche *v.* Fletcher, 1 Doug. 251.

[5] Marshall on Ins. 464 (3d ed.). The representation by a broker, made at the time of treating for the policy, is binding on the assured, unless it is withdrawn or qualified before the execution of the policy: Edwards *v.* Footner, 1 Campb. 530.

[1] Marshall on Ins. 453–460, 472, 473 (3d ed.); Walden *v.* New York Ins. Co., 12 Johns. 128; Bell *v.* Bell, 2 Campb. 475, 479; 1 Phillips on Ins. 103.

[2] Green *v.* Merchants' Ins. Co., 10 Pick. 402. And see Laidlow *v.* Organ, 2 Wheat. 178, 195.

[3] Littledale *v.* Dixon, 1 New Rep. 151 (4 B. & P. 151); McDowell *v.* Fraser, 1 Doug. 260; New York Ins. Co. *v.* Walden, 12 Johns. 513.

[4] See *ante*, Vol. I. § 441.

[5] Berthon *v.* Loughman, 2 Stark. 258; 2 Stark. Evid. 649.

[1] Tidmarsh *v.* Washington Ins. Co., 4 Mason 439, 441, per Story, J.; Fiske *v.* New England Ins. Co., 15 Pick. 310, 316; 2 Phillips on Ins. 504; *ante*, Vol. I. §§ 34, 35, 80.

[2] 2 Phillips on Ins. 505; Livingston *v.* Delafield, 3 Caines 51–53; Brander *v.* Ferriday, 16 La. 296; *ante*, Vol. I. § 138.

are certain *warranties implied* by law in every contract of this sort, — namely, that the ship shall be *seaworthy* when she sails; that she shall be *documented* and *navigated* in conformity with her national character, and with *reasonable skill* and care; that the *voyage is lawful* and shall be *lawfully performed;* and that it shall be pursued in the usual course, without wilful *deviation*. A breach in any of these is a valid defence to an action on the policy.[1]

§ 400. **Seaworthiness.** The warranty of *seaworthiness* imports that the ship is stanch and sound, of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchor, stores, and supplies, a captain of competent skill and capacity, a competent and sufficient crew, a pilot, when necessary, and, generally, that she is in every respect fit for the voyage insured.[1] And neither the innocence nor ignorance of the insured, nor the knowledge of the underwriter, will excuse a breach of this warranty.[2] The beginning of the risk is the period to which this warranty relates. If the vessel subsequently becomes unseaworthly, the warranty is not broken, if the assured uses his best endeavor to remedy the defect; and of a neglect to do this, the underwriter can avail himself only when a loss has occurred in consequence thereof.[3]

§ 401. **Burden of Proof.** Where unseaworthiness of the ship is relied on, as a non-compliance with an implied warranty, the ship will be *presumed seaworthy*, and to continue so, until the contrary is proved by the underwriter, or shown from the evidence adduced on

[1] Marshall on Ins. 353, 354 (3d ed.); 1 Phillips on Ins. 112, 113; Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Stocker *v.* Merrimack Ins. Co., 6 Mass. 220; Cleveland *v.* Union Ins. Co., 8 Mass. 308. {Where the defence relied on is breach of warranty, and not condition precedent, the answer should set it up, and the burden of proof, by a preponderance of evidence, is on the defendant: Jones *v.* Brooklyn, etc. Ins. Co., 61 N. Y. 79; Piedmont, etc. Ins. Co. *v.* Ewing, 92 U. S. 377. So, where, in a policy of insurance on a paper-mill and fixtures, the words "on condition that the applicants take all risk from cotton waste," inserted between the statement of the sum insured and of the place where the property is situated, constitute a proviso, the burden of proof is on the insurers to show that the loss was occasioned by cotton waste: Kingsley *v.* New England, etc. Ins. Co., 8 Cush. (Mass.) 393. See also Jones Manuf. Co. *v.* Manufacturers' Mut. Ins. Co., ib. 82.}

[1] 1 Phillips on Ins. c. 7, §§ 1, 2; Marshall on Ins. 146–160 (3d ed.).

[2] Marshall on Ins. 152–157 (3d ed.); Park on Ins. 343. [But as to the extent of the warranty, see Thebaud *v.* Great Western Ins. Co., 155 N. Y. 516.]

[3] Phillips on Ins. 117, 118; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; Weir *v.* Aberdeen, 2 B. & Ald. 320; Starbuck *v.* New England Ins. Co., 19 Pick. 198; Paddock *v.* Franklin Ins. Co., 11 id. 227; Copeland *v.* New Eng. Ins. Co., 2 Met. 432; Watson *v.* Clark, 1 Dow 344; Hollingsworth *v.* Brodrick, 7 Ad. & El. 40; 2 N. & P. 608; 1 Jur. 430; [Union Ins. Co. *v.* Smith, 124 U. S. 405;] {Deshon *v.* Merchants' Ins. Co., 11 Met. (Mass.) 199. If the vessel is unseaworthy when she sails, the fact that the defect is afterwards remedied does not avoid the breach of the warranty: Quebec Marine Ins. Co. *v.* Commercial Bank of Canada, L. R. 3 P. C. 234. The word "seaworthy" does not necessarily mean that the ship is in a state completely fit for sea navigation, but includes in it a fitness for present navigation, either on a sea or river, if about to sail, or sailing, on either, and a condition of repair and equipment fit for such a port, if she is then in port (Small *v.* Gibson, 3 Eng. Law & Eq. 299, affirmed in the House of Lords, 24 Id. 16), and also seaworthy for the special purposes for which she is to be used. So, when the insurance was on a deckload, the vessel was held unseaworthy if it was necessary to jettison the deckload to make her seaworthy: Daniels *v.* Harris, L. R. 10 C. P. 1. In a time policy there is no implied

the other side.[1] And this may not only be shown by any competent direct evidence, but may be proved inferentially, by evidence of the bad condition of the ship soon after sailing, without the occurrence of any new and sufficient cause.[2] After proof of her actual condition, experienced shipwrights, who never saw her, may be asked their opinion, whether, upon the facts sworn to, she was seaworthy or not.[3] But a sentence of condemnation for unseaworthiness in a foreign vice-admiralty court, after a survey, though conclusive to prove the fact of condemnation, has been held inadmissible as evidence of the fact recited in it, that, from prior defects, unseaworthiness might be presumed; nor are the reports of surveyors abroad admissible evidence of the facts contained in them.[4]

§ 402. **Unlawful Voyage.** If the defence rests on the *violation of law* by the assured, whether in the object or the conduct of the voyage, such as non-compliance with the convoy act, or destination to a hostile port; or, on any neglect of duty in the master, — the burden of proof is on the underwriter, it being always presumed that the law has been observed, and that duty has been done, until the contrary is shown.[1] The want of *neutral character* is usually shown by a decree of condemnation for that cause; and to this point the

warranty or condition that the vessel is seaworthy at the commencement of the risk or term, wherever she happens to be, or in whatever circumstances she is placed at the time. The rule is otherwise in a voyage policy: ibid.; Gibson *v.* Small, L. R. 4 H. L. C. 353; Thompson *v.* Hopper, 6 El. & Bl. 192; Fawcus *v.* Sarsfield, 34 Eng. L. & Eq. 277; Dudgeon *v.* Pembroke, L. R. 9 Q. B. 581; 1 Q. B. Div. 96; 2 App. Cas. 284; Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517. See Jones *v.* Insurance Co., 2 Wallace, Jr. 278. In a time policy on a vessel which at the commencement of the risk is in a foreign port, where full repairs may be made, there is an implied warranty of seaworthiness, both for port and in setting out therefrom: Hoxie *v.* Pacific Mut. Ins. Co., 7 Allen (Mass.) 211. In this case the authorities are very fully collected and considered in the arguments of counsel and the opinion of Bigelow, C. J. The implied warranty of seaworthiness attaches to a policy for the insurance of goods as well as that of the ship: Horter *v.* Merchants', etc. Ins. Co., 28 La. An. 730.]

[1] Parker *v.* Potts, 3 Dow 23; Taylor *v.* Lowell, 3 Mass. 347; Barnewall *v.* Church, 1 Caines 234, 246; Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 236, 237; Martin *v.* Fishing Ins. Co., 20 id. 389; Talcot *v.* Commercial Ins. Co., 2 Johns. 124. But see Tidmarsh *v.* Washington Ins. Co., 4 Mason 441, per Story, J. If the underwriters admit, in the policy, that the ship is seaworthy, they are bound by the admission, and cannot dispute the seaworthiness: Parfitt *v.* Thompson, 13 M. & W. 392. [In New York, by statute, any foreign vessel leaving port without a licensed pilot is presumed unseaworthy: Laws 1857, c. 242. This presumption is not overcome merely by the fact that the master took her out safely: Borland *v.* Mercantile Mut. Ins. Co., 46 N. Y. Superior Ct. 433.

The sinking of a boat in port is enough to rebut the presumption of seaworthiness: Gartside *v.* Orphans,' etc. Ins. Co., 62 Mo. 322. Or if the vessel puts back a few days after leaving port, from inability to proceed: Pickup *v.* Thames, etc. Ins. Co., L. R. 3 Q. B. Div. 594.]

[2] Marshall on Ins. 157; Watson *v.* Clark, 1 Dow 344; Parker *v.* Potts, 3 id. 23; Douglas *v.* Scougall, 4 id. 269; Park on Ins. 333; 1 Phillips on Ins. 116.

[3] Beckwith *v.* Sydebotham, 1 Campb. 117; Thornton *v.* Royal Exch. Co., Peake's Cas. 25; *ante*, Vol. I. § 440.

[4] Marshall on Ins. 151, 152 (3d ed.); Wright *v.* Barnard, ib. p. 152; Dorr *v.* Pacific Ins. Co., 7 Wheat. 581; Watson *v.* North Amer. Ins. Co., 2 Wash. C. C. 152; Saltus *v.* Commercial Ins. Co., 10 Johns. 58.

[1] Thornton *v.* Lance, 4 Campb. 231; *ante*, Vol. I. §§ 34, 35, 80, 81; 2 Phillips on Ins. 503, 504.

sentence of a foreign tribunal of competent jurisdiction is, as we have seen, conclusive.[2] The fabrication and spoliation of documents and papers are also admissible evidence to the same point, though not conclusive in law.[3] If the defendant would impugn the plaintiff's right to recover for a loss by capture, on the ground that the sentence of condemnation, rendered in a foreign court, appears to have been founded on the want of documents, not required by the law of nations, which the plaintiff ought to have provided, the burden of proof is on the defendant, to show the foreign law or treaty, which rendered it necessary for the plaintiff to provide such documents.[4]

§ 403. **Deviation.** The defence of *deviation* is made out by proof that there has been a voluntary departure from, or delay in, the usual and regular course of the voyage insured without necessity or reasonable cause.[1] The ordinary causes of necessity, which justify a deviation, are, stress of weather; want of necessary repairs, or men; to join convoy; to succor ships in distress; to avoid capture or detention; sickness of the captain or crew; mutiny; and the like.[2] And hence the objects or causes of deviation are distributed into two general classes, — namely, first, to save life; and, secondly, to preserve the property intrusted to the master's care.[3]

§ 404. **Fire Insurance.** In the SECOND PLACE, as to INSURANCE AGAINST FIRE. Here, the same general principles apply as in the case of Marine Insurance. The declaration contains similar allegations as to the contract, the performance of conditions, and the loss; and the points to which the evidence is to be applied are generally the same, differing only so far as the subjects differ in their nature. The policy is to be produced and proved as in other cases, together with proof of the payment of the premium, and of the plaintiff's interest in the property; of his compliance with all the conditions precedent; and of the loss, by fire, within the period limited in the policy.[1]

[2] *Ante*, Vol. I. § 541.

[3] *Ante*, Vol. I. § 37.

[4] Le Cheminant *v.* Pearson, 4 Taunt. 367.

[1] [Hostetter *v.* Park, 137 U. S. 30.]

[2] Marshall on Ins. 177–206 (3d ed.); 1 Phillips on Ins. 179–216; Coffin *v.* Newburyport Ins. Co., 9 Mass. 436; Stocker *v.* Harris, 3 id. 409. Putting into a port to put a vessel in good trim, if it could not be conveniently done at sea, is not a deviation: Chase *v.* Eagle Ins. Co., 5 Pick. 51.

[3] Turner *v.* Protection Ins. Co., 12 Shepl. 515.

[1] See Ellis on Fire and Life Insurance, pp. 24–58, 61–66, 93, 94, in the Law Library, vol. iv.; 3 Kent Comm. 370–376; Lawrence *v.* Columbian Ins. Co., 2 Pet. 25; 10 id. 507. If the insurer sues on a premium note, he must show also his compliance with the conditions precedent to the right: *ante*, p. 162, n.

The following is the usual form of a count upon a valued fire policy: "For that the plaintiff on —— was interested in a certain dwelling-house, in ——, then occupied by him, to the value of —— dollars, and so continued interested until the destruction of said house by fire, as hereinafter mentioned; and the said (*defendants*), on the same day, in consideration of a premium in money then and there paid to them therefor by the plaintiff, made a policy of insurance upon the said dwelling-house, and thereby promised the plaintiff to insure —— dollars thereon, from said —— day of —— until the —— day of ——, against all such immediate loss or damage as should happen to said dwelling-house by fire, other than fire happening by means of any invasion, insur-

§ 405. **Loss must be by Actual Ignition.** The proof of loss must show an *actual ignition* by fire; damage by heat alone, without actual ignition, not being covered by the policy.[1] And as to the

rection, riot, or civil commotion, or of any military or usurped power, to the amount aforesaid, to be paid to the plaintiff in sixty days after notice and proof of the same; upon condition that the plaintiff, in case of such loss, should forthwith give notice thereof to said company; and as soon thereafter as possible should deliver in a particular account thereof under his hand, and verified by his oath or affirmation; and, if required, should produce his books of account and other proper vouchers; and should declare on oath whether any and what other insurance was made upon said property; and should procure a certificate under the hand of a magistrate, notary-public, or clergyman (most contiguous to the place of the fire, and not concerned in the loss, nor related to the plaintiff), that he was, at the time of certifying, acquainted with the character and circumstances of the plaintiff, and knew, or verily believed, that he really, and by misfortune, and without fraud or evil practice, had sustained by such fire loss and damage to the amount therein mentioned; and the plaintiff avers that afterwards, and before the expiration of the time limited in said policy, to wit, on the —— day of ——, the said dwelling-house was accidentally, and by misfortune, totally consumed by fire; of which loss the plaintiff forthwith gave notice to said (*defendants*), and as soon as possible thereafter, to wit, on ——, delivered to them a particular account thereof, under his hand, and verified by his oath, and did at the same time declare on his oath that no other insurance was made on said property [except ——]; and afterwards, on ——, did procure a certificate under the hand of [A. B.], Esquire, a magistrate most contiguous to the place of said fire, not concerned in said loss, nor related to the plaintiff, that he was then acquainted with the character and circumstances of the plaintiff, and verily believed that he really, and by misfortune, had sustained, by said fire, loss and damage to the amount of the sum in said certificate mentioned, to wit, ——, and on the same day the plaintiff produced and delivered said certificate to the said (*defendants*). Yet though requested, and though sixty days after such notice and proof of said loss have elapsed, the said (*defendants*) have never paid either of the sums aforesaid to the plaintiff," etc. See as to stating the limitations and qualifications of the contract, 1 Chitty's Pl. 267–269, 316; Clark *v.* Gray, 6 East 564; Howell *v.* Richards, 11 id. 633; Hotham *v.* E. Ind. Co., 1 T. R. 638; Brown *v.* Knill, 2 B. & B. 395; Tempany *v.* Burnand, 4 Campb. 20; 6 Vin. Ab. 450, pl. 40; Anon., Th. Jones 125; Butterworth *v.* Lord Despencer, 3 M. & S. 150. And see *contra*, 8 Conn. 459.

[1] Austin *v.* Drew, 4 Campb. 360; 6 Taunt. 436; Hillier *v.* Alleghany Ins. Co., 3 Barr 470. [Nor damage by explosion caused by lighting a match in a room filled with gas: Heuer *v.* Northwestern, etc. Ins. Co., 144 Ill. 393. But see Lynn Gas Co. *v.* Meriden Ins. Co., 158 Mass. 570, where damage caused by electrical action due to the fire was held to be "caused by fire."] And see Babcock *v.* Montgomery Ins. Co., 6 Barb. S. C. 637, where the position in the text is fully sustained. And see, accordingly, Angell on Fire Ins. §§ 111–129, where the authorities on this point are collected. In Illinois, however, where the plaintiff's goods, which were insured "against loss or damage by fire," were damaged by the smoke from an adjoining building which was on fire, and by the water thrown in extinguishing it, the goods having been removed from the store in consequence of the imminent danger; but no part of the plaintiff's store was burnt, though the heat was so great as to crack the window-glass and scorch the window frames through the iron shutters, and to destroy the paint on the roof; a majority of the court held, that the loss was within the terms of the policy, the Chief Justice dissenting: Case *v.* Hartford Fire Ins. Co., 13 Ill. 676. The court, in this case, denied the soundness of the position in the text. *Ideo quære.* And the doctrine of the Illinois case seems to have the better support both of reason and authority: Scripture *v.* Lowell, 10 Cush. (Mass.) 350; May on Ins. § 402. If the loss is occasioned by the mere force of lightning, without actual combustion, it is not covered by a policy against losses "by fire," or "by reason or by means of fire:" Kennison *v.* Merrimack Co. Ins. Co., 14 N. H. 341; Babcock *v.* Montgomery Ins. Co., 6 Barb. S. C. 637. If the fire was caused by mere negligence of the assured, it is still covered by the policy: Shaw *v.* Robberds, 6 Ad. & El. 75; Waters *v.* Merchants' Ins. Co., 11 Peters 213; 3 Kent Comm 374; Catlin *v.* Springfield F. Ins. Co., 1 Sumn. (U. S. C. Ct.) 434; [Des Moines Ice Co. *v.* Niagara Ins. Co., 99 Ia. 193; Pool *v.* Milwaukee Ins. Co., 91 Wis. 530; Liverpool, etc. Ins. Co. *v.* McNeill, 89 F. 131, U. S. App.] Unless it amounts to misconduct: Citizens' Ins. Co. *v.* Marsh, 5 Pa. St. 387. But the assured may be guilty of such misconduct, not amounting to a fraudulent intent to burn the building,

plaintiff's interest, it is not necessary that it be absolute, unqualified, or immediate; a trustee, mortgagee, reversioner, factor, or other bailee, being at liberty to insure their respective interests subject only to the rules adopted by the underwriters, which generally require that such interests be distinctly specified.[2] But a policy

as to preclude him from recovering for its loss by fire. In Chandler *v.* Worcester Ins. Co., 3 Cush. 328, where evidence of such misconduct was offered in the court below and rejected, a new trial was ordered for that cause; but the facts proposed to be proved are not stated in the report. The general doctrine on this subject was stated by Shaw, C. J., as follows: "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitute no defence. Whether the same rule will apply equally to a case where a loss has occurred by means which the assured by ordinary care could have prevented is a different question. Some of the cases countenance this distinction: Lyon *v.* Mells, 5 East 428; Pipon *v.* Cope, 1 Campb. 434.

"But it is not necessary to decide this question. The defendants offered to prove gross misconduct on the part of the assured. How this misconduct was to be shown, and in what acts it consisted, is not stated. The question then is, whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn the building, we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, but not including a mere nonfeasance. Suppose the assured, in his own house, sees the burning coals in the fireplace roll down on to the wooden floor, and does not brush them up; this would be mere nonfeasance. It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flame begin to kindle in a small spot which a cup of water would put out; and the assured has the water at hand, but neglects to put it on. This is mere nonfeasance; yet no one would doubt that it is culpable negligence, in violation of the maxim, 'Sic utere tuo ut alienum non lædas.' To what extent such negligence must go, in order to amount to gross misconduct, it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration, that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury.

"Whether the facts relied on to show gross negligence and gross misconduct, of which evidence was offered, would have proved any one of these supposed cases, or any like case, we have no means of knowing; but as they might have done so, the court are of opinion, that the proof should have been admitted, and proper instructions given in reference to it."

[2] Ellis on Insurance, p. 22; Marshall on Ins. 789 (3d ed.); Lawrence *v.* Columbian Ins. Co., 2 Peters 25, 49; 10 id. 507. ¦The interest sufficient to support an action on a policy of insurance against fire has been variously defined by the courts. The best general description of it seems to be that the insurer must have such an interest in the property insured, that, if it is destroyed, some loss will fall on him: Lycoming Fire Ins. Co. *v.* Jackson, 83 Ill. 302; Merrett *v.* Farmers' Ins. Co., 42 Iowa 11; [Home Ins. Co. *v.* Mendenhall, 164 Ill. 458. Although he may be able to reimburse himself for the loss: U. S. *v.* American Tobacco Co., 166 U. S. 468.]

A mere creditor, who has no lien on any property of the debtor, has been held not to have an insurable interest: Wheeler *v.* Factors', etc. Ins. Co., 3 Woods C. Ct. 43.

The interest need not be legal. An equitable interest is sufficient: Rumsey *v.* Phœnix Ins. Co., 17 Blatch. C. Ct. 527; Dunlop *v.* Avery, 23 Hun (N. Y.) 509; [California Ins. Co. *v.* Union, etc. Co., 133 U. S. 387.]

So, one who has advanced money to purchase the land, and is in possession, and holds a power of attorney to dispose of it, has an insurable interest: Brugger *v* State, etc. Ins. Co., 5 Sawyer C. Ct. 304.

A mortgagee's interest is insurable: King *v.* State, etc. Ins. Co., 7 Cush. (Mass.) 4; Foster *v.* Equitable Ins. Co., 2 Gray (Mass.) 216.

One partner has an insurable interest in a building purchased with partnership

against fire is a personal contract only; and, therefore, if the assured parts with all his interest in the property, before a loss happens, the policy is at an end; though if he retains a partial or qualified interest, it will still be protected.[3]

funds, although it stands upon land owned by the other partner: Converse *v.* Citizens', etc. Ins. Co., 10 Cush. (Mass.) 37.

One who has a lien on property may insure it to the extent of his lien. So held in case of a warehouseman's lien on goods deposited with him: Waters *v.* Monarch. etc. Ins. Co., 94 Eng. L. & Eq. 116. And of a mechanic's lien on a building: Insurance Co. *v.* Stimson, 103 U. S. 25.

[An insurance agent interested in the profits of the insurance business has an insurable interest in the property insured: Hayes *v.* Milford Ins. Co., 49 N. E. 754, Mass.]

Cf., on the general question of insurable interest, Lord *v.* Dall, 12 Mass. 115; Etna Ins. Co. *v.* Miers, 5 Sneed (Tenn.) 139; Milligan *v.* Eq. Ins. Co., 16 Up. Can. Q. B. 304; Eastern R. R. Co. *v.* Relief F. Ins. Co., 98 Mass. 420; Forbes *v.* Am. Mut. L. Ins. Co., 15 Gray (Mass.) 249; May on Ins. § 76 *et seq.*

The burden of proof of an insurable interest, if it is not admitted by the pleadings, is on the plaintiff: Planters' Ins. Co. *v.* Diggs, 8 Baxt. (Tenn.) 563.

Proof of an application for insurance, and of a policy issuing thereon, both of which describe the property insured as the property of the plaintiffs, is *prima facie* evidence of title and of an insurable interest in the plaintiffs: Nichols *v.* Fayette Ins. Co., 1 Allen (Mass.) 63. An insurance policy purported to insure S. upon certain property described as his; the amount, in case of loss, to be paid to W. In an action of assumpsit on the policy, brought by W. against the insurance company, it was held that parol evidence was not admissible to show that W. was the real party to the contract; that the defendants had agreed to insure a mortgage interest held by him, and undertook to do so by the policy; and that they contracted with him by the name of S.: Woodbury Savings Bank *v.* Charter Oak Ins. Co., 29 Conn. 374.{

[3] Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; 2 Peters 25; 10 id. 507; {McCluskey *v.* Providence, etc. Ins. Co., 126 Mass. 306.} Where the policy prohibited any assignment of the interest of the assured, "unless by the consent of the company, manifested in writing," and the secretary, on application to him, at the office of the company, indorsed and subscribed such consent on the policy; it was held, that his authority to do so, in the absence of evidence to the contrary, should be presumed; and that, if proof were necessary, evidence that he had often indorsed such consent on other policies would be *prima facie* sufficient: Conover *v.* Mutual Ins. Co. of Albany, 3 Denio 254. {Parting with the interest during the currency of the policy does not put an end to it, if the interest be recovered and held at the time of the loss: Rex *v.* Ins. Co., 2 Phila. (Pa.) 357; Worthington *v.* Bearse, 12 Allen (Mass.) 382. On this point the note of Mr. May, in the previous edition of this work, is as follows: —

A policy made by a mutual fire insurance company was assigned by the insured, with the consent of the company, to a mortgagee of the property insured, on his giving a written promise to pay future assessments, and that the property should be subject to the same lien as before for the payment of assessments. This assignment was held to constitute a new contract of insurance between the mortgagee and the insurers, and not to be affected by the subsequent alienation by the mortgagor of his equity of redemption, nor by his grantees obtaining subsequent insurance thereon: Foster *v.* Equitable, etc. Ins. Co., 2 Gray (Mass.) 216. The giving a mortgage of real estate, made after insurance has been effected, where the mortgagee does not take possession, is not such an alienation as will avoid a policy which is on the condition that it shall become void in case the property insured is alienated (Jackson *v.* Mass. Mut., etc. Ins. Co., 23 Pick. 418); and there is no distinction on this point between real and personal property (Rice *v.* Tower, 1 Gray (Mass.) 426; Folsom *v.* Belknap, etc. Ins. Co., 30 N. H. 231; Howard Ins. Co. *v.* Bramer, 23 Pa. St. 50); nor is the seizure of the insured goods on execution without removing them such an alienation as will avoid such a policy (ibid.; Franklin Fire Ins. Co. *v.* Findlay, 6 Whart. 483); nor is the levy of an execution on real estate, so long as the right of redemption remains in the debtor, such an alienation as will avoid such a policy (Clark *v.* New England, etc. Ins. Co., 6 Cush. (Mass.) 342). The alienation of one of several estates, separately insured by the same policy, only avoids such a policy as to the estate so alienated: ibid. It seems that this indorsement on a policy of insurance, "For value received, pay the within, in case of loss, to F. & H.," made to the purchaser of the property insured, is rather an

§ 406. **Conditions Precedent.** Though the plaintiff must here also, as in other cases, show a compliance with all *precedent conditions* and warranties,[1] yet, if any mistake or misrepresentation, in

order or assignment of a right to the money in case of loss than a regular transfer of the contract of insurance: Fogg *v.* Middlesex, etc. Ins. Co., 10 Cush. (Mass.) 337. As to what the assignees must show in order to render such an assignment operative, see the same case. See also Phillips *v.* Merrimack, etc. Ins. Co., ib. 350. Proof of an application for insurance, and of a policy issuing thereon, both of which describe the property insured as the property of the plaintiffs, is *prima facie* evidence of title and of an insurable interest in the plaintiffs: Nichols *v.* Fayette Ins. Co., 1 Allen (Mass.) 63. An insurance policy purported to insure S. upon certain property described as his; the amount, in case of loss, to be paid to W. In an action of assumpsit on the policy, brought by W. against the insurance company, it was held that parol evidence was not admissible to show that W. was the real party to the contract; that the defendants had agreed to insure a mortgage interest held by him, and undertook to do so by the policy; and that they contracted with him by the name of S.: Woodbury Savings Bank *v.* Charter Oak Ins. Co., 29 Conn. 374.]

[1] [The valuable note, on this point, of Mr. May in the previous edition of this work is as follows: "A warranty in a policy of insurance is an express stipulation that something then exists, or has happened, or been done, or shall happen, or be done; and this must be literally and strictly complied with by the assured, whether the truth of the fact, or the happening of the event, be or be not material to the risk, or be or be not connected with the cause of the loss. It is a strict condition. Its effect is that the assured takes on himself the responsibility of the truth of the fact, or of the happening or not of such contingency; and unless the warranty be strictly complied with, the policy does not take effect. It is a condition precedent; and the assured is estopped from denying or asserting anything contrary to his express warranty: Blackhurst *v.* Cockell, 3 T. R. 360; De Hahn *v.* Hartley, 1 T. R. 343; Newcastle F. Ins. Co. *v.* MacMorran, 3 Dow 255; Miles *v.* Connecticut Mutual Life Ins. Co., 3 Gray 580. But whilst the law requires of the assured a strict and literal compliance with the warranty, whatever may be the motive for inserting it, so the same rule of strict and literal performance shall be applied when it operates in favor of the assured: Kemble *v.* Rhinelander, 3 Johns. Cas. 134. Nothing is to be added by way of intendment or construction, when the words are clear and intelligible, although it may reasonably be inferred that some object was intended to be accomplished by the warranty, which a mere literal compliance does not fully reach: Hyde *v.* Bruce, reported in 1 Marsh. Ins. (3d ed.) 354." By Shaw, C. J., in Forbush *v.* Western Mass. Ins. Co., 4 Gray 337. This case decides that a statement in a policy of insurance, that a certain sum is insured on the same property by another company named, even if a warranty, is satisfied by the existence of such insurance by that company at the time of issuing *this* policy; although one of the conditions of *that* insurance be that it shall be annulled by any subsequent insurance obtained without the consent of that company, and such consent be not obtained to this insurance. And if such consent be not obtained, these insurers are liable for the whole amount of any loss, notwithstanding a provision in their policy, that, in case of any other insurance, whether prior or subsequent, they will not be liable beyond the proportion which the amount insured by them bears to the whole amount insured. See Hubbard *v.* Hartford Fire Ins. Co., 33 Iowa 325, for an elaborate discussion of the effect of condition against prior and subsequent insurance, in a case where two policies of different dates, upon the same property, each had conditions against other insurance, both prior and subsequent.

The by-laws of a mutual insurance company provided that the policy, which was made subject to the conditions and provisions of the by-laws, should be void unless the true title of the insured should be expressed in the application. A failure to disclose a mortgage of $800 in the application was held to avoid the policy: Bowditch, etc. Ins. Co. *v.* Winslow, 3 Gray 415; Packard *v.* Agawam, etc. Ins. Co., 2 id. 334. So where the application in answer to a question stated that there was an incumbrance on the property of "about $3,000," and it was in fact $4,000, the policy was held void: Hayward *v.* New England Mutual Ins. Co., 10 Cush. 444. And where the policy was on real and personal estate, and the application disclosed an incumbrance of "about $4,000," to A. B., and the fact was that there was a mortgage to C. D. of $3,600 on the real and personal estate, and another mortgage on the real estate to E. F. of $1,100, the policy was held void. And it makes no difference that the insurers are an incorporated company in another State, and so may have no lien on the property insured in

this or any other case, has been occasioned by the insurers themselves or their agents, the assured is excused.[2] The usual stipulation in these policies, that the insured shall, upon any loss, forthwith deliver an account of it, and procure a certificate from the nearest clergyman or magistrate, stating his belief that the loss actually occurred, and without fraud, etc., is a condition precedent, the performance of which must be particularly alleged and strictly proved.[3]

this State (Davenport *v.* New. Eng. Mut. Ins. Co., 6 id. 340); nor that the mortgage was made before the mortgagor acquired his title, and was not recorded until after the lien of the insurance company would have attached (Packard *v.* Agawam Mut., etc. Co., 2 Gray 334). [A statement that "the amount of the mortgage" is the principal sum seems sufficient. See Hosford *v.* Germania Ins. Co., 127 U. S. 399.] And where the application, which the applicant covenanted was a just, full, and true exposition of the condition and value of the property, so far as known, or material to the risk, stated the value of the goods to be insured to be from $2,000 to $3,000, it was held, the policy being an open one, that it was not void, although the insured knew that he had not goods on hand, at the time of insurance, to the amount of $2,000, if such representation was made in good faith that the stock on hand, together with the goods to be added and kept during the continuance of the policy, should range in amount from $2,000 to $3,000: Lee *v.* Howard, etc. Ins. Co., 11 Cush. 324. A representation in an application for insurance against fire, that a counting-room in the building which contains the property insured is warmed by a stove, and that the stove and funnel are well secured, does not bind the insured to keep the stove and funnel well secured when not in use: Loud *v.* Citizens', etc. Ins. Co., 2 Gray 221.

Where the applicant stated that the premises were his, without anything more specific in regard to his title, and he had in fact only a bond for a deed, the policy was held void: Smith *v.* Bowditch, etc. Co., 6 Cush. 448; Marshall *v.* Columbian Ins. Co., 27 N. H. 157; Leathers *v.* Ins. Co., 24 id. 259. So where the application represents that the property belongs to the insured only, and it is in fact owned by him and another, and where it is represented as unincumbered, and it has been sold for taxes, the policy is made void, though the misrepresentations are not made with a knowledge of their falsity, or with an intent to deceive: Wilbur *v.* Bowditch, etc. Ins. Co., 10 Cush. 446; Friesmuth *v.* Agawam, etc. Co., ib. 587. So where the by-laws in a policy so made provide that a subsequent insurance made by the insured without the consent of the insurers shall avoid the policy, the procuring a subsequent valid insurance annuls the policy (Burt *v.* People's Mut. Ins. Co., 2 Gray 398; Carpenter *v.* Prov. Wash. Ins. Co., 16 Pet. 495, and 4 How. (U. S.) 224); but if the subsequent insurance is not valid, it does not avoid the policy (Clark *v.* New Eng. Mut. Fire Ins. Co., 6 Cush. 342; Hardy *v.* Union Mut. Fire Ins. Co., 4 Allen 217); and this is so, although the underwriters of the void policy pay the loss (Philbrook *v.* New Eng., etc. Ins. Co., 37 Me. 137). For cases in which the insured have attempted to avoid the effect of this stipulation by showing that the insurers or their agents had notice of the subsequent insurance, see Barrett *v.* Union Mut., etc. Co., 7 Cush. 175; Forbes *v.* Agawam, etc. Ins. Co., 9 id. 470; Worcester Bank *v.* Hartford, etc. Ins. Co., 11 id. 265; Lowell *v.* Middlesex, etc. Ins. Co., 8 id. 127; Schenck *v.* Mercer Co., etc. Ins. Co., 4 Zabr. 447. The better doctrine now is, that if an insurance company accept a policy, knowing any fact which would make it void if fairly availed of, it is estopped to set up such fact in defence: Un. Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222; May on Ins. § 497 *et seq.*; [Continental Ins. Co. *v.* Chamberlain, 132 U. S. 304.] It seems, where the subsequent insurance is the renewal of a former policy, or a substitute for it, that the rule is the same: Burt *v.* People's Mut. Ins. Co., 2 Gray 398. Fraud in inducing a person to accept a policy of insurance will not render an insurance company liable in an action of contract upon it, if, by the terms of the policy, such action cannot be maintained: Tebbetts *v.* Hamilton Mut. Ins. Co., 3 Allen 569. Where the policy contained this clause in connection with the description of the property insured, "This policy not to cover any loss or damage by fire which may originate in the theatre proper," the burden of proof is on the plaintiff to show a loss not originating in the theatre proper: Sohier *v.* Norwich Fire Ins. Co., 11 Allen 336.]

[2] Newcastle Fire Ins. Co. *v.* MacMorran, 3 Dow. 255. See, as to representations, 2 Phillips on Ins. 96–100, 136–142; 3 Kent Comm. 372–375.

[3] Worsley *v.* Wood, 6 T. R. 710; 2 H. Bl. 574; Marshall on Ins. 807–811 (3d ed.). [The certificate and other preliminary proof of loss, although it states the amount of

But slight proof that the certifying magistrate is the nearest one is sufficient.[4] And it is sufficient if the condition be performed in reasonable time.[5]

the loss, is not admissible evidence of the value of the property destroyed (Moor *v.* Protection Ins. Co., 29 Me. 97; Newmark *v.* Liverpool Ins. Co., 30 Mo. 160; Farrell *v.* Ætna Fire Ins. Co., 7 Baxt. (Tenn.) 542; Edgerly *v.* Farmers' Insurance Co., 48 Iowa 644); nor is it made evidence if introduced by the company to prove an overvaluation (Brown *v.* Clay, etc. Ins. Co., 68 Mo. 133).

The affidavits and proofs of loss are *prima facie* evidence for the insurer as *admissions* of the plaintiff (Insurance Co. *v.* Newton, 22 Wall. U. S. 32); nor are bills of lading, invoices, etc. (Paine *v.* Maine, etc. Ins. Co., 69 Me. 568); nor offers of purchase of the property made after the policy is issued (Wood *v.* Fireman's, etc. Ins. Co., 126 Mass. 316).

An affidavit of the plaintiff in other proceedings, if tending to prove the amount of loss, is an admission and may be proved against him: Mispelhorn *v.* Farmers' Fire Ins. Co., 53 Md. 473.

The rental of a building at the time of loss is competent on the question of value: Atlantic Insurance Co. *v.* Manning, 3 Col. 224; Graham *v.* Phœnix Ins. Co., 77 N. Y. 171.

From the previous edition the following note of Mr. May is extracted: A policy, issued by a mutual fire insurance company, was expressly made subject to the provisions, etc., of the by-laws of the company, one of which required that the insurance shall not be payable until the insured shall have delivered a particular account in writing under oath to the company, stating the nature and value of his interest therein. It was held that such an account was insufficient that did not state the nature and value of the insured's interest at the time of the loss, although it stated that the entire property was destroyed, and although the value of the property was stated in the application which was expressly "made part of the policy, reference thereto being had for description;" because the parties, by an express stipulation, made the rendition of such an account an essential prerequisite to the right to recover any part of the insurance: Wellcome *v.* People's, etc. Ins. Co., 2 Gray 480. See Kingley *v.* New England, etc. Ins. Co., 8 Cush. 393. Where notice of a loss is given, but not according to the by-laws, and the insurers, without objecting to the form of the notice, decline paying the loss for other reasons, they will be held to have waived the right to a more particular notice: Clark *v.* New England, etc. Ins. Co., 6 id. 342; Underhill *v.* Agawam, etc. Ins. Co., ib. 440.]

[4] Cornell *v.* Le Roy, 9 Wend. 163; [Williams *v.* Niagara Fire Ins. Co., 50 Iowa 561. Cf. Gilligan *v.* Commercial Fire Ins. Co., 20 Hun (N. Y.) 93;] [Oswalt *v.* Hartford Ins. Co., 175 Pa. 427; Virginia Ins. Co. *v.* Goode, 30 S. E. 370, Va.]

[5] Lawrence *v.* Columbian Ins. Co., 10 Peters 507. [Any conduct of the insurer which renders the production of these proofs useless, either because he will not receive them or because he appears satisfied with those already given, is a waiver of the performance of this condition: Williams *v.* Hartford Ins. Co., 54 Cal. 442; Rokes *v.* Amazon Ins. Co., 51 Md. 512; Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 53.

Merely holding the proofs without returning them does not waive the right of the company to object to them: Bell *v.* Lycoming Fire Ins. Co., 19 Hun (N. Y.) 238; [*contra*, Minneapolis, etc. R. *v.* Home Ins. Co., 64 Minn. 61; Capitol Ins. Co. *v.* Wallace, 50 Kan. 453; Union Ins. Co. *v.* Barwick, 36 Neb. 223; Carpenter *v.* Allemannia Ins. Co, 156 Pa. 37.] Nor does mere silence waive the right to have such proofs furnished: Mueller *v* South Side, etc. Ins. Co., 87 Pa. St. 399. [But see Martin *v.* Manufacturers', etc. Co., 151 N. Y. 94.] If a particular defect be pointed out, silence as to others, *e. g.* defective preliminary proof, is a waiver: Phillips *v.* Prot. Ins. Co., 14 Mo. 220; German Ins. Co. *v.* Ward, 90 Ill. 550; Hartford Fire Ins. Co. *v.* Smith, 3 Col. 422; [Levine *v.* Lancashire Ins. Co., 66 Minn. 138.] And a refusal to pay, on grounds which render preliminary proof unnecessary, is a waiver of such proof: Blake *v.* Exch. Ins. Co., 12 Gray (Mass.) 265. So when the insured furnished proofs, and the company did not accept them, but denied that any liability to plaintiffs had arisen under said alleged policy, and refused to pay any alleged claim thereunder: Harriman *v.* Queen Ins. Co., 49 Wis. 71; Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. (Va.) 613; [Lumbermen's Ins. Co. *v.* Bell, 166 Ill. 400; Ætna Ins. Co. *v.* Simmons, 49 Neb. 811; Gross *v.* Milwaukee Ins. Co., 92 Wis. 656; Linn *v.* United States Ins. Co., 104 Mich. 397; Bloom *v.* State Ins. Co., 94 Ia. 359; Stepp *v.* National, etc. Ass'n, 37 S. C. 417; Hahn *v.* Guardian Ass. Co., 23 Or. 576; but the question is for the jury: Robinson *v.*

§ 407. **Damages.** In the estimation of *damages*, the question for the jury is, the actual loss of the plaintiff; which is to be ascertained by the expenses of restoring the property to the condition in which it was before; the contract being one of mere indemnity. Therefore, in case of the loss of a building by fire, the assured cannot recover for the damage occasioned by the interruption or destruction of his business, carried on in the building; nor for the gains which were morally certain to come to him if the building had not been destroyed; but only sufficient for the restoration of that which was insured, namely, the building.[1] The law of marine insurance respecting salvage does not apply to policies of insurance against fire. They assume the risk of the property to a fixed and agreed amount. If the loss is partial, the party is entitled to recover to the amount of that loss, if less than the sum insured; and if there is a total destruction of the property, then to the amount of the policy, the value stated being in that case in the nature of liquidated damages.[2]

§ 408. **Wilful Burning.** Where the *defence* is that the property was *wilfully burnt by the plaintiff* himself, the crime must be as fully and satisfactorily proved to the jury as would warrant them in finding him guilty on an indictment for the same offence.[1] If

Pennsylvania Ins. Co., 90 Me. 385.] So, a full examination under oath, of the insured, pursuant to a stipulation of the policy, is a waiver of defective proof: Badger *v.* Phœnix Ins. Co., 49 Wis. 396.}

[1] Niblo *v.* N. American Ins. Co., 1 Sandf. 551. [As to what loss is not the proximate result of the fire, see Cuesta *v.* Royal Ins. Co., 98 Ga. 720.]

[2] Liscom *v.* Boston Mutual Ins. Co., 9 Met. 205; Harris *v.* Eagle Fire Co., 5 Johns. 368, 373; 1 Phillips on Ins. 375; Vance *v.* Foster, 1 Irish Circuit Cas. 51, cited 3 Steph. N. P. 2084. By a misapprehension of the remarks of Pennefather, B., in this last case, it was erroneously stated in the first edition of this volume, that no deduction was to be made for the difference of value between new and old materials, or any regard had to the cost of the property. See *contra*, Brinley *v.* National Ins. Co., 11 Met. 195. {The total destruction need not be an entire destruction of the materials. If the building ceases to exist as such, it is totally destroyed: Williams *v.* Hartford Ins. Co., 54 Cal. 442; Harriman *v.* Queen Ins. Co., 49 Wis. 71; [O'Keefe *v.* Liverpool Ins. Co., 140 Me. 558.]

The valuation of the building, expressed in the policy, binds the company: Reilly *v.* Franklin Ins. Co., 43 Wis. 449.} [By statute: Caledonian Ins. Co. *v.* Cooke, 41 S. W. 279, Ky.]

[1] Thurtell *v.* Beaumont, 1 Bing. 339. But see *contra*, Hoffman *v.* Western Ins. Co., 1 La. Ann. 216. [If the assured is insane the insurer is liable unless otherwise stipulated in the policy: Showalter *v.* Mutual Ins. Co., 3 Pa. Super. Ct. 448; D'Autremont *v.* Fire Ass'n, 65 Hun 475.] {On the mode of proof of a crime in civil cases in general, see Vol. I. § 13 *a*. The decisions have varied greatly, but it is now generally held, that to prove wilful burning is not proving a crime, so as to compel proof beyond a reasonable doubt. It is enough if the wilful burning is established by a preponderance of the evidence: Kane *v.* Hibernia, etc. Ins. Co., 39 N. J. L. 697; Ellis *v.* Buzzell, 60 Me. 209; Schmidt *v.* N. Y. Un. Mut. Ins. Co., 1 Gray (Mass.) 529; Wash. Ins. Co. *v.* Wilson, 7 Wis. 169; Scott *v.* Home Ins. Co., 1 Dill. (C. Ct.) 105; *post*, § 426; Am. L. Rev., July, 1876; Vaughton *v.* L. & N. W. R. R. Co., L. R. 9 Ex. 93. The insured in a policy against fire may be guilty of such gross misconduct, not amounting to a fraudulent intent to burn the building, as to preclude him from recovering for a loss of the same by fire: Chandler *v.* Worcester, etc. Ins. Co., 3 Cush. (Mass.) 328; Hynds *v.* Schenectady Ins. Co., 16 Barb. (N. Y.) 119. When the insured stated that the fire might have originated in some oiled shavings in a lumber-room in a cellar, this was held to be no evidence of his wilfully setting the place on fire: Farmers', etc. Ins. Co. *v.* Gargett, 42 Mich. 287. On such an issue, evidence that the money, etc., of

the defence is, that the *risk* has been *materially increased contrary to a condition in the policy*, so as to render the policy void, the question, whether, upon the facts proved, the risk has been so increased, is for the jury to determine.[2] But it is not necessary *in such case* for the defendant to show that any loss has resulted therefrom; for it is the change of circumstances and consequent increase of peril that absolves the underwriter, and not the actual loss.[3] Such change

plaintiff was destroyed by the fire, and that the property far exceeded in value the insurance, is competent: Farmers', etc. Ins. Co. *v.* Crampton, 43 Mich. 421.}

[2] Curry *v.* Commonwealth Ins. Co., 10 Pick. 585; {Lockwood *v.* Middlesex, etc. Ins. Co., 47 Conn. 553; Griswold *v.* American, etc. Ins. Co., 70 Mo. 654; Thayer *v.* Providence, etc. Ins. Co., 70 Me. 531; Rice *v.* Tower, 1 Gray (Mass.) 426. The permitting an officer who has seized the goods insured on execution to sell the same in the insured's building, if the risk is enhanced thereby, would be an increase of the risk which the insured had the means to control: Rice *v.* Tower, *supra*. A policy of insurance, which is issued upon a dwelling-house in consequence of an express oral promise by the applicant that it shall be occupied, will not be avoided by the failure to fulfil such promise, unless fraud is proved, even though the risk is thereby increased. Gray, J., says, "An oral representation as to a future fact honestly made can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract:" Kimball *v.* Ætna Ins. Co., 9 Allen (Mass.) 543. The fact that a building, insured when occupied, afterwards becomes unoccupied, does not necessarily increase the risk, but this question should be left for the jury: ibid. So if experts are called to show that an unoccupied building is more of a risk than one occupied, and the other side puts in evidence showing the location and condition of the lot, the evidence should be given to the jury: Cornish *v.* Farm Buildings, etc. Ins. Co., 74 N. Y. 295.} [See also Vol. I. § 441 *e*.]

[3] Merriam *v.* Middlesex Ins. Co., 21 Pick. 162. In this case, it was provided, in the act incorporating the company, that if any alteration should be made in any house or building, by the proprietor thereof, after insurance has been made thereon with said company, whereby it may be exposed to greater risk or hazard from fire, the insurance shall be void, unless an additional premium shall be settled with and paid to the directors, etc. And the court held, that, as this constituted part of the contract between the parties, an alteration, such as there described, was fatal to the policy. So where a similar provision was contained in the policy itself, the like judgment was given: Houghton *v.* Manufacturers' Mutual Fire Ins. Co., 8 Met. 114, 121. The language of the court on this point was as follows: "There is another clause in the policy to which the attention of the court was drawn at the argument, which is this: 'If the situation or circumstances affecting the risk upon the property insured shall be altered or changed, by or with the advice, agency, or consent of the assured or their agent, so as to increase the risk thereupon, without the consent of the company, the policy shall be void.' The court are of opinion that this was a stipulation and condition, without a substantive compliance with which the company, from the time of its happening, would cease to be bound by the contract. This provision binds the assured, not only not to make any alteration or change in the structure or use of the property, which will increase the risk, but prohibits them from introducing any practice, custom, or mode of conducting their business, which would materially increase the risk, and also from the discontinuance of any precaution represented in the application to be adopted and practised with a view to diminish the risk. The clause in question, as well as the preceding clause, refers to the application and the representations contained in it. Taking this clause with the representations, we think the legal effect is, that, so far as these representations set forth certain usages and practices observed at the factory, as to the mode of conducting their business, and as to precautions taken to guard against fire, it is not only an affirmation that the facts are true at the time, but in effect a stipulation, that, as far as the assured, and all those intrusted by them with the care and management of the property, are concerned, such modes of conducting the business shall be substantially observed, and such precautions substantially continue to be taken, during the continuance of the policy.

"By a *substantial* compliance, we mean the adoption of precautions, if not exactly those stated in the application, precautions intended to accomplish the same purpose,

of circumstances alone, without consequent increase of risk, is not sufficient to avoid the policy; and therefore the erection of a wooden building, in actual contact with the building insured, will not have this effect, unless the risk is thereby increased.[4] The change of use, too, must be habitual, or of a permanent character. Thus, where the policy was on premises "where no fire is kept, and where no hazardous goods are deposited," a loss occasioned by making a fire once on the premises, and heating tar, for the purpose of making repairs, was held covered by the policy.[5] And where a kiln used for drying corn was upon one occasion used for the more dangerous process of drying bark, whereby the building took fire and was consumed, the underwriters, on the same principle, were held liable.[6]

and which may be reasonably considered equally or more efficacious. For instance, when it is stated that ashes are taken up in iron hods, it would be a substantial compliance if brass or copper were substituted. So, when it is represented that casks of water, with buckets, are kept in each story, if a reservoir were placed above with pipes to convey water to each story, and found by skilful and experienced persons to be equally efficacious, it would be a substantial compliance." If there be no such stipulation in the contract, but the risk is materially increased by the fraud or misconduct of the assured, whereby the loss happens, it is conceived that he cannot recover: Stebbins *v.* Globe Ins. Co., 2 Hall (N. Y.) 632. And see Loundsbury *v.* Protection Ins. Co., 8 Conn. 459; 5 Western Law Journ. 303.

{Mr. May's note on this point in the previous edition was as follows: "A fire policy issued by a stock company stipulated that the use of the buildings insured, during the continuance of the policy, for any trade or business denominated hazardous or extra hazardous, *or specified on a memorandum of special rates*, in the terms and conditions annexed to this policy, should avoid the policy, and that the conditions annexed should be resorted to in order to explain the rights and obligations of the parties. One condition was, that, if the risk should be increased, *or the premises be so occupied by the assured as to render the risk more hazardous*, the policy should be void. During the continuance of the policy, a part of the premises was used for a trade or a business *specified in the memorandum of special rates*, and not mentioned in the policy, and it was held that this avoided the policy, although the risks of the policy were special hazards; and that parol evidence was not admissible to show that such use did not increase the risk, and that such use was in fact known to the agent of the company, who examined the premises, and agreed with the assured upon what facts were material to be stated, and filled up the application, received the premium, and issued the policy: Lee *v.* Howard Fire Ins. Co., 3 Gray 583; Westfall *v.* Hudson River, etc. Ins. Co., 2 Kernan 89. And such policy cannot be held valid for a portion of the risk, and invalid for the residue: ibid. See also Brown *v.* People's Mut. Ins. Co., 11 Cush. 280; Friesmuth *v.* Agawam, etc. Ins. Co., 10 id. 587."}

[4] Stetson *v.* Massachusetts Ins. Co., 4 Mass. 330.

[5] Dobson *v.* Sotheby, 1 M. & Malk. 90. {Where the policy of insurance upon a trip-hammer shop, with the machinery therein, contained a provision that the policy should be void if the building remains unoccupied over thirty days without notice, it was held not erroneous to instruct the jury that "it is not sufficient to constitute occupancy, that the tools remained in the shop, and that the plaintiff's son went through the shop, almost every day, to look around and see if things were right, but some practical use must have been made of the building:" Keith *v.* Quincy Mutual Fire Ins. Co., 10 Allen 228.}

[6] Shaw *v.* Robberds, 6 Ad. & El. 75; {Barrett *v.* Jermy, 3 W. H. & G. (Ex.) 535, 545. And where the building was represented as occupied for storing lumber, and having a counting-room in it, and the counting-room for a single night was used as a resting-place for strangers, it was held that it did not avoid the policy: Loud *v.* Citizens', etc. Ins. Co., 2 Gray 221, 224. In this case, the counting-room was warmed by a stove, which at that season (September) was not in a safe condition to use, a portion of the funnel in the loft being removed. The crew of a vessel that had filled with water were permitted to lodge in the counting-room, but were expressly forbidden to make any fire in the stove. They did make a fire therein, the building was burned thereby, and the insurers were held liable. The drawing of a lottery (that being an

§ 409. **Life Insurance.** In the THIRD PLACE, as to INSURANCE UPON LIVES. The same principles, course of proceeding, defences, and rules of evidence are applicable here as in policies on other subjects which have been already considered.[1] But in regard to the *interest* of the plaintiff in the life in question, it is not necessary that it be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life; and therefore the reciprocal interests of husband and wife, parent and child, and brother and sister, in the lives of each other, are sufficient to support this contract.[2]

unlawful act) with the consent and participation of the insured, in a building insured against loss by fire as a shoe manufactory, does not avoid the policy on the building, nor on the stock therein: Boardman *v.* Merrimack, etc. Ins. Co., 8 Cush. 583. Mr. May's note in previous edition.]

[1] See 3 Kent Comm. 365–370; Ellis on Ins. pp. 161–171; 2 Phillips on Ins. pp. 100–103, 143–145, 199; Marshall on Ins. pp. 770–784 (3d ed.); 3 Steph. N. P. 2068–2076.

[2] Ibid.; Ellis on Ins. pp. 122–128; Lord *v.* Dall, 12 Mass. 115; [Central N. B. *v.* Hume, 128 U. S. 195.]

[Yet if the insurer has no interest in the life insured, the policy is void as to him: Missouri, etc. Ins. Co. *v.* Sturges, 18 Kan. 93; [Trinity College *v.* Travellers' Ins. Co., 113 N. C. 244; Crotty *v.* Union Ins. Co., 144 U. S. 621. But a man may insure his own life in favor of any one he chooses, unless the insurance is really a wager: Albert *v.* Insurance Co., 30 S. E. 327, N. C.; Crosswell *v.* Connecticut Ass'n, 28 S. E. 20, S. C.]

It is held in Singleton *v.* St. Louis, etc. Ins. Co., 66 Mo. 63, that the relation of uncle and nephew is not enough to support the insurance.

A creditor of a firm has an insurable interest in the life of one of the partners thereof, although the other partner may be entirely able to pay the debt, and the estate of the insured is perfectly solvent, and he may recover the whole amount insured: Morrell *v.* Trenton, etc. Ins. Co., 10 Cush. (Mass.) 282. [A child has an insurable interest in the life of its mother (Crosswell *v.* Connecticut Ass'n, 28 S. E. 200, S. C.); an aunt in that of her niece (Cronin *v.* Vermont Ins. Co., 40 A. 497, R. I.); a woman in that of her *fiancé* (Taylor *v.* Travellers' Ins. Co., 39 S. W. 185, Tex. Civ. App.; Bogart *v.* Thompson, 53 N. Y. S. 622, 24 Misc. Rep. 581). But a son-in-law has no insurable interest in the life of his father-in-law (Ramsay *v.* Myers, 6 Pa. Dist. Rep. 468); nor a mother-in-law in that of her son-in-law (Adams *v.* Reed, 36 S. W. 568, Ky.); nor a partner in the life of his co-partner (Powell *v.* Mutual Ins. Co., 31 S. E. 381, N. C.). See further as to insurable interest, Barnes *v.* London, etc. Ins. Co., 1892, 1 Q. B. 864.]

The contract of life insurance is a contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity during his life, and it is not a contract of indemnity: Dalby *v.* India, etc. Ins. Co., 28 Eng. Law & Eq. 312; Trenton, etc. Ins. Co. *v.* Johnson, 4 Zabr. (N. J.) 576. See Bevin *v.* Connecticut, etc. Ins. Co., 23 Conn. 244.

The rules as to concealment or misrepresentation of material facts apply to life insurance policies. If the statement is untrue, it does not avoid the policy unless the applicant knew it was not true: Union, etc. Ins. Co. *v.* Wilkinson, 13 Wall. U. S. 222. But if there is a stipulation in the policy that it shall be void if any of the statements in the application are untrue, it will be avoided, though the applicant believed the statement he made to be true: Macdonald *v.* Law, etc. Ins. Co., L. R. 9 Q. B. 328.

Statements in an application for life insurance "upon the faith of which" the policy is expressed to be made, with a stipulation that if they shall be found in any respect untrue, the policy shall be void, are warranties, and if untrue, even in a matter immaterial to the risk, they avoid the policy: Miles *v.* Conn. Mut. Life Ins. Co., 3 Gray (Mass.) 580. If, in the representation on which a life insurance is effected, a material fact is untruly stated or concealed, if a general question was put which would elicit

that fact, the policy will be void though no specific questions are asked respecting such fact, and though such statement or concealment arises from accident or negligence, and not from design: Vose *v.* Eagle Life, etc. Ins. Co., 6 Cush. (Mass.) 42. The extreme doctrine of these cases is criticised in Horn *v.* Amicable L. Ins. Co., 64 Barb. (N. Y.) 81.

If the defence relied on is the falseness of the statements of the insured in the application for insurance, the burden of proof is on the company to establish such falsity: Grangers' Life Ins. Co. *v.* Brown, 57 Miss. 308. [Otherwise, if they were made warranties by the policy: Sweeney *v.* Metropolitan Ins. Co., 36 A. 9, R. I.]

And the court should not direct the jury to find for the defendant if there is evidence on both sides: Moulor *v.* American Life Ins. Co., 101 U. S. 708.

The defence of suicide by the insured is, as to third parties, wholly based on the stipulation in the policy. If there is no such proviso, the death of the assured by his own hand will not avoid such a policy: Patrick *v.* Excelsior Life Ins. Co., 67 Barb. (N. Y.) 202.

If in a policy of life insurance it is provided that the policy shall be void if the insured "should die by his own hand," the self-destruction of the insured while insane is not within the proviso: Newton *v.* Mut., etc. Ins. Co., 76 N. Y. 426; Scheffer *v.* National Life Ins. Co., 25 Minn. 534; Breasted *v.* Farmers', etc. Ins. Co., 4 Selden 299. *Contra*, Dean *v.* Am. Mut. L. Ins. Co., 4 Allen 96. [The burden of proof to show that the death was suicidal is on the insurer: Inghram *v.* National Union, 103 Iowa 395; Fisher *v.* Fidelity, etc. Ass'n, 41 A. 467, Pa.]

But if the proviso avoids liability, in case of the death of the insured by his own act or intention, whether sane or insane, insanity will not excuse the suicide: Chapman *v.* Republic Life Ins. Co., 6 Biss. (C. Ct.) 238; [Tritschler *v.* Keystone Ass'n, 180 Pa. 205; Spruill *v.* Northwestern Ins. Co., 120 N. C. 141; Kelley *v.* Mutual Ins. Co., 75 F. 637.]

The question of what degree of insanity will excuse the act of taking his own life by the assured, so as to allow a recovery on the policy, has been decided in various ways. The most stringent rule is laid down in Life Ins. Co. *v.* Terry, 15 Wall. (U. S.) 580, which holds that if the death is caused by the voluntary act of the insured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is death by suicide: ib. Probably the more general view is that if the insured acts under an irresistible impulse to take his life, or his reason is so impaired that he does not understand the moral character of the act, though he knows and intends that death shall follow his act, the act is not suicide in such a sense as to avoid the policy: Connecticut, etc. Ins. Co. *v.* Groom, 86 Pa. St. 92; Hathaway *v.* National Ins. Co., 48 Vt. 335; Adkins *v.* Columbia Life Ins. Co., 70 Mo. 27; [Connecticut Ins. Co. *v.* Akens, 150 U. S. 468.]

Such insanity as overpowers consciousness, reason, and will, certainly excuses the act: Knickerbocker Life Ins. Co. *v.* Peters, 42 Md. 414.

The proviso, "shall die by his own hand," includes suicide by swallowing arsenic: Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466. See also Moore *v.* Woolsey, 28 Eng. Law & Eq. 248. [In Missouri the rule that suicide is a defence is altered by statute: Haynie *v.* Knights Templars, 41 S. W. 461, Mo. A contract provision, however, that suicide shall be no defence, "sane or insane," is held against public policy in Ritter *v.* Mutual Ins. Co., 169 U. S. 139.]

If the death results from an over-dose of medicine taken to relieve pain, it will be a question of whether the act was culpably negligent: Mutual Life Ins. Co. *v.* Laurence, 8 Ill. App. 488. And this question should be left to the jury: Lawrence *v.* Mutual, etc. Ins. Co., 5 id. 280. And the question of the insanity of the insured in general should be left to the jury, if there is any competent evidence of it: Insurance Co. *v.* Rodel, 95 U. S. 232.

The burden of proof in avoiding a case of suicide by showing insanity is on the party setting it up: Weed *v.* Mut., etc. Ins. Co., 70 N. Y. 561; Knickerbocker Life Ins. Co. *v.* Peters, 42 Md. 414.

An important point in the trial of actions on life insurance policies is that declarations of the party whose life is insured, offered in evidence by the defendant, are competent as admissions only when he is the party really interested: [Hermany *v.* Fidelity Ass'n, 151 Pa. 17. But if facts are otherwise proved, his declarations are competent to show his knowledge of the facts: Union, etc. Ins. Co. *v.* Pollard, 94 Va. 146.] Thus, where a man takes out a policy on his life in his wife's name, and

in his application states that he is of correct and temperate habits, his wife's affidavit, filed in a suit by her for separation, alleging his intemperate habits, is admissible as an admission of hers: Furniss *v.* Mut. Life Ins. Co., 46 N. Y. Super. Ct. 467. Where the application was in the name of a man and his wife, for her sole benefit, his declarations, prior to the application, tending to show that one of the statements in said application was to his knowledge untrue, was held incompetent: Union Central Life Ins. Co. *v.* Cheever, 36 Ohio St. 201; Grangers' Life Ins. Co. *v.* Brown, 57 Miss. 308; McGinley *v.* United States, etc. Ins. Co., 8 Daly (N. Y.) 390. So where a policy was taken out for the benefit of the son of the insured, admissions by the father as to his age and health are inadmissible to prove that his statements in his application were false, in an action by the son: Mobile, etc. Ins. Co. *v.* Morris, 3 Lea (Tenn.) 101. On the issue of the insanity of a parent of the insured, a duly certified copy of the records of a probate court, reciting that such parent had been adjudged a lunatic, is admissible to prove that fact: Newton *v.* Mutual, etc. Ins. Co., 15 Hun (N. Y.) 595.]

LIBEL AND SLANDER.

§ 410. **Same Rules applicable to both.** As the general principles and rules of proceeding are the same, whether the plaintiff has been slandered by words or libelled by writings, signs, pictures, or other symbols, both these modes of injury will be treated together.[1] In either case, the plea of the general issue will require the plaintiff to prove, (1) the special character and extrinsic facts, when they are essential to the action; (2) the speaking of the words, or publication of the libel; (3) the truth of the *colloquium;* (4) the defendant's malicious intention, where malice in fact is material; (5) the damage, where special damages are alleged, or more than nominal damages are expected.

[1] The general form of a declaration for a *libel,* where no special inducement is requisite, is as follows: —

—"In a plea of trespass on the case; for that the said (*defendant*), wickedly intending to injure the plaintiff, heretofore, to wit, on ——, did maliciously compose and publish, of and concerning the plaintiff, a certain false, scandalous, and defamatory libel, containing, among other things, the false, scandalous, and defamatory matters following, of and concerning the plaintiff, that is to say [here state the libellous matter, *in hæc verba,* with proper innuendoes]. By means of the committing of which grievances by the said (*defendant*) the plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, and otherwise injured." [If special damage has been sustained, by words not actionable in themselves, it should be here particularly alleged.]

The usual introductory averment of the plaintiff's good name and reputation, etc., is altogether superfluous, his good character being presumed.

For *verbal slander,* charging an indictable offence, and not requiring a special inducement, the declaration is as follows: —

—"for that the said (*defendant*), wickedly intending to injure the plaintiff, heretofore, to wit, on ——, in a certain discourse which he then had of and concerning the plaintiff, did, in the presence and hearing of divers persons, maliciously and falsely speak and publish of and concerning the plaintiff the following false, scandalous, and defamatory words, that is to say [here state the words, with proper innuendoes]. By means," etc., as before.

The following is an example of a count for words not in themselves actionable, with a special inducement: —

—"for that heretofore, and before the speaking of the words hereinafter mentioned, to wit, at the —— court begun and holden at ——, in and for the county of ——, on ——, a certain action was pending between the plaintiff and the said (*defendant*), upon the trial whereof in said court, and in the due course of legal proceedings therein, the plaintiff, being duly sworn before the said court, made affidavit and testified touching the loss of a certain promissory note, in controversy in said action, and material to the issue joined therein; and the said (*defendant*), wickedly intending to injure the plaintiff, did afterwards, on ——, in a certain discourse which he then had of and concerning the plaintiff, in the presence and hearing of divers persons maliciously and falsely speak and publish of and concerning the plaintiff, and of and concerning his affidavit aforesaid, the following false, scandalous, and defamatory words, that is to say, 'He' (meaning the plaintiff) 'has forsworn himself,' thereby meaning that the plaintiff (in his affidavit) had committed the crime of perjury. By means," etc., as before.

§ 411. **Libel; Question of Fact.** It was formerly held, that the question, whether the publication proved was or was not a libel, or slanderous, was a question of law; and the general dislike of this doctrine has occasioned the enactment of statutes [1] for the purpose of referring this question, at least in criminal cases, to the jury. But such statutes are now understood to be merely declaratory of the true doctrine of the common law; and, accordingly, it is now held, that the judge is not bound to state to the jury, as a matter of law, whether the publication is a libel or not; but that the proper course is for him to define what is a libel, in point of law, and to leave it to the jury to say, whether the publication falls within that definition, and, as incidental to that, whether it is calculated to injure the reputation of the plaintiff.[2]

§ 412. (1) **Proof of Official Character.** Where the plaintiff's *office or special character* is alleged in *general terms*, it is sufficient to prove, by general evidence, that he was in the actual possession and enjoyment of the office, or in the actual exercise of the calling, profession, or employment in question, without strict proof of any legal inception, investment, or appointment.[1] Thus, the general allegation that the plaintiff was a magistrate, or peace-officer, or an attorney of a particular court, may be proved by general evidence

[1] 32 Geo. III. c. 60; Constitution of Maine, art. 1, § 4; Const. of New York, art. 7, § 9; Rev. Stat. New York, part 1, c. 4, § 21. [See also Vol. I. § 81*f*.]

[2] Parmiter *v.* Coupland, 6 M. & W. 105, 108; Baylis *v.* Lawrence, 11 Ad. & El. 920. And see Tuson *v.* Evans, 12 Ad. & El. 733, where the same doctrine is substantially confirmed. See acc. Dalloway *v.* Turrill, 26 Wend. 383; 2 Stark. on Slander, p. 306, n. (1) by Wendell.] "Yet it is clear, that, upon a demurrer, or an answer in the nature of a demurrer, the court must determine whether a cause of action is set out in the declaration to be sent to the jury. And if the judge presiding at the trial, and the jury, should think the publication libellous, still, if on the record it appear to be not so, judgment must be arrested. The true distinction probably is, that, though the court will, upon proper motion or plea of the defendant, judge whether the publication, as set out, constitutes a ground of action or not; yet, if such demurrer or motion is overruled, and the cause goes to the jury, the judge is to define what is a libel, and to leave to the jury to determine whether the publication falls within the definition of the offence." By Thomas, J., Shattuck *v.* Allen, 4 Gray (Mass.) 546; Goodrich *v.* Davis, 11 Met. (Mass.) 473.

"When words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other. The case of husband and wife is not an exception to this rule. If there is a slander upon both, the husband should sue alone for the injury to him, and they should join for the injury to her. The exceptions to the rule are words spoken of partners in the way of their trade, and the case of slander of the title of joint owners of land: Dyer, 19 *a*; Burges *v.* Ashton, Yelv. 128; Sheppard's Action on the Case for Slander, 52; 1 Walford on Parties, 514–516; Ebersoll *v.* Krug, 3 Binn. (Pa.) 555; Hart *v.* Crow, 7 Blackf. (Ind.) 351." By Metcalf, J., in Gazynski *v.* Colburn, 1 Gray (Mass.) 10. A corporation may be liable in damages for the publication of a libel just as an individual may. To establish its liability the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of business in which he was employed: Fogg *v.* Boston & Lowell R. R. Co., 148 Mass. 513.] [In Georgia the corporation must have directed or authorized the use of the actionable words: Behre *v.* National, etc. Co., 100 Ga. 213.]

[1] 2 Stark. on Slander, p. 5, by Wendell. And see Picton *v.* Jackson, 4 C. & P. 257.

that he acted in such character.[2] So, it seems, if he alleges himself a *physician;*[3] though formerly some doubts have been entertained on this point, principally on the ground that the statute prohibited the practice of that profession, without certain previous qualifications. But this objection proceeds on the presumption that the law has not been complied with; which is contrary to the rule of presumption as now well settled.[4] If, however, the plaintiff *specially* alleges the mode of his appointment, or otherwise qualifies the allegation of his special character, as, by stating that he is "a physician, and has regularly taken his degree of doctor of physic," the special matter must be strictly proved by the best evidence of the fact.[5] But if the special matter does not amount to a qualification of that which might have been more generally alleged, but is merely cumulative and independent, it is conceived that general evidence would still be sufficient.[6] And where the slander or libel assumes that the plaintiff possesses the character alleged, as, if he was slanderously spoken of in that character, by his title of attorney,[7] clergyman,[8] or other functionary,[9] proof of the words is sufficient evidence that he held the office.

§ 413. **Other Extrinsic Facts.** In regard to the prefatory allegations of *other extrinsic facts*, these, where they are material, must be strictly proved as alleged; but if they are in their nature divisible and independent, this part of the declaration will be maintained by evidence of so much as, if alleged alone, would have been sufficient.[1]

§ 414. (2) **Publication; Slander.** The plaintiff must also prove the *fact of the publication* of the words by the defendant. Words spoken may be proved by any person who heard them, though they are alleged to have been spoken in the hearing of A. B. and others.[1]

[2] Berryman *v.* Wise, 4 T. R. 366; *ante*, Vol. I. §§ 83, 92; Jones *v.* Stevens, 11 Price 235; Pearce *v.* Whale, 5 B. & C. 38. Where the words were charged as spoken of the plaintiff in his office of treasurer and collector, evidence that he was treasurer only was held insufficient: Sellers *v.* Till, 4 B. & C. 655.

[3] McPherson *v.* Chedeall, 24 Wend. 24; Finch *v.* Gridley, 25 id. 469; 1 Stark. on Slander, p. 361 [405]; Brown *v.* Minns, 2 Rep. Const. Ct. 235.

[4] Smith *v.* Taylor, 1 New Rep. 196 [4 B. & P. 196]; 2 Stark. on Slander, p. 9 [6].

[5] Moises *v.* Thornton, 8 T. R. 303; *ante*, Vol. I. §§ 58, 195, n.

[6] 2 Stark. on Slander, p. 11, n. (*p*) [8].

[7] Berryman *v.* Wise, 4 T. R. 366.

[8] Cummen *v.* Smith, 2 S. & R. 440.

[9] Yrisarri *v.* Clement, 3 Bing. 432. See also R. *v.* Sutton, 4 M. & S. 548, 549, per Bayley, J.; Bagnall *v.* Underwood, 11 Price 621; Gould *v.* Hulme, 3 C. & P. 625.

[1] See *ante*, Vol. I. §§ 58–63, 67; 2 Stark. on Slander, p 14 [12]. In libel, as in other cases, there is an important difference between matters of mere allegation and matters of description. In respect to the former, a variance in proof as to number, quantity, or time does not affect the plaintiff's right of recovery; but in respect to the latter, the variance is fatal. Hence, the day on which a libel is alleged to have been published is not material: Cates *v.* Bowker, 18 Vt. 23.

[1] Bull. N. P. 5. [The words must be in the presence of a third person: Conerford *v.* West End St. R., 164 Mass. 13.]

[Where no special damages are laid as the result of spoken words, and the plaintiff relies solely on the injurious effect of the words themselves on his reputation, words must be proved which come within one of three classes.

1. They must impute an indictable crime to the plaintiff: [Mudd *v.* Rogers, 43

And here, also, if the words are in themselves actionable, and the slanders are several and independent, it is sufficient to prove as

S. W. 255, Ky. A charge of violating a town ordinance against intoxication is insufficient: Lodge *v.* O'Toole, 39 A. 752, R. I.] The words need not allege the crime with the precision of an indictment, but their natural import, viewed under the circumstances of the case, must be an accusation of some offence cognizable by the criminal law: Barnett *v.* Ward, 36 Ohio St. 107; Borgher *v.* Knapp, 8 Mo. App. 591; Blackwell *v.* Smith, ib. 43; Huddleson *v.* Swope, 71 Ind. 430; Drown *v.* Allen, 91 Pa. St. 393; Havemeyer *v.* Fuller, 60 How. (N. Y.) Pr. 316; Schmisseur *v.* Kreilich, 92 Ill. 347. Thus, for example, to accuse one of theft is actionable (Fawcett *v.* Clark, 48 Md. 494); or of an attempt to steal, if that is a criminal offence (Berdeaux *v.* Davis, 58 Ala. 611); or of blackmailing (Robertson *v.* Bennett, 44 N. Y. Super. Ct. 66); or of perjury (Hutts *v.* Hutts, 62 Ind. 414). But if the words do not charge a crime they are not actionable. Thus, to say one stole windows from J.'s house is not actionable, for windows are not at common law subjects of larceny: Wing *v.* Wing, 66 Me. 62. Nor is it actionable to charge a woman with being an inhuman stepmother and beating her child unmercifully (Geisler *v.* Brown, 6 Neb. 254); [nor to charge one with fornication at common law; Ledlie *v.* Wallen, 17 Mont. 150; Douglas *v.* Douglas, 38 P. 934, Idaho]; nor to charge one who has been a witness in court with false swearing, if the court had no jurisdiction (Hamm *v.* Wickline, 26 Ohio St. 81); or if the words used show that perjury was not meant to be imputed (Pegram *v.* Stoltz, 76 N. C. 349); [or if the charge is of "forgery," when the specific act charged is not forgery (Barnes *v.* Crawford, 115 N. C. 76).] The criminality of the act alleged is governed by the law of the place where it is alleged to have taken place, not by that where the words were spoken: Dufresne *v.* Weise, 46 Wis. 290.

2. Or the words must accuse the plaintiff of having a loathsome contagious disease: Kaucher *v.* Blinn, 29 Ohio St. 62; Bruce *v.* Soule, 69 Me. 562; Gottbehuet *v.* Hubachek, 36 Wis. 515.

3. Or they must impute to the plaintiff inefficiency and inability to fulfil the duties of his office, or be of such a nature as to injure him in his profession: Foster *v.* Scripps, 39 Mich. 376; Gunning *v.* Appleton, 58 How. (N. Y.) Pr. 471; Spiering *v.* Andrae, 45 Wis. 330. If one states that a clergyman was intoxicated, this injures him in his profession and is actionable: Hayner *v.* Cowden, 27 Ohio St. 292. And in a recent case, the rule was affirmed that words or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of a merchant or trader, by imputing to him insolvency or embarrassment, are libellous, *per se:* Hayes *v.* The Press Company, Limited, 127 Pa. St. 643; [Mattice *v.* Wilcox, 147 N. Y. 624. If the office is not one of profit, the imputation must relate to his conduct in office, or be such as if true would lead to his removal: Alexander *v.* Jenkins, 1892, 1 Q. B. 797.] It is held in a recent case that an action will not lie for mere disparagement of the goods offered by a shopkeeper for sale without an averment and proof of special damage: Dooling *v.* Budget Publishing Co., 144 Mass. 258; but words implying an imputation upon the general business of the shopkeeper will support an action without proof of special damage: Boynton *v.* Shaw Stocking Co., 146 Mass. 220. Thus, it has been held that evidence of a publication of an article in a newspaper containing statements that a public dinner furnished by a caterer "was wretched," and was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile, and the wines not much better," would not support an action of libel without proof of special damage: Dooling *v.* Budget Publishing Co., *supra;* but a general disparagement of his mode of doing business would have been actionable; Boynton *v.* Shaw Stocking Co., *supra.* [As to charges against a business corporation, see American Book Co. *v.* Gates, 85 F. 729; South Hetton Coal Co. *v.* Northeastern News Ass'n, 1894, 1 Q. B. 133; against an educational institution, see St. James Academy *v.* Gaiser, 125 Mo. 517.] Under the recent organization of trades-unions, a system of street parades in front of the shop of an employer who has rendered himself obnoxious to the trades-union, the persons taking part in the parade carrying banners bearing inscriptions more or less injurious to the employer, has been brought before the courts for judicial construction. The courts have held that although the inscriptions upon the banners may be false, and in their nature not disparaging to the business of the plaintiff, and therefore not such as to constitute a libel, yet the parade may be considered a nuisance which a court of equity will enjoin: Sherry *v.* Perkins, 147 Mass. 214. The publication of a statement by the proprietor of a college of shorthand and typewriting, teaching a certain system of shorthand, to

many of them as constitute any one of the slanderous accusations;[2] but if they constitute one general charge, they all must be proved.[3] And in all cases, the words must be proved strictly as they are alleged.[4] But though it is not competent for the witness to state the impression produced on his mind by the whole of the conversation;[5] yet it has been held sufficient to prove the substance of the words, and the sense and manner of speaking them.[6] If they are alleged as spoken affirmatively, proof that they were spoken interrogatively will not support the count.[7] So, an allegation of words in the second person is not proved by evidence of words in the third person;[8]

the effect that the inventor of the system can recommend her teaching but cannot recommend that of another teacher who is using his name without authority, and for whose teaching he would not be responsible, is in itself matter damaging the other teacher in her office, profession, calling, or trade, and is libellous without the introduction of proof of special damage: Price *v.* Conway, 134 Pa. St. 340. Words spoken or written imputing mental derangement to a bank teller, even though it is said that this derangement arises from over-zealous application in his employment, and is thus calculated to excite the sympathy of those who hear or read the words, are, nevertheless, actionable as a libel or slander without proof of a special damage, since the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, no matter how it arises, must necessarily injure the person of whom the words are spoken in his business: Moore *v.* Francis, 121 N. Y. 206. If they fail to come under either of these classes, some special damage must be alleged and proved in order to render the defendant liable: Pollard *v.* Lyon, 91 U. S. 225; Dean *v.* Miller, 66 Ind. 440.}

[2] 2 East 434, per Lawrence, J.; Flower *v.* Pedley, 2 Esp. 491; Orpwood *v.* Barkes, 4 Bing. 461; Compagnon *v.* Martin, 2 W. Bl. 790; Easley *v.* Moss, 9 Ala. 266; Iseley *v.* Lovejoy, 8 Blackf. 462.

[3] Flower *v.* Pedley, 2 Esp. 491.

[4] {The action cannot be sustained by proof of different words than those alleged, although they are of the same import: Ward *v.* Dick, 47 Conn. 300; Norton *v.* Gordon, 16 Ill. 38; Sandford *v.* Gaddis, 15 id. 228; Smith *v.* Hollister, 32 Vt. 695; [Roberts *v.* Lamb, 93 Tenn. 343.] The defamatory words must be proved as laid; and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words, as qualified, are still libellous: Rainy *v.* Bravo, 4 P. C. App. 287; Barrows *v.* Carpenter, 11 Cush. (Mass.) 456. But see Miller *v.* Miller, 8 Johns. (N. Y.) 74, *contra*. See also Bull. N. P. 5; Nye *v.* Otis, 8 Mass. 122. So if the complaint states the slander to be an accusation of theft, and the proof is of one of embezzlement, this is a variance (Schulze *v.* Fox, 53 Md. 37); or if the allegation is of an accusation of larceny and the proof is of one of deception and fraud (Perry *v.* Porter, 124 Mass. 338); but it is true, as stated in the text, that proof only of the substance of the words is necessary: Albin *v.* Parks, 2 Ill. App. 576; } [Fritz *v.* Williams, 16 S. 359, Miss.; Naylor *v.* Ponder, 41 A. 88, Del.]

[5] Harrison *v.* Bevington, 8 C. & P. 708. A witness cannot be asked, in the first instance, on his examination in chief, what he understood by the words; but after a foundation has been laid, by evidence showing something to prevent their being taken in their plain and obvious sense, the witness may then be asked, with reference to that evidence, in which sense he understood them: Daines *v.* Hartley, 12 Jur. 1093; 3 Exch. 200.

[6] Miller *v.* Miller, 8 Johns. 74; Whiting *v.* Smith, 13 Pick. 364. {So if the words complained of were written, and the contents of the writing are proved by secondary evidence, the witnesses who testify as to the contents of the writing must be able to testify what the *words* were and not what their *impressions* of the meaning of them were: Rainy *v.* Bravo, L. R. 4 P. C. 287.}

[7] Barnes *v.* Holloway, 8 T. R. 150. Proof of special damage must be confined to the evidence of persons who received the slanderous statements from the defendant himself: Rutherford *v.* Evans, 4 C. & P. 74; s. c. 6 Bing. 451; Ward *v.* Weeks, 7 id. 211.

[8] Avarillo *v.* Rogers, Bull. N. P. 5; Whiting *v.* Smith, 13 Pick. 364; Miller *v.* Miller, 8 Johns. 74.

nor is an allegation of slanderous words, as founded on an asserted fact, supported by proof of the words as founded on the speaker's belief of such fact.[9] Nor will evidence of words spoken as the words of another support an allegation in the common form as of words spoken by the defendant.[10] Words in a *foreign language*, whether spoken or written, must be proved to have been understood by those who heard or read them; and a libel by pictures or signs must also be shown to have been understood by the spectators.[11] If the libel is contained in a letter addressed to the plaintiff, this is no evidence of a publication in a civil action, though it would be sufficient to support an indictment on the ground of its tendency to provoke a breach of the peace.[12] But if the letter, though addressed to the plaintiff, was forwarded during his known absence, and with intent that it should be opened and read by his family, clerks, or confidential agents, and it is so, it is a sufficient publication.[13] If it was not opened by others, even though it were not sealed, it is no publication.[14]

§ 415. **Publication; Libel.** The publication of a *libel* by the defendant may be proved by evidence that he distributed it with his own hand, or maliciously exposed its contents, or read or sang it in the presence of others; or, if it were a picture, or a sign, that he painted it; or if it were done by any other symbol or parade, that he took part in it, for the purpose of exposing the plaintiff to contempt and ridicule.[1] But to show a copy of a caricature to an individual privately, and upon request, is not a publication.[2] Nor is the porter guilty of publishing, who delivers parcels containing libels, if he is

[9] Cook *v.* Stokes, 1 M. & Rob. 237. And see Brooks *v.* Blanshard, 1 Cr. & M. 779; Hancock *v.* Winter, 7 Taunt. 205; s. c. 2 Marsh. 502.

[10] McPherson *v.* Daniels, 10 B. & C. 274; Bell *v.* Byrne, 13 East 554. And see Walters *v.* Mace, 2 B. & Ald. 756; Zenobio *v.* Axtell, 6 T. R. 162.

[11] 2 Stark. on Slander, p. 14 [13]; Du Bost *v.* Beresford, 2 Campb. 512. {If the words charged were spoken in a foreign language, they should be set forth in the declaration in such language, with an English translation. If they are set forth in English without a translation, and the proof is that they were spoken in a foreign tongue, the action cannot be sustained. If the words were spoken in a foreign language, the declaration must allege that the hearers understood them, and so must be the proofs: Zeig *v.* Ort, 3 Chand. (Wis.) 26.}

[12] 2 Stark. on Slander, p. 33 [35]; Hodges *v.* State, 5 Humph. 112.

[13] Delcroix *v.* Thevenot, 2 Stark. 63; Phillips *v.* Jansen, 2 Esp. 624; Ahern *v.* Maguire, 1 Armst. & McCartn. 39. {A slander spoken only in the presence of the plaintiff's own family is still published, sufficiently to support an action: Miller *v.* Johnson, 79 Ill. 58.} [The transmission by sound of a written message delivered to the sending operator, which is reduced to writing by the receiver, constitutes a publication by a telegraph company: Peterson *v.* Western Union Tel. Co., 74 N. W. 1022, Minn. But dictating a libel to a stenographer, who transcribes it and mails it to the plaintiff, is apparently not a publication: Owen *v.* Ogilvie Pub. Co., 53 N. Y. S. 1033, 32 App. Div. 465. See Vol. III. § 172.]

[14] Clutterbuck *v.* Chaffers, 2 Stark. 471; Lyle *v.* Clason, 1 Caines 581.

[1] 2 Stark. on Slander, pp. 16, 44 [49]; De Libellis Famosis, 5 Co. 125; Lambe's Case, 9 Co. 59. And see Johnson *v.* Hudson, 7 Ad. & El. 233. Lending a libellous paper, or sending it in manuscript to a printer, is publication, though it be returned to the party: R. *v.* Pearce, Peake's Cas. 75; 2 Stark. on Slander, p. 44 [49].

[2] Smith *v.* Wood, 3 Campb. 323.

ignorant of their contents.[3] So, if one sells a few copies of a periodical, in which, among other things, the libel is contained, it is still a question for the jury, whether he knew what he was selling.[4] If the libel was published in a newspaper, evidence that copies of the paper containing it were gratuitously circulated in the plaintiff's neighborhood, though they be not shown to have been sent by the defendant, who was the publisher, is admissible to show the extent of the circulation of the paper, and the consequent injury to the plaintiff.[5]

§ 416. **Same Subject.** Evidence that a libel is in the *defendant's handwriting* is not, of itself, proof of a publication by him; but it is admissible evidence, from which, if not explained, publication may be inferred by the jury; the question of publication, where the facts are doubtful, being exclusively within their province.[1] The mode of proof of handwriting has been already considered.[2] If the manuscript is in the defendant's handwriting, and is also proved to have been printed and published, this is competent evidence of a publication by him.[3] Where the action for a libel is against the *printer* or *bookseller*, the fact of publication may be proved by evidence that it was sold or issued by him or in his shop, though it were only in the way of his trade; or by his agent or servant, in the ordinary course of their employment; and this, whether the master were in the same town at the time, or not; for the law presumes him to be privy to what is done by others in the usual course of his business, and the burden is on him to rebut this presumption, by evidence to the contrary; such as, that the libel was sold clandestinely, or contrary to his orders, or that he was confined in prison, so that his servants had no access to him, or that some deceit or fraud was practised upon him, or the like.[4] If the defendant procure another to publish a libel, this is evidence of a publication by the defendant, whenever it takes place.[5] The sending of a letter by the post is a publication in the place to which it is sent;[6] the date of the letter is

[3] Day *v.* Bream, 2 M. & Rob. 54.

[4] Chubb *v.* Flannagan, 6 C. & P. 431.

[5] Gathercole *v.* Miall, 15 M. & W. 319; 10 Jur. 337.

[1] R. *v.* Beare, 1 Ld. Raym. 417; Lambe's Case, 9 Co. 59; Baldwin *v.* Elphinston, 2 W. Bl. 1038. And see R. *v.* Almon, 5 Burr. 2686; The Seven Bishops' Case, 4 St. Tr. 304; R. *v.* Johnston, 7 East 65, 68. {So, where the defendant threatened to publish libellous matter of the plaintiff, and it was afterwards published, this is some evidence for the jury that the defendant was the author of the libel: Bent *v.* Mink, 46 Iowa 576.}

[2] See *ante*, Vol. I, §§ 576–581.

[3] R. *v.* Lovett, 9 C. & P. 462; Bond *v.* Douglas, 7 id. 626.

[4] R. *v.* Almon, 5 Burr. 2686; R. *v.* Walter, 3 Esp. 21; R. *v.* Gutch, 1 M. & Malk. 433; 2 Stark. on Slander, pp. 28–32 [30–34]. If the act of the servant was beyond the scope of his employment, it is no evidence of a publication by the master: Harding *v.* Greening, 1 Holt's Cas. 531; s. c. 1 J. B. Moore 477; R. *v.* Woodfall, 1 Hawk. P. C. c. 73, § 10, n. (by Leach); *ante*, Vol. I. § 234.

[5] R. *v.* Johnson, 7 East 65; [International, etc. Alliance *v.* Mallalieu, 39 A. 93, Md.]

[6] R. *v.* Watson, 1 Campb. 215. Whether it is also a publication, or even a misde-

prima facie evidence that the letter was written at the place where it is dated;[7] and the postmark is *prima facie* evidence that the letter was put into the office at the place denoted by the mark,[8] and that it was received by the person to whom it was addressed.[9]

§ 417. (3) **Truth of Colloquium.** The plaintiff must prove the *truth of the colloquium*, or the application of the words to himself, and to the extrinsic matters alleged in the declaration, where these are material to his right to recover.[1] The meaning of the defendant is a question of fact, to be found by the jury.[2] It may be proved by

meanor in the place *from* which it is sent, *quære;* and see R. *v.* Burdett, 4 B. & Ald. 95. {And where two persons participated in the composition of a libellous letter written by one of them, which letter was afterwards put into the post-office and sent by mail to the person to whom it was addressed, this was held competent and sufficient to prove a publication by both: Miller *v.* Butler, 6 Cush. 71.}

[7] R. *v.* Burdett, 4 B. & Ald. 95.

[8] R. *v.* Johnson, 7 East 65; Fletcher *v.* Braddyll, 3 Stark. 64. See 2 Stark. on Slander, p. 36 [38].

[9] Shipley *v.* Todhunter, 7 C. & P. 680; Warren *v.* Warren, 4 Tyrw. 850; Callan *v.* Gaylord, 3 Watts 321.

[1] Strader *v.* Sorgder, 67 Ill. 404. [It is not sufficient to show that plaintiff's name was used; it must also be shown that he was the person the words were intended to describe: Hanson *v.* Globe Co., 159 Mass. 293.]

[2] Oldham *v.* Peake, 2 W. Bl. 959, 962; s. c. Cowp. 275, 278; Van Vechten *v.* Hopkins, 5 Johns. 211. Roberts *v.* Camden, 9 East 93, 96; [Australian, etc. Co. *v.* Bennett, 1894, A. C. 284; Press Pub. Co. *v.* McDonald, 26 U. S. App. 167; Boehmer *v.* Detroit Free Press, 94 Mich. 7; Call *v.* Hayes, 169 Mass. 586.] If the innuendo does not refer to a preceding allegation, but introduces new matter, not essential to the action, it needs not be proved: ibid. It is for the judge to decide whether the publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it: Blagg *v.* Stuart, 10 Ad. & El. N. S. 899. {The office of the colloquium or innuendo is merely explanatory, and it performs this duty properly only so far as the facts alleged in the complaint bear out its allegations. An innuendo therefore cannot be used to extend the complaint so that it may cover facts not alleged in it, nor enlarge or alter the natural meaning of the words, but everything on which the plaintiff intends to rely should be alleged in the complaint itself: Havemeyer *v.* Fuller, 60 How. (N. Y.) Pr. 316; Salvatelli *v.* Ghio, 9 Mo. App. 155; Gault *v.* Babbitt, 1 Ill. App. 130; Bloss *v.* Tobey, 2 Pick. (Mass.) 320; Carter *v.* Andrews, 16 id. 1; Snell *v.* Snow, 13 Met. (Mass.) 278; Goodrich *v.* Davis, 11 id. 473.

Thus where the libel was contained in a bill in chancery which stated a series of facts, and the innuendo was that the defendant meant thereby to charge the plaintiff with embezzlement, it was held that if the statements of the bill themselves did not amount to a charge of embezzlement no innuendo could enlarge the meaning to include such a charge: Johnson *v.* Brown, 13 W. Va. 71. So, again, if the words are *prima facie* innocent, and the plaintiff contends that they are ironical, he must state the facts on which he relies to support this contention; a mere innuendo that such was the purport of the words will not be enough: Stewart *v.* Wilson, 23 Minn. 449. And on the other hand, if the words in their ordinary signification impute a crime, the defendant must show that he so limited them at the time, or that they were spoken under such circumstances, that the bystanders did not understand them as so imputing the crime: Miller *v.* Johnson, 79 Ill. 58. As the injury for which the law gives damages is the injury to the reputation of the plaintiff in the minds of those that hear the slander, it follows that, to use the language of Parke, B., in Hankinson *v.* Bilby, 16 M. & W. 442, "The effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable or not; that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them."

If the language is ambiguous the jury is to determine which of the meanings was the one which was conveyed by the defendant to his hearers when he spoke the words (Thompson *v.* Powning, 15 Nev. 195), *e. g.* where the language might be construed as

the testimony of any persons conversant with the parties and circumstances; and, from the nature of the case, they must be permitted to some extent to state their opinion, conclusion, and belief, leaving the grounds of it to be inquired into on a cross-examination.[3] If the words are ambiguous and the hearers understood them in an actionable sense, it is sufficient; for it is this which caused the damage; and if a foreign language is employed, it must appear to have been understood by the hearers.[4] The rule is, that words must be construed in the sense which hearers of common and reasonable understanding would ascribe to them; even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject.[5] But where the words are spoken in relation to extrinsic facts, in respect of which alone they are actionable, as, where they are spoken of one in his office of attorney, it is not necessary to prove that the hearers knew the truth of the extrinsic facts at the time of speaking; for they may afterwards learn the truth of the facts, or may report them to others, who already know the truth of them.[6] Where the libellous words do themselves assume the existence of the extrinsic facts, there, as we have just seen, they need not be proved.[7]

§ 418. (4) **Malice; Intent.** As to the proof of *malice* or *intention*. If the words are in themselves actionable, malicious intent in publishing them is an inference of law, and therefore needs no proof; though evidence of express malice may perhaps be shown, in proof

imputing to the plaintiff either such fraudulent deeds as would render him liable to a criminal prosecution, or a mere failure to perform a contract, for which he could only be made answerable in a civil action: Struthers *v.* Peacock, 11 Phila. (Pa.) 287; Hays *v.* Ball, 72 N. Y. 418. In doing this they take into account all the circumstances attending the utterance of the words, *i. e.* the time, place, and words, and the persons uttering them: Riddell *v.* Thayer, 127 Mass. 487; Downing *v.* Brown, 3 Col. 371.]

[3] 2 Stark. on Slander, p. 46 [51]. Evidence that the plaintiff had been made the subject of laughter at a public meeting is admissible for this purpose, as well as in proof of damages: Cook *v.* Ward, 6 Bing. 409. [In proving the application of the language of an alleged libel to the person who is the subject of it, witnesses may be asked their opinion as to the meaning and intent, and what is their understanding of particular expressions: Miller *v.* Butler, 6 Cush. (Mass.) 71; Russell *v.* Kelley, 54 Cal. 641; *ante*, Vol. I. § 440. See also Goodrich *v.* Davis, 11 Met. (Mass.) 473. But see Snell *v.* Snow, 13 Met. (Mass.) 278; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211; Gibson *v.* Williams, 4 Wend. (N. Y.) 320; White *v.* Sayward, 33 Me. 322; McCue *v.* Ferguson, 73 Pa. St. 333. In Daines *v.* Hartley, 3 Exch. 200, it was held that, unless a foundation is laid by showing that something had previously passed which gave a peculiar character and meaning to some word, the question cannot be put to a witness, "What did you understand by it?" Where the slander is alleged to have been made not in direct terms, but by expressions, gestures, and intonations of voice, it is competent for witnesses who heard the expressions to state what they understood the defendant to mean by them, and to whom he intended to apply them: Leonard *v.* Allen, 11 Cush. (Mass.) 241.]

[4] 2 Stark. on Slander, p. 46 [51]; Fleetwood *v.* Curley, Hob. 268; Keen *v.* Ruff, 1 Clarke (Iowa) 482.

[5] Per Pollock, C. B., in Hankinson *v.* Bilby, 16 M. & W. 445.

[6] Fleetwood *v.* Curley, Hob. 268.

[7] Jones *v.* Stevens, 11 Price 235; Bagnall *v.* Underwood, ib. 621; Gould *v.* Hulme, 3 C. & P. 625; Yrisarri *v.* Clement, 3 Bing. 432.

of damages.[1] But if the circumstances of the speaking and publishing were such as to repel that inference and exclude any liability of the defendant, unless upon proof of actual malice, the plaintiff must furnish such proof.[2] To *this* end, he may give in evidence any language of the defendant, whether oral or written, showing ill-will to the plaintiff, and indicative of the temper and disposition with which he made the publication; and this, whether such language were used before or after the publication complained of.[3] But if

[1] Stark. on Slander, p. 47 [53]. And see Bodwell *v.* Osgood, 3 Pick. 379, 384; [Union Ins. Co. *v.* Thomas, 83 F. 803, U. S. App.; Candrian *v.* Miller, 73 N. W. 1004, Wis.; State *v.* Clyne, 53 Kan. 8.] Where the truth of the words had been pleaded in justification, and the plaintiff at the trial offered to accept an apology and nominal damages, if the defendant would withdraw the justification, which the defendant refused, but did not attempt to prove it; this conduct was held proper for the jury to consider with reference to the question of malice, as well as to that of damages: Simpson *v.* Robinson, 18 Law J. Q. B. 73; 12 Ad. & El. N. S. 511. {The question whether the fact that the defendant pleaded the truth of the words spoken, but failed to offer any or sufficient proof to support his plea, is evidence of actual malice, must probably be decided upon principles similar to those governing the insertion of libellous matter in pleadings in other actions of law, *i. e.* such allegations are conditionally privileged, and their use by the defendant gives rise to no inference of actual malice, and if the plaintiff wishes to use them to enhance his damages he must show by other proof that their insertion was due to the express malice of the defendant. To the effect that the failure to support a plea of justification is not of itself proof of malice are Corbley *v.* Wilson, 71 Ill. 209; Murphy *v.* Stout, 1 Smith (Ind.) 250; Byrket *v.* Monahan, 7 Blackf. (Ind.) 83; Shortley *v.* Miller, 1 Smith (Ind.) 395; Rayner *v.* Kinney, 14 Ohio St. 283; Sloane *v.* Petrie, 15 Ill. 425; Morehead *v.* Jones, 2 B. Mon. (Ky.) 210; Klink *v.* Colby, 46 N. Y. 427.

If, therefore, there are circumstances showing that the insertion of such a plea is malicious, as if the defendant inserted it without reasonable cause to believe it to be true, or knowing it to be false, or other things of a like nature, it may be used as a proof of actual malice, showing the *animus* of the defendant towards the plaintiff: Chamberlain *v.* Vance, 51 Cal. 75; Freeman *v.* Tinsley, 50 Ill. 497; Holmes *v.* Jones, 121 N. Y. 461.} In an action for a libel in charging the plaintiff with murder in a duel, with circumstances of aggravation, these circumstances, if libellous, must be justified, as well as the principal charge. The record of the plaintiff's acquittal is admissible in evidence; but it is not alone a sufficient answer to the defendant's justification; nor is it conclusive against the defendant, in proof of the plaintiff's innocence of all the circumstances alleged: Helsham *v.* Blackwood, 15 Jur. 861. {There is no necessity of proving malice in an action of libel or slander, because an injury is done to the reputation of the plaintiff by a false disparagement, whether malicious or not. Proof, therefore, of the utterance of the words is enough to make out a *prima facie* case for the plaintiff: Hamilton *v.* Eno, 81 N. Y. 116; Dillard *v.* Collins, 25 Grat. (Va.) 523; Wilson *v.* Noonan, 35 Wis. 321.

The rule is stated by Parke, B., in Toogood *v.* Spyring, 4 Tyrwh. 582, p. 595, as follows: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by some person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his own interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice." And this malice in fact, or express malice, is to be found by the jury from the facts of the case: Swan *v.* Tappan, 5 Cush. (Mass.) 104; Lewis *v.* Chapman, 16 N. Y. 369; Bush *v.* Prosser, 11 id. 358; Howard *v.* Sexton, 4 id. 157.}

[2] [Strode *v.* Clement, 90 Va. 553; Cooper *v.* Phipps, 24 Or. 357.]

[3] 2 Stark. on Slander, pp. 47–53 [53–60]. See *supra*, § 271; Kean *v.* McLaughlin, 2 S. & R. 469; Pearson *v.* Le Maitre, 7 Jur. 748; Stuart *v.* Lovell, 2 Stark. 93; Chambers *v.* Robinson, 1 Str. 691; Wallis *v.* Mease, 3 Binn. 546; Macleod *v.* Wakley, 3 C. & P. 311; Plunkett *v.* Cobbett, 5 Esp. 136; Chubb *v.* Westley, 6 C. & P. 436. In

such collateral evidence consists of matter actionable in itself, the jury must be cautioned not to increase the damages on that account.[4]

§ 419. **Falsity of Charge; General Issue.** In ordinary cases, under the general issue, the plaintiff will not be permitted to prove the *falsity* of the charges made by the defendant, either to show malice, or to enhance the damages; for his innocence is presumed; unless the defendant seeks to protect himself under color of the circumstances and occasion of writing or speaking the words; in which case it seems that evidence that the charge was false, and that the de-

some cases the admissibility of other words or writings has been limited to those which were not in themselves actionable (Mead *v.* Daubigny, Peake's Cas. 125; Bodwell *v.* Swan, 3 Pick. 376; Defries *v.* Davis, 7 C. & P. 112); or for which damages had already been recovered: Symmons *v.* Blake, 1 M. & Rob. 477. In other cases it has been restricted to words or writings relating to those which are alleged in the declaration: Finnerty *v.* Tipper, 2 Camph. 72; Delegal *v.* Highley, 8 C. & P. 444; Barwell *v.* Adkins, 1 M. & G. 807; Ahern *v.* Maguire, 1 Armstr. & Macartn. 39; Bodwell *v.* Swan, 3 Pick. 376. In others, the admissibility of subsequent words has been limited to cases where the intention was equivocal, or the words ambiguous: Stuart *v.* Lovell, 2 Stark. 93; Pearce *v.* Ornsby, 1 M. & Rob. 455; Lanter *v.* McEwen, 8 Blackf. 495; Kendall *v.* Stone, 2 Sandf. S. C. 269; Berson *v.* Edwards, 1 Smith 7. {The fact that the defendant has at other times repeated the slander of which the plaintiff complains has been offered for two purposes: (1) to prove express malice in the defendant; (2) to enhance the damages. It is well settled that it is not admissible for the latter purpose. The plaintiff founds his claim for damages on the injury caused by the utterance on which he declares, and all he can claim is the natural results of this wrong. There is, however, a general inclination in the courts to admit evidence of such repetitions to prove the malice of the defendant, and in States where the jury are allowed to give vindictive damages if the slander appears to be maliciously spoken, the measure of damages would thus be indirectly affected: Ward *v.* Dick, 47 Conn. 300; Austin *v.* Remington, 46 id. 16; Chamberlain *v.* Vance, 51 Cal. 75; Parmer *v.* Anderson, 33 Ala. 78. And for the same purpose other slanders of a similar import may be shown: Brown *v.* Barnes, 39 Mich. 211; Hemmings *v.* Gasson, 1 E. B. & E. 346; [Botsford *v.* Chase, 108 Mich. 432; Seip *v.* Deshler, 170 Pa. 334; Fredrickson *v.* Johnson, 60 Minn. 337; Bailey *v.* Bailey, 94 Iowa 598; Post Pub. Co. *v.* Hallam, 16 U. S. App. 613, disapproving the New York rule.] *Contra,* Howard *v.* Sexton, 4 N. Y. 157. [See also Vol. I. § 14 *o.*]

Whether such repetitions made after the suit is brought are admissible, has been questioned. As proof of malice, probably the better rule is to admit them: Sonneborn *v.* Bernstein, 40 Ala. 168; Ellis *v.* Lindley 38 Iowa 461; Parmer *v.* Anderson, 33 Ala. 78; [Hearne *v.* De Young, 119 Cal. 670; Craven *v.* Walker, 29 S. E. 152, Ga.; Barker *v.* Prizer, 48 N. E. 4, Ind.]; *contra,* Frazier *v.* McCloskey, 60 N. Y. 337; Howard *v.* Sexton, 4 id. 157. But such subsequent statements cannot be used to alter the meaning of the words which are the ground of the action, so as to give them a slanderous interpretation when they are ambiguous. The test of their meaning is the impression they would naturally make on those who heard them, and if this impression is not defamatory of the plaintiff, subsequent words cannot make it so: Lucas *v.* Nichols, 7 Jones (N. C.) L. 32.

To prove actual malice in the defendant in an action of slander for charging an infant with larceny, evidence of a previous quarrel between the defendant's father and next friend is not admissible: York *v.* Peace, 2 Gray (Mass.) 282. In Taylor *v.* Church, 8 N. Y. 452, evidence of what was said by the defendant in directing the printing of the libellous matter was admitted, in order to disprove actual malice in the publication, and to influence the question of damages.} [As to evidence of malice, see Post Pub. Co. *v.* Hallam, 16 U. S. App. 613; Thibault *v.* Sessions, 101 Mich. 279.]

[4] Rustell *v.* Macquister, 1 Campb. 49, n.; Pearson *v.* Le Maitre, 7 Jur. 748; 5 Man. & Grang. 700; 6 Scott N. R. 607. And see Finnerty *v.* Tipper, 2 Camph. 74, 75; Tate *v.* Humphrey, id. 73, n.; [Post Pub. Co. *v.* Hallam, 16 U. S. App. 613.] If the plaintiff collaterally introduces other libels in evidence, the defendant may rebut them by evidence of their truth: Stuart *v.* Lovell, 2 Stark. 93; Warne *v.* Chadwell, ib. 457; Com. *v.* Harmon, 2 Gray 289.

fendant knew it to be so, is admissible to rebut the defence.[1] But where the action is for slander in giving a character to a former servant, or one who has been in the employment of the defendant, the plaintiff must prove that the character was given both falsely and maliciously.[2] Proof that the defendant was aware of its falsity is sufficient proof of malice; and in proof of its falsity, general evidence of his good character is sufficient to throw the burden of proof upon the defendant.[3]

§ 420. (5) **Damages.** As to the *damages*. Where special damage is essential to the action the plaintiff must prove it, according to the allegation. We have already seen, that damages, which are the *necessary* results of the wrongful act complained of, need not be alleged; and these are termed general damages; but that those which, though *natural*, are not *necessary results*, and which are termed special damages, must be specially alleged and proved; and that no damages can, in any case, be recovered except those which are the natural and proximate consequences of the wrongful act complained of.[1] Even if the words are actionable in themselves, and *a fortiori*

[1] 2 Stark. on Slander, p. 53 [59].

[2] Brommage *v.* Prosser, 4 B. & C. 256; Hargrave *v.* Le Breton, 4 Burr. 2425; Weatherstone *v.* Hawkins, 1 T. R. 110.

[3] Rogers *v.* Clifton, 3 B. & P. 587, 589; 2 Stark. on Slander, p. 52 [58]; King *v.* Waring, 5 Esp. 13; Pattison *v.* Jones, 8 B. & C. 578; Chubb *v.* Gsell, 34 Pa. St. 114; Hartranft *v.* Hesser, ib. 117.

[1] See *supra*, tit. Damages, §§ 254, 256, 267, 269, 271, 275. In a joint action by partners, for a libel in respect to their trade, damages cannot be given for any injury to their private feelings, but only for injury to their trade: Haythorne *v.* Lawson, 3 C. & P. 196. [The question of punitive damages arises very frequently in actions of slander. The two conflicting opinions held by Mr. Greenleaf and Mr. Sedgwick, are fully discussed in the note of Mr. Greenleaf under the title Damages, *ante*, the opinion of Mr. Sedgwick being that damages which are not based on any injury to the plaintiff, even to his feelings, but are strictly a punishment for the offence, may in some cases be awarded. In actions for words, it is often said that punitive damages may be given if the jury finds that the words were spoken with evil and malicious intent, and with express malice. These damages are not based on any injury to the plaintiff, even to his feelings, but are intended as a repressive measure to check the repetition of the same offence: Barr *v.* Moore, 87 Pa. St. 385; Nolan *v.* Traber, 49 Md. 460; Bowe *v.* Rogers, 50 Wis. 598. Damages to compensate for the injury to the plaintiff's feelings are always allowed when the injury is proved: Hamilton *v.* Eno, 16 Hun (N. Y.) 599. It was held in Brown *v.* Barnes, 39 Mich. 211, that the plaintiff can show, in aggravation of damages, the fact that the defendant is a man of wealth and standing, to show what weight his word would have in the community, and so in Humphries *v.* Parker, 52 Me. 502. [When the defendant is a corporation, evidence of its wealth is inadmissible: Randall *v.* Evening News, 97 Mich. 136.] But he cannot show his own poverty: Case *v.* Marks, 20 Conn. 245. [He may show that he has a family of young children: Enos *v.* Enos, 135 N. Y. 609.]

The repetition of a slander by others, is not such a natural and proximate result of the utterance by the defendant as to render him liable for it, unless he in some way requested or caused the repetition: Hastings *v.* Stetson, 126 Mass. 329; Terwilliger *v.* Wands, 17 N. Y. 54; Derry *v.* Handley, 16 L. T. N. S. 263; Parkins *v.* Scott, 1 H. & C. 153; [Turner *v.* Hearst, 115 Cal. 394; Wallace *v.* Rodgers, 156 Pa. 395.] But where the publication is by a private letter, directed and sent by mail to a particular person, the defendant is liable for the damages caused by any further publication of the letter by the person to whom it is addressed, or by other persons after it comes into the hands of the person addressed, if such further publication is a probable and natural consequence of the first sending the letter: Miller *v.*

if they are not, no evidence of special damage is admissible, unless it is specially alleged in the declaration; and to such special allegation the evidence must be strictly confined.[2] Thus, if the loss of marriage is alleged as special damage, the individual must be named with whom the marriage might have been had, and no evidence can be received of a loss of marriage with any other person.[3] But where the damage is in the prevention of the sale of an estate by auction, a general allegation is sufficient, and evidence that any person would have bid upon it is proof of such prevention.[4] So, where the damage consists in the desertion of a chapel,[5] or of a theatre,[6] by those who used to resort to it, it seems that a general allegation and proof of the diminution of receipts is sufficient. If the defendant admits and justifies the fact of publication, without pleading the general issue, the plaintiff may show the manner of publication, as affecting the question of damages.[7]

Bartlett, 6 Cush. (Mass.) 71. When the libel consists in statements contained in a pamphlet which has been printed and largely distributed by the defendant, evidence may be introduced of all of the distinct publications or issuing of said pamphlets as proving the allegation of the publication in the declaration, and may all be treated as publications for which the plaintiff can recover, provided they took place before the date of the writ: Bigelow *v.* Sprague, 140 Mass. 425. The plaintiff cannot show, in order to enhance the damages, that it was currently reported in the neighborhood that the defendant had charged the plaintiff with the crime alleged in the declaration: Leonard *v.* Allen, 11 Cush. (Mass.) 241.

The effect of a public retraction of the slander (which is undoubtedly no bar to the action) upon the question of damages has been variously decided. It has been held that proof of a retraction of the slander in the presence of the defendant's family is not admissible in mitigation of damages: Kent *v.* Bonney, 38 Me. 435. But it was held in Cass *v.* New Orleans Times, 27 La. Ann. 214, that the publication of a retraction might be admissible evidence in mitigation of damages. Cf. Evening News Association *v.* Tryon, 42 Mich. 549; [Turner *v.* Hearst, 115 Cal. 394; but evidence of an offer to retract is inadmissible: Turton *v.* New York Recorder, 144 N. Y. 144.] And where a libel was published in a newspaper and retracted the day but one after, and no evidence of actual damage was shown, a verdict of over $1000 damages was held good: Meyer *v.* Press Publishing Co., 46 N. Y. Super. Ct. 127. But cf. Samuels *v.* Evening Mail Association, 16 N. Y. Supreme Ct. 288. [As to the admissibility of evidence of a previous publication by another person of the same defamation in mitigation of damages, see Hoey *v.* Fletcher, 39 Fla. 325.]

If the defendant has been induced to believe the truth of the slander from the plaintiff's own conduct, he may give this in evidence in mitigation of damages: Moor *v.* Mauk, 3 Ill. App. 114. In Watson *v.* Moore, 2 Cush. (Mass.) 133, which was an action by the husband and the wife for words spoken of the wife by the defendant, charging her with larceny, it was held that the defendant cannot show, in mitigation of damages, that the husband keeps a disorderly wife.] [The negligence of the plaintiff is a bar to recovery only for loss caused by such negligence: Giacona *v.* Bradstreet Co., 48 La. Ann. 1191.]

[2] See *supra*, tit. Damages; Herrick *v.* Lapham, 10 Johns. 281; Hallock *v.* Miller, 2 Barb. S. C. 730; [Ivey *v.* Pioneer Savings Co., 113 Ala. 349.] Where the action was for alleging that the plaintiff's ship was unseaworthy, proof of special damage was held admissible, without any averment of special damage in the declaration; because, being a chattel, no action is maintainable without proof of some damage: Ingram *v.* Lawson, 9 C. & P. 326. *Sed quære.*

[3] 1 Saund. 243, n. 5, by Williams; Hunt *v.* Jones, Cro. Jac. 499; Anon., 2 Ld. Raym. 1007; 2 Stark. on Slander, p. 55 [62, 63]. So the loss of customers and the like: ibid.; Tilk *v.* Parsons, 2 C. & P. 201; Ashley *v.* Harrison, 1 Esp. 48, 50.

[4] 2 Stark. on Slander, p. 56 [63].

[5] Hartly *v.* Herring, 8 T. R. 130.

[6] Ashley *v.* Harrison, 1 Esp. 48.

[7] Vines *v.* Serell, 7 C. & B. 163. But evidence of the defendant's procuring testi-

§ 421. **Defence; General Issue.** In the DEFENCE of this action under the *general issue*, the defendant may give in evidence any matter tending to deny or disprove any material allegation of the plaintiff; such as the speaking and publishing of the words, the malicious intention or the injurious consequences resulting from the act complained of. If the plaintiff, in proof of malice, relies upon the falsity of the charge, the defendant may rebut the inference by evidence of the truth of the charge, even under the general issue. And where the occasion and circumstances of the publication or speaking were such as to require from the plaintiff some proof of actual malice, the defendant may prove these circumstances under the general issue.[1] Such is the case where the alleged libel or slander consisted in communications, made to the *appointing power* in relation to the conduct of the plaintiff as a *public officer;* or, to the individuals or authorities empowered by law to *redress grievances*, or supposed to possess influence and ability to procure the means of relief; or, where they were *confidential communications*, made in the ordinary course of lawful business, from good motives and for justifiable ends. So, where the circumstances were such as to exclude the presumption of malice, as, if the words were spoken by the defendant in his office of *Judge, Juror, Attorney, Advocate, Witness*, or *Party*, in the course of a judicial proceeding, or as a *member of a legislative assembly*, in his place, these also may be shown under the general issue.[2] So, if a person having information materially

mony to prove the truth of his charges, and then declining to plead in justification, is not admissible to affect the damages, though it might be properly referred to the jury, upon the question of malice: Bodwell *v.* Osgood, 3 Pick. 379. Nor is evidence of a repetition of the slander admissible to enhance the plaintiff's damages: Burson *v.* Edwards, 1 Smith 7; Lanter *v.* McEwen, 8 Blackf. 495; Shortley *v.* Miller, 1 Smith 395 c. Nor can the failure to sustain a plea in justification have that effect: Shank *v.* Case, ib. 87. [*Contra*, Upton *v.* Hume, 24 Or. 420; Browning *v.* Powers, 38 S. W. 943, Mo.; Marx *v.* Press Pub. Co., 134 N. Y. 561. The question turns upon the circumstances of the plea.]

[1] Huson *v.* Dale, 19 Mich. 17. The class of privileged communications "comprehends all cases of communications made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words:" Somervill *v.* Hawkins, 15 Jur. 450, per Maule, J.; 3 Eng. Law & Eq. 503. A communication being shown to be privileged, the burden of proof is on the plaintiff to show actual malice in the defendant. But to enable the plaintiff to have the question of malice submitted to the jury, it is not essential that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence: ibid.

[2] 1 Stark. on Slander, pp. 401–406, by Wendell; Fairman *v.* Ives, 5 B. & Ald. 642; Bradley *v.* Heath, 12 Pick. 163; Hoar *v.* Wood, 3 Met. 193; Coffin *v.* Coffin, 4 Mass. 1; Remington *v.* Congdon, 2 Pick. 310. Confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be viewed liberally by juries; and unless they see clearly that there was a malicious intention of defaming the plaintiff, they ought to find for the defendant: Todd *v.* Hawkins, 8 C. & P. 88, per Alderson, B. See, to the same effect, Wright *v.* Woodgate, 2 C. M. & R. 573; 1 Tyrw. & G. 12; Toogood *v.* Spyring, 1 C. M. & R. 181; 4 Tyrw. 582; Shipley *v.* Todhunter, 7 C. & P. 680; Storey *v.* Challands, 8 id. 234, 236; Wilson *v.* Robinson, 9 Jur. 726; Griffith *v.* Lewis, 7 Ad. & El. N. S. 61; Warr *v.*

affecting the interest of another honestly communicates it privately to such other party, in the full and reasonably grounded belief that it

Jolly, 6 C. & P. 497; Padmore *v.* Lawrence, 11 Ad. & El. 380; Needham *v.* Dowling, 15 Law Jour. N. s. 9; Gardner *v.* Slade, 13 Jur. 826; Kershaw *v.* Bailey, 1 Exch. 743; Somervill *v.* Hawkins, 15 Jur. 450; 3 Eng. Law & Eq. 503; Simpson *v.* Robinson, 12 Ad. & El. N. s. 511. Though the expressions were stronger than the circumstances required, it is still a question for the jury whether they were used with intent to defame or in good faith to communicate facts interesting to one of the parties: Dunman *v.* Bigg, 1 Campb. 269, n.; Ward *v.* Smith, 4 C. & P. 302; s. c. 6 Bing. 749.

[A communication relating to affairs of state made by one minister to another is absolutely privileged: Chatterton *v.* Secretary, 1895, 2 Q. B. 189.]

[The privilege of Judges, etc., as they are enumerated above is twofold.

1. It is an absolute privilege as to all writings or statements which *are material to the case*, and no proof of malice, express or implied, will support an action of libel or slander which is based on them. The English rule seems to be, that judges, counsel, parties, and witnesses, are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings, whether the words were pertinent to the case or not: Henderson *v.* Broomhead, 4 H. & N. 569; Revis *v.* Smith, 18 C. B. 126; Dawkins *v.* Rokeby, L. R. 8 Q. B. 255; s. c. L. R. 7 H. L. 744; Seaman *v.* Netherclift, L. R. 1 C. P. Div. 540; Mackay *v.* Ford, 5 H. & N. 792. The same doctrine is generally held in the American courts, with the qualification above given, that, in order to be privileged, these statements made in the course of an action must be pertinent and material to the case: White *v.* Carroll, 42 N. Y. 161; Gar *v.* Selden, 4 N. Y. 91; Mower *v.* Watson, 11 Vt. 536; McLaughlin *v.* Cowley, 127 Mass. 316; Smith *v.* Howard, 28 Iowa 51; Barnes *v.* McCrate, 32 Me. 442; Rice *v.* Coolidge, 121 Mass. 393; Lanning *v.* Christy, 30 Ohio St. 115; Kidder *v.* Parkhurst, 3 Allen (Mass.) 393; [Union Ins. Co. *v.* Thomas, 83 F. 803, U. S. App.] Shaw, C. J., in Hoar *v.* Wood, 3 Met. (Mass.) 193, says: "We take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and, therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry."

2. If the statements are immaterial to the case, and impertinent, the fact that they are spoken in the course of legal proceedings rebuts the presumption of malice and renders them conditionally privileged, but open to proof of actual malice: Johnson *v.* Brown, 13 W. Va. 71; Wallis *v.* New Orleans, etc. R. R. Co., 29 La. Ann. 66; Kelly *v.* Lafitte, 28 id. 435. Cf. Hoar *v.* Wood, 3 Met. (Mass.) 193. A complaint to the grand jury containing a charge of perjury is entitled to the same privilege and is not a libel, although before its presentation to them it was exhibited to various persons, by whom it was signed: Kidder *v.* Parkhurst, 3 Allen (Mass.) 393. This privilege extends to a justice of the peace if he has jurisdiction of the case: McBee *v.* Fulton, 47 Md. 403.

The publication of a fair and correct report of proceedings taking place in a public court of justice, even of proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge by the magistrate of the party charged, is protected by the same conditional privilege: Lewis *v.* Levy, 1 E. B. & E. 537. [And see Kimber *v.* Press Ass'n, 1893, 1 Q. B. 65.] But this privilege does not extend to such reports when they are garnished with libellous and scurrilous matter (Scripps *v.* Reilly, 40 Mich. 10); or if actual malice is proved (McBee *v.* Fulton, 47 Md. 403). [The publication is privileged only when fair and correct: Metcalf *v.* Times Pub. Co., 40 A. 864, R. I.; Post Pub. Co. *v.* Moloney, 50 Ohio 71.]

It has been held in some cases libellous to publish *ex parte* affidavits, or complaints of crime made to procure arrest, but the better rule is probably that they are only conditionally privileged: Cincinnati, etc. Co. *v.* Timberlake, 10 Ohio St. 548; Stanley *v.* Webb, 4 Sand. (N. Y.) S. C. 21; Mathews *v.* Beach, 5 id. 256.

There are also many kinds of communications which the law has shielded by requiring that the plaintiff, in order to sustain an action on them, must prove that they were spoken with actual malice or ill will. A good description of the kind of statement which is thus privileged is given by Parke, B., in Toogood *v.* Spyring, 4 Tyrwh. 582–595. "The law considers a publication as malicious unless it is fairly made by some person in the discharge of some *public* or *private duty*, whether *legal* or *moral*, or in the conduct of his own affairs, in matters where his own interest is concerned." The

is true,[3] he is justified in so publishing it, though he has no personal

duty in question need only be one of moral or imperfect obligation: Van Wyck *v.* Aspinwall, 17 N. Y. 190. Cf. Elam *v.* Badger, 23 Ill. 498. [Belief that the person to whom the statements are made has a duty or interest in regard to them is insufficient excuse: Hebditch *v.* MacIlwaine, 1894, 2 Q. B. 54.]

The parties to proceedings in church discipline, whether they are the parties complainant or the accused, the synod or tribunal, or the witnesses, have the benefit of this conditional privilege, in all the proceedings taken to accomplish such discipline: Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412; York *v.* Pease, 2 Gray (Mass.) 282; Shurtleff *v.* Stevens, 51 Vt. 501; Streety *v.* Wood, 15 Barb. (N. Y.) 105; [Piper *v.* Woolman, 43 Neb. 280.]

The reports of mercantile agencies, if confined to those who have an interest in knowing the standing of the party who claims to have been injured, are privileged if made without actual malice: Lewis *v.* Chapman, 16 N. Y. 374; State *v.* Lonsdale, 48 Wis. 348; Taylor *v.* Church, 8 N. Y. 452. [But see Traynor *v.* Sieloff, 62 Minn. 420. If not so confined, the reports are actionable: Mitchell *v.* Bradstreet Co., 116 Mo. 226.] So the reports [and proceedings] of a school committee [or other public committee] are conditionally privileged: Shattuck *v.* Allen, 4 Gray (Mass.) 540; [Vallery *v.* State, 42 Neb. 123; Etchison *v.* Peyerson, 88 Ga. 620; Howland *v.* Flood, 160 Mass. 509; Blakeslee *v.* Carroll, 64 Conn. 223.]

As to publications in newspapers. — The fact that the defendant is the conductor of a public press gives him no peculiar rights, or especial privileges, or claims to indulgence. He has just the same rights that the rest of the community have, and no more. He has the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity: Sheckell *v.* Jackson, 10 Cush. (Mass.) 25; [Fenstermaker *v.* Tribune Co., 13 Utah 532; Haynes *v.* Clinton, etc. Co., 169 Mass. 512.] But if he publish an article without knowing it to be libellous, and so satisfy the jury, he will not be liable therefor, although the writer of the article intended it to be libellous. In such case the writer only is liable to the party injured: Smith *v.* Ashley, 11 Met. (Mass.) 367. The publisher of the parliamentary debates was held liable for a libel therein published, although done by the order of the House of Commons: Stockdale *v.* Hammond, 2 Eng. C. L. & Ch. 155.

A newspaper may publish a *bona fide* criticism of the conduct of a candidate for office: Sweeney *v.* Baker, 13 W. Va. 158. [But a charge of professional incompetence is not privileged: Mattice *v.* Wilcox, 147 N. Y. 624.]

A communication to the public at large, in a newspaper, in respect to the qualifications of a candidate for an office, the appointment to which is made by a board of limited number, does not stand on the same footing of privilege as if addressed to the appointing power: Hunt *v.* Bennett, 19 N. Y. 173. On a trial for libel, where the publication consisted of a criticism of a candidate for the office of representative in Congress, the publication containing charges that the candidate had formerly been guilty of corrupt conduct as Commissioner of Pensions, at the conclusion of the trial the counsel for the defendant stated to the court that it was not claimed on the part of the defence that there was anything wrong in the plaintiff's conduct in the Pension Office, and the plaintiff's counsel then stated that upon the defendant's statement plaintiff would rest; and the court thereupon charged the jury that there must be a verdict for the plaintiff for nominal damages at least. To this charge the defendant's counsel excepted, and the jury rendered a verdict for plaintiff at $2,000 damages. On appeal, defendant's counsel raised a point which had not previously been raised, that the question of malice in the publication complained of should have been submitted to the jury, and that the publication in question was privileged, unless it appeared to have been printed with actual malice. The court, however, held that the point was raised too late; that if the defendant had wished it to go to the jury on the question of malice, he should have made that request at the time the case was submitted to the jury, or should have stated this special ground of exception to the charge at the time when the trial court might have been able to correct it in the respect complained of: Van Aernam *v.* Bleistein, 102 N. Y. 360. If one holds himself out to the public as a teacher and guide of youth, and seeks to attract them to his place by signs, placards, and advertisements of an extraordinary nature, he thereby assumes a certain publicity which renders a newspaper article, discussing the question of whether or not

[3] [The belief must be reasonable: Toothaker *v.* Conant, 40 A. 331, Me. Evidence of the falsity of the charge, though insufficient to prove malice, is admissible to rebut the claim of privilege: Laing *v.* Nelson, 40 Neb. 252.]

interest in the subject-matter, and though no inquiry has been made

he is a suitable person to instruct the youth, a privileged communication, and not actionable, unless actual malice is proved: The Press Company, Limited, *v.* Stewart, 119 Pa. St. 584. The enactment of a public statute or the amendment of the existing statute is a matter of public interest, and information furnished to the governor of the State to affect his action upon a bill pending before him, even though it contain defamatory matter, is privileged. But if information is published unnecessarily by being distributed among others whose action is not necessary upon the pending bill, this is sufficient evidence of malice to go before the jury: Woods *v.* Wiman, 122 N. Y. 449. When one person applies to another for credit and the latter seeks information from a third, as to the propriety of giving credit to the applicant, this constitutes a privileged communication bearing upon that subject: Ormsby *v.* Douglass, 37 N. Y. 477; Fahr *v.* Hayes, 50 N. J. L. 279. If, however, these communications are made with express malice they are not privileged. [Malice against a third party is immaterial: Bearce *v.* Bass, 88 Me. 521.] The existence of express malice may be shown by the character of the words used, as if they are exaggerated and extravagant, or if the person making the communication seeks the opportunity of making it in the presence of persons who are not legitimately interested in hearing it; and other facts of the same nature: Fahr *v.* Hayes, *supra*. It is not, however, sufficient to show that the person making the communication was merely indignant with the person against whom he makes the statement, if that indignation arises simply from the nature of the defamatory act which the person making the communication alleges against the plaintiff: Fahr *v.* Hayes, *supra*. In regard to the various kinds of communications which are privileged, among them may be included memorials to officers of state respecting the conduct of magistrates and officers, comments by electors upon the character of candidates for office; communications in matters of public interest in which the public generally is concerned, communications in the interest of third persons or for the protection of the party's own interest, communications respecting the character of servants, or the credit and responsibility of tradesmen, or made in the performance of social, moral, or legal duties; but the circumstances of each case go to vary the character of the privilege, for instance, while a newspaper may publish a criticism of the public acts of a candidate for office, or the same may be inserted in a circular without liability, yet if such publicity were given to comments derogatory to the character of a servant, or to the financial standing of a trader, the circumstances would not justify the communication. If the communication is a privileged one, then if the defendant stated no more than he believed, or might have reasonably believed, he is not liable; but good faith and honest belief in the truth of the statement made will not of itself act as justification if the circumstances were not such as to make the communication privileged: King *v.* Patterson, 49 N. J. L. 421. In libel cases, where the defendant relies upon privilege, it is held in Pennsylvania that the natural order of proof is for the defendant to show in rebuttal of the inference of implied malice the probable cause for the publication of the libel, when such is the case, and for the plaintiff to meet such evidence in rebuttal by evidence showing a lack of probable cause [or malice: Bearce *v.* Bass, 88 Me. 521.] Thus, where the publication charges an indictable offence, the presumption of innocence is sufficient *prima facie* evidence of the want of probable cause of the libel, and the defendant must then put in proof of the facts to support his claim of privilege: Conroy *v.* Pittsburgh Times, 139 Pa. St. 339. In an action for libel printed in a newspaper owned by the defendants, the evidence showed that the article in question, which related to transactions in a comptroller's office in the city, was printed in the newspaper, and immediately after its printing, the question arising in the newspaper office as to the truth of its charge, the reporter who wrote it went to the comptroller's office to ascertain if the charges were true. The reporter found that they were false, and wrote a retraction for the next edition of the paper. The defendants, however, declined to publish it, and the second edition was issued with the same libellous article as previously published. The evidence of the visit of the reporter to the comptroller's office was objected to by the defence on the ground that the defendants' denial of ever sending him to the office concluded the matter, as the same was collateral to the main question. The court held otherwise, that the visit of the reporter to the office of the comptroller was material in regard to the question of malice, and the plaintiff was at liberty to contradict the evidence of the defendants by further proof, showing that the reporter did in fact make the visit in question: People *v.* Sherman, 103 N. Y. 516.

As to what is not a sufficient duty to rebut the presumption of malice, see Joannes *v.* Bennett, 5 Allen (Mass.) 169, where it was held that a letter addressed to a woman,

of him, and though the danger to the other party is not imminent.[4] Under this plea, also, the defendant may prove that the publication was procured by the fraudulent contrivance of the plaintiff himself, with a view to an action; or that the cause of action has been *discharged* by an accord and satisfaction, or by a release.[5]

§ 422. **Rebuttal.** But in all cases where the occasion itself affords *prima facie* evidence to repel the inference of malice, the plaintiff may rebut the defence, by showing that the object of the defendant was malignant, and that the occasion was laid hold of as a mere color and excuse for gratifying his private malice with impunity.[1]

§ 423. **Plaintiff's Case.** If, from the plaintiff's own showing, it appears that the words were not used in an actionable sense, he will be nonsuited.[1] But if the plaintiff once establishes a *prima facie* case, by evidence of the publishing of language apparently injurious and actionable, the *burden of proof* is on the defendant to explain it.[2] But the defendant is entitled to have the whole of the alleged libel read, and the whole conversation stated, in order that its true sense and meaning may appear. And if the libel is contained in a letter, or a newspaper, the whole writing or paper is admissible in evidence.[3] The defendant may also give in evidence a letter written to him, containing a statement of the facts upon which he founded his charges, to show the *bona fides* with which he acted.[4]

§ 424. **Truth; General Issue.** It is perfectly well settled that, under the *general issue*, the defendant cannot be admitted to prove the *truth* of the words, either in bar of the action or in mitigation of damages.[1] And whether, for the latter purpose, he may show that

and containing libellous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. On the proof of actual malice, see also Taylor *v.* Hawkins, 5 Eng. Law & Eq. 253; Harris *v.* Thompson, 24 id. 370; Cook *v.* Wildes, 30 id. 284; Gilpin *v.* Fowler, 26 id. 386; Harrison *v.* Bush, 32 id. 173.]

[4] Coxhead *v.* Richards, 10 Jur. 984. But whether such communication is privileged, *quære:* ibid. And see Bennett *v.* Deacon, 15 Law Journ. N. S. 289; Blackham *v.* Pugh, id. 290; Wilson *v.* Robinson, 9 Jur. 726.

[5] King *v.* Waring, 5 Esp. 13; Smith *v.* Wood, 3 Campb. 323; Lane *v.* Applegate, 1 Stark. 97; Borsey *v.* Wood, 3 H. & C. 484.

[1] 2 Stark. Evid. 464; Somervill *v.* Hawkins, 15 Jur. 450; 3 Eng. Law & Eq. 503.

[1] Thompson *v.* Bernard, 1 Campb. 48.

[2] Penfold *v.* Westcote, 2 New Rep. 335; Christie *v.* Cowell, Peake's Cas. 4, and note by Hay; Button *v.* Hayward, 1 Vin. Abr. 507, in marg.; s. c. 8 Mod. 24.

[3] Weaver *v.* Lloyd, 1 C. & P. 295; Thornton *v.* Stephen, 2 M. & Rob. 45; Cooke *v.* Hughes, Ry. & M. 112. [So if the libel is contained in one of a series of articles dealing with questions of public interest in a lawful and innocent manner, the whole series may be put in evidence to show the character of the writings: Scripps *v.* Foster, 41 Mich. 742.]

[4] Blackburn *v.* Blackburn, 3 C. & P. 146; s. c. 4 Bing. 305. See also Fairman *v.* Ives, 5 B. & Ald. 642; Blake *v.* Pilford, 1 M. & Rob. 198; Pattison *v.* Jones, 8 B. & C. 578.

[1] [Atwater *v.* Morning News, 67 Conn. 504; Continental N. B. *v.* Bowdre, 92 Tenn. 723.] But matters which fall short of a justification, and do not tend to it, may be shown in mitigation of damages, under this issue: Snyder *v.* Andrews, 6 Barb. S. C. 43; Tollett *v.* Jewett, 1 Am. Law Reg. p. 600. [In Michigan, it is held that the

the plaintiff was *generally suspected*, and commonly reported to be guilty of the particular offence imputed to him, is, as we have seen,[2] not universally agreed. But by the weight of authorities, it seems settled that the defendant may impeach the plaintiff's character by general evidence, in order to reduce the amount of damages.[3] And if the plaintiff declares that he was never guilty, nor *suspected* to be guilty, of the crime imputed to him, it has been held that the defendant may disprove the latter allegation by evidence showing

truth may be given under the general issue in rebuttal of malice, and in mitigation of damages: Hudson *v.* Dale, 19 Mich. 17. And when the defendant establishes the truth of the charges, the intent with which they were made is immaterial: Joannes *v.* Jennings, 6 N. Y. S. C. (T. & C.) 138.}

[2] *Supra*, § 275; 2 Stark. on Slander, pp. 77–95, by Wendell. See also Waithman *v.* Weaver, 11 Price 257, n.; Wolmer *v.* Latimer, 1 Jur. 119. {Such general reputation is not admissible: Chamberlain *v.* Vance, 51 Cal. 75; Pease *v.* Shippen, 80 Pa. St. 513. In Bailey *v.* Kalamazoo Publishing Co., 40 Mich. 251, it was held that general reputation was a sufficient justification for the allegation that an attorney was a pettifogging shyster. And so, in an action for the publication of a libel, which charged the plaintiff with dishonesty and bad faith, the defendant cannot ask a news-collector, who wrote part of the article complained of, "what inquiries and examinations he made, and what sources of information he applied to, before making the communications." Nor can he, as a foundation for such a question, prove that there was a general anxiety in the community in regard to the facts stated in the publication: Sheckell *v.* Jackson, 10 Cush. (Mass.) 25. Nor can he show circumstances which excited his suspicion, and furnished reasonable cause for belief, on his part, that the words spoken were true: Watson *v.* Moore, 2 Cush. (Mass.) 133; Dane *v.* Kenney, 5 Foster (N. H.) 318; Knight *v.* Foster, 3 N. H. 576. But in Wetherbee *v.* Marsh, 20 id. 561, it is held that the defendant may prove in mitigation of damages that when the words were uttered a general report existed that the plaintiff had committed the act charged. Cf. Peterson *v.* Morgan, 116 Mass. 350; and in Parkhurst *v.* Ketchum, 6 Allen (Mass.) 406, that evidence was not admissible, either in mitigation of damages or as a justification in an action of slander by words imputing unchastity to a woman, to show that the defendant spoke the words to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the same to be true; but in such a case, evidence that the plaintiff's general reputation is bad, independently of the slander of which she complains, and that it was so even ten years before and at another place, is admissible in mitigation of damages.} Where the defendant, when speaking the words, referred to certain current reports against the plaintiff, which he said he had reason to believe were true, it was held, under the general issue, that he might prove, by cross-examination of the plaintiff's witnesses, that such reports had in fact prevailed in the plaintiff's neighborhood, and were the common topic of conversation before the words were uttered by him: Richards *v.* Richards, 2 M. & Rob. 557. And see Morris *v.* Barker, 4 Harringt. 520.

[3] *Ante*, Vol. I. § 55; Paddock *v.* Salisbury, 2 Cowen 811. It must be *general* evidence: Ross *v.* Lapham, 14 Mass. 275; Huff *v.* Bennett, 6 N. Y. 337; Stone *v.* Varney, 7 Met. 86. {The general practice is now to admit at least evidence of the plaintiff's bad reputation in regard to the crime charged in the slanderous words: Maxwell *v.* Kennedy, 50 Wis. 645; Drown *v.* Allen, 91 Pa. St. 393. In this case, the slander charged the plaintiff with being a thief. Counsel for defendant asked a witness what the general reputation of the plaintiff was as to being a thief. The Court said the question should be what is the general reputation of the plaintiff for honesty, but on appeal, the Supreme Court held the original question was the proper form. So, where the words complained of imputed a want of chastity to a woman, evidence of her general reputation for want of chastity is admissible, but not evidence of specific acts: Duval *v.* Davey, 32 Ohio St. 604. In Leonard *v.* Allen, 11 Cush. (Mass.) 241, the inquiries were restricted to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offence with which the defendant had charged him.

If this kind of evidence is introduced, the plaintiff, to rebut it, may give in evidence his own general good character in this regard: McBee *v.* Fulton, 47 Md. 403; Chubb *v.* Gsell, 34 Pa. St. 114.} [See Vol. I. §§ 14*b*–14*h*, 461 *d*.]

that he was suspected.[4] The defendant may also show, upon the question of damages, under this issue, that the charge was occasioned by the misconduct of the plaintiff either in attempting to commit the crime, or in leading the defendant to believe him guilty, or in contemporaneously assailing the defendant with opprobrious language; or, that it was made under a mistake which was forthwith corrected;[5] or, that he had the libellous statement from a third person;[6] or, being the proprietor of a newspaper, that he merely copied the statement from another paper, giving his authority;[7] or that he was insane, and known to be so, at the time of speaking the words.[8] And in an action for a libel upon the plaintiff in his trade of bookseller, as the publisher of immoral and foolish books, it has been held that the defendant, under this issue, may show that the supposed libel is nothing more than a fair stricture upon the general nature of the plaintiff's publications.[9]

§ 425. **Mitigation; Justification; General Issue.** It is obvious that evidence in mitigation of damages must be such as involves an admission of the falsity of the charge. If the defendant would prove that the charge is true, he can do this only under a special plea in justification; it is only evidence of facts not sufficient to justify that is admissible under the general issue, to reduce the damages.[1] And if such facts have been specially pleaded in justification, but the plea is withdrawn before the trial, and the plaintiff is therefore not prepared with evidence to disprove it, the defendant may, under the circumstances, still be permitted to prove the facts under the general issue, to affect the amount of damages to be recovered.[2] It has also been held that where the facts offered in

[4] Earl of Leicester *v.* Walter, 2 Campb. 251; Case *v.* Marks, 20 Conn. 249. But in an action for a libel, which was actionable only in respect of the plaintiff's office, where his due discharge of its duties was averred, the defendant was not permitted, under the general issue, to disprove this averment, by evidence of the plaintiff's negligence in discharging his official duties: Dance *v.* Robson, 1 M. & Malk. 294.

[5] *Supra*, § 275; Bradley *v.* Heath, 12 Pick. 163; *infra*, § 426.

[6] Duncombe *v.* Daniell, 2 Jur. 32; Maitland *v.* Goldney, 2 East 426; Haynes *v.* Leland, 16 Shepl. 233; *sed vid.* Mills *v.* Spencer, Holt's Cas. 513. Its effect will depend on the intent with which the name of the author was mentioned: Dole *v.* Lyon, 10 Johns. 447. The fact that the defendant heard the words from another, whose name he mentioned at the time of speaking of them, was formerly held a good *justification*, and therefore pleadable in bar. See 1 Stark. on Slander, c. 14; id. p. 301, n. (1), by Wendell. But this doctrine has been solemnly denied in the United States (ibid.); Dole *v.* Lyon, 10 Johns. 447; {Fowler *v.* Chichester, 26 Ohio St. 9;} [Upton *v.* Hume, 24 Or. 420;] and has of late been repudiated in England (De Crespigny *v.* Wellesley, 5 Bing. 392).

[7] Saunders *v.* Mills, 6 Bing. 213; Greeve *v.* Carr, 7 C. & P. 64. See also Mullett *v.* Hulton, 4 Esp. 248; Wyatt *v.* Gore, Holt's Cas. 303; East *v.* Chapman, 2 C. & P. 570; s. c. 1 M. & Malk. 46; [Upton *v.* Hume, 24 Or. 420.]

[8] Dickinson *v.* Barber, 9 Mass. 225. {Insanity, if not a defence, will go to mitigate the damages: Pratt *v.* Ford, 11 Law Rep. 421; *ante*, § 275.}

[9] Tabart *v.* Tipper, 1 Campb. 350. See also Gandy *v.* Humphries, 35 Ala. 617; *ante*, § 421.

[1] Underwood *v.* Parkes, 2 Stra. 1200; Knobell *v.* Fuller, Peake's Ad. Cas. 139; Andrews *v.* Vanduzer, 11 Johns. 38.

[2] East *v.* Chapman, 2 C. & P. 570; s. c. 1 M. & Malk. 46.

evidence in mitigation of damages would be sufficient to justify *a part only* of the libel, they must be specially pleaded in justification of that part, and cannot otherwise be received.[3] But these rules, it is conceived, do not preclude the defendant from showing, under the general issue, all such facts and circumstances as belong to the *res gestæ*, and go to prove the intent with which the words were spoken or the publication was made.[4] And if a justification is pleaded, the defendant may still give *general evidence*, in mitigation of damages, under the general issue, though he will not be permitted, under a plea in justification, to give evidence of particular facts and circumstances respecting the charge, which go merely to the amount of damages.[5]

§ 426. **Justification; Criminal Charge.** To support a special plea in *justification*, where *crime* is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived, that he would be entitled to the benefit of any reasonable doubts of his guilt, in the minds of the jury, in the same manner as in a criminal trial.[1]

[3] Vesey *v.* Pike, 3 C. & P. 512.

[4] See 2 Stark. on Slander, p. 88, n. (1), by Wendell. [Evidence of mitigating circumstances in disproof of malice is not admissible to reduce actual damages: Candrian *v.* Miller, 73 N. W. 1004, Wis.; Pellardis *v.* Journal Co., 74 id. 99, Wis.] In several of the United States, the course is to plead the general issue in all cases, with a brief statement of the special matter to be given in evidence under it. It has been held that where such statement, in an action of slander, is ruled out, as not amounting to a justification, the matter is not admissible in evidence in mitigation of damages; for the reason that, so far as it goes, it tends to prove the charge to be well founded: Cooper *v.* Barber, 24 Wend. 105. And see Turrill *v.* Dolloway, 17 id. 426. But the soundness of these decisions has been combated, with great force of reasoning, by Mr. Wendell, in the Introduction to his valuable edition of Starkie on Slander, pp. 27–55. {Selden, J., in Bush *v.* Prosser, 11 N. Y. 347, says on this point, "The rule upon which these decisions proceed was merely an unforeseen consequence of the rule which excluded proof of *the truth of the charge*, under the general issue, in mitigation of damages; a rule which originated with the case of Underwood *v.* Parks, 2 Stra. 1200. The intrinsic propriety or impropriety of the evidence had nothing to do with the adoption of the rule. It was a rule of pleading merely, having no other object than to prevent plaintiffs from being taken by surprise upon the trial by evidence of the truth of the charge without notice. This was very well in cases where the defendant was prepared to justify, which cases alone the judges had in view in adopting the rule. But when the doctrine came to be applied to cases where all the defendant could or desired to do was to mitigate the damages by showing the absence of malice, it took away the right altogether, since the rules of pleading did not allow anything short of a complete defence to be proved upon the record. The conceded *right* of the defendant to mitigate the damages by showing the absence of malice, and the *rule*, were directly repugnant to each other, and no question has ever given rise to a more protracted struggle. The courts of England, under a sense of the admitted right, have in a number of cases decided that facts and circumstances *falling short of proving*, although tending to prove, the truth of the charge, might be received in mitigation: Knobell *v.* Fuller, *supra;* Leicester *v.* Walter, 2 Campb. 251. But the courts in New York and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge *must necessarily* exclude evidence tending to prove it:" [Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439.] The rule is now changed in New York by the Code. Cf. Bisbey *v.* Shaw, 12 N. Y. 71.}

[5] 2 Stark. on Slander, pp. 83–94, and notes by Wendell. See also Stone *v.* Varney, 7 Law Reporter 533; Mullett *v.* Hulton, 4 Esp. 248; East *v.* Chapman, 2 C. & P. 570; s. c. 1 M. & Malk. 46; Newton *v.* Rowe, 1 C. & K. 616; Crandall *v.* Dawson, 1 Gilm. (Ill.) 556. But see Larned *v.* Buffington, 3 Mass. 546.

[1] {In proving the truth of the alleged libel, the defendant's proof must coincide

And if the evidence falls short of proving the commission of the crime, the jury may still consider the circumstances, as tending to show that the defendant had probable cause to believe the charge to be true, and to lessen the character of the plaintiff, and therefore to reduce the amount of damages.[2] But wherever the truth of a charge of crime is pleaded in justification, the plaintiff may give his own character in evidence, to rebut the charge.[3]

§ 427. **Breach of Confidence.** Where the libel is upon a lawyer, charging him with *divulging confidential communications* made to him by his client, it is not necessary for the defendant, in support of a plea in justification, to prove that the communications were of such strictly privileged character that the plaintiff could not have been compelled to disclose them, if called as a witness in a court of justice; but it will suffice to show that the matters disclosed by the

substantially with the words of the libel. Thus an allegation that the plaintiff was "indicted" will be supported by proof that he was prosecuted and convicted on information in a justices' court: Bailey *v.* Kalamazoo Publishing Co., 40 Mich. 251.

And in general, if a justification is alleged, the proof must correspond substantially with the allegations, as in all other cases of proof, to avoid a variance: Carpenter *v.* Bailey, 56 N. H. 283.

The evidence to support this justification must include all the elements necessary to prove the accused guilty of the crime in a prosecution therefor, *e. g.* both the intent and the criminal act: McBee *v.* Fulton, 47 Md. 403; [McClaugherty *v.* Cooper, 39 W. Va. 313;] but it seems to be the established rule now that a preponderance of the evidence tending to convict him of the crime is enough, and that the statement in the text, that he is entitled to a reasonable doubt, is not well supported: McBee *v.* Fulton, *supra*; Ellis *v.* Buzzell, 60 Me. 207; Knowles *v.* Scribner, 57 id. 497; Matthews *v.* Huntley, 9 N. H. 150; Folsom *v.* Brown, 5 Foster (N. H.) 114; Schmidt *v.* N. Y. Un. Mut. Ins. Co., 1 Gray (Mass.) 529; Gordon *v.* Parmelee, 15 id. 413; Kincade *v.* Bradshaw, 3 Hawk. (N. C.) 63; Briggs *v.* Cooper, cited in Bradish *v.* Bliss, 33 Vt. 326; Wash. Ins. Co. *v.* Wilson, 7 Wis. 169; Howell *v.* Hartford Fire Ins. Co., C. Ct. U. S., No. Dist. Ill., 3 Ins. L. J. 653; Scott *v.* Home Ins. Co., 1 Dil. C. Ct. U. S. 105; Marshall *v.* Marine Ins. Co., 43 Mo. 586; [Finley *v.* Widner, 70 N. W. 433, Mich.] *Contra*, Corbley *v.* Wilson, 71 Ill. 209; Mark *v.* Gelzhaueser, 50 Cal. 631; Tucker *v.* Call, 45 Ind. 31; Polston *v.* Lee, 54 Mo. 291; Ellis *v.* Lindley, 38 Iowa 461; [Wintrode *v.* Renbarger, 50 N. E. 570, Ind.] See also 10 Am. L. Rev. 642, where the cases are all collected and carefully examined. See also *ante*, § 408, n.; Kidd *v.* Fleek, 47 Wis. 443.

If there is any special rule of evidence relative to the proof of the crime alleged, this rule must be complied with in proving the crime as a justification. *E. g.* in the prosecution for perjury, two witnesses, or one and corroborating circumstances, are requisite, and so in proving this crime in an action of libel: Ransone *v.* Christian, 51 Ga. 351.]

[2] [See Vol. I. §§ 14 *b*–14 *h*;] Chalmers *v.* Shackell, 6 C. & P. 475; *supra*, § 408; Gants *v.* Vinard, 1 Smith (Ind.) 287; Lanter *v.* McEwen, 8 Blackf. 495; Hopkins *v.* Smith, 3 Barb. S. C. 599; Shortly *v.* Miller, 1 Smith (Ind.) 395; Minesinger *v.* Kerr, 9 Barr 312; [Naylor *v.* Ponder, 41 A. 88, Del.] A charge of polygamy, by marrying three persons, may be justified by proof of actual marriage to two wives, and cohabitation and reputation as to the third: Wilmett *v.* Harmer, 8 C. & P. 695.

[3] Harding *v.* Brooks, 5 Pick. 244. Such is the rule in criminal jurisprudence. "The object," said Patteson, J., "of laying it before the jury, is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case:" R. *v.* Stannard, 7 C. & P. 673. Such also is the law in Scotland: Alison's Prac. p. 629. And see State *v.* Wells, Coxe 424; Wills on Circumst. Ev. p. 131. But see *contra*, Houghtaling *v.* Kelderhouse, 1 Comst. 530; 2 Barb. S. C. 149; Shipman *v.* Burrows, 1 Hall (N. Y.) 399; Converse *v.* Stowe, 4 Conn. 42.

plaintiff were confidential communications, acquired by him professionally, in the more enlarged and popular sense of the word.[1]

§ 428. **When Express Malice to be shown.** Where the matter is actionable only in respect of the special damage, the plaintiff must generally show express malice in the defendant. Such is the case in actions for *slander of title.*[1] In these cases, the defendant, under the general issue and in disproof of malice, may give in evidence that he spoke the words, claiming title in himself;[2] or, as the attorney of the claimant; or, that the words were true.[3]

§ 429. **Same Subject.** In actions of this nature, where the general issue is pleaded, with a justification, the usual course is for the plaintiff to prove the libel, and leave it to the defendant to make out his justification; after which the plaintiff offers all his evidence rebutting the defence. And if the plaintiff elects, in the opening of his case, to offer any evidence to repel the justification, he is ordinarily required to offer it all in that stage of the cause, and is not permitted to give further evidence in reply.[1] But this rule is not imperative, the subject resting in the discretion of the judge, under the circumstances of the case.[2]

[1] Moore *v.* Terrell, 4 B. & Ad. 870. But see Riggs *v.* Denniston, 3 Johns. Cas. 198.

[1] {To maintain an action of slander of title to land, the words must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration, and substantially proved on the trial. Kendall *v.* Stone, 5 N. Y. 18;} [Cardon *v.* McConnell, 120 N. C. 461; Harrison *v.* Howe, 109 Mich. 476. But see Hopkins *v.* Browne, 41 A. 567, R. I.]

[2] Smith *v.* Spooner, 3 Taunt. 246; Hovey *v.* Rubber Tip Pencil Co., 57 N. Y. 119.

[3] Watson *v.* Reynolds, 1 M. & Malk. 1; 2 Stark. on Slander, pp. 98, 99 [103], [104]; Pitt *v.* Donovan, 1 M. & S. 639.

[1] Browne *v.* Murray, Ry. & M. 254; *ante*, Vol. I. § 431.

[2] For the *damages* in this action, see *supra*, tit. Damages, § 275.

LIMITATIONS.

§ 430. **What limits Rights of Entry.** The statute of limitations is set up in bar either of *rights of entry*, or of rights of action.[1] In

[1] [The general principle expressed in the maxim *nullum tempus occurrit regi*, prevents the statute of limitations from applying to suits by the sovereign power in the exercise of its sovereign rights. Therefore the United States cannot be bound by such statutes, nor the various sovereign States of the Union, and in some States this privilege is extended to municipal corporations: U. S. *v.* Thompson, 98 U. S. 486; Wheeling *v.* Campbell, 12 W. Va. 36; Zadiere's Succession, 30 La. An. Pt. ii. 1260; [State *v.* Buck, 46 La. Ann. 656; Williams *v.* St. Louis, 120 Mo. 403; Wagnon *v.* Fairbanks, 105 Ala. 527; McTarnahan *v.* Pike, 91 Cal. 540; Mills *v.* Traver, 35 Neb. 292. This right is personal to the State: Cressey *v.* Meyer, 138 U. S. 525. Hence the rule does not apply where the State is only a nominal plaintiff: U. S. *v.* Beebe, 127 U. S. 338; U. S. *v.* Des Moines Nav. Co., 142 id. 510; Curtner *v.* U. S., 149 id. 662. The rule is abrogated by statute in some States: Busby *v.* Florida R., 45 S. C. 312; Wyatt *v.* Tisdale, 97 Ala. 594. The statute of limitations ran against the proprietors of the American colonies: Yard *v.* Ocean Beach Ass'n, 49 N. J. Eq. 306. In most States the statute runs against municipal corporations: Ames *v.* San Diego, 101 Cal. 390; Chicago *v.* Middlebrooke, 143 Ill. 265; Bedford *v.* Willard, 133 Ind. 562. Generally, however, an exception is made in favor of municipal corporations with regard to property dedicated to public use: Heddleston *v.* Hendricks, 52 Ohio 460; Depriest *v.* Jones, 21 S. C. 478, Va.; Almy *v.* Church, 18 R. I. 182; Webb *v.* Butler County, 52 Kan. 375; Ulman *v.* Charles St. Co., 83 Md. 130; Harn *v.* Dadeville, 100 Ala. 199; Wolfe *v.* Sullivan, 133 Ind. 331; St. Louis *v.* Missouri, etc. R., 114 Mo. 13; Nicolai *v.* Davis, 91 Wis. 370; Taraldson *v.* Lime Springs, 92 Ia. 187; Crocker *v.* Collins, 37 S. C. 327; Oakland *v.* Oakland Co., 118 Cal. 160; *contra*, Lewis *v.* Baker, 39 Neb. 636; Teass *v.* St. Albans, 38 W. Va. 1; Vier *v.* Detroit, 70 N. W. 139, Mich.]

The statute of limitations may be considered as one of two things: 1. As only a rule of procedure established to prevent suit on a cause of action after a certain time has elapsed, leaving the cause of action still existing, though it has been deprived of its remedy: Meek *v.* Meek, 45 Iowa 294. It may be said that there is then no legal cause of action, since the law knows no wrong without a remedy, but the distinction becomes important when suit is brought on a cause of action which has accrued in another State. The question then arises, whether the claim is to be governed by the statute of the State where the debt was incurred, or where it is sued. If the statute of limitations is a rule of procedure, the *lex fori*, *i. e.* the statute of the State where the suit is brought, will govern: Miller *v.* Brenham, 68 N. Y. 83; McArthur *v.* Goddin, 12 Bush (Ky.) 274; McMerty *v.* Morrison, 62 Mo. 140; Meek *v.* Meek, *sup.*; [Obear *v.* First N. B., 97 Ga. 587; Home Life Ins. Co. *v.* Elwell, 70 N. W. 334, Mich.]

2. Or as an absolute principle of the substantive law which extinguishes all debts, etc., after the lapse of a certain time. If the statute of limitations extinguishes the right of action, as has been held in some States, then the *lex loci contractus* will govern: Hardy *v.* Harbin, 4 Sawyer C. Ct. 536; McMerty *v.* Morrison, 62 Mo. 140.

A question has arisen whether a new statute of limitations is not unconstitutional as impairing vested interests: for instance, if it shortens the time within which action may be brought for breach of contract. It is generally held that if the new statute allows a reasonable time for bringing actions under the old statute which would be barred under the new one (and such time will be allowed by implication, if not expressly denied); and if it does not destroy any defence which had become complete under the old statute, it is constitutional and valid: Terry *v.* Anderson, 95 U. S. 628; People *v.* Wayne Circuit Judge, 37 Mich. 287; Krone *v.* Krone, ib. 308.

The legal statute of limitations is not considered as of binding force on a court of

the former case, when the defendant claims title to land under a long possession, he must show that the possession was open and visible, notorious, exclusive, and adverse to the title of the plaintiff.[2] It must be such that the owner may be presumed to know that there is a possession adverse to his title;[3] but his actual knowledge is not necessary, it being sufficient if, by ordinary observation, he might have known.[4] It must be knowingly and designedly taken and held; an occupancy by accident and mistake, such as through ignorance of the dividing line, or the like, is not sufficient.[5] And it must be with exclusive claim of title in the possessor, and not in submission to the title of the true owner.[6]

§ 431. **Burden of Proof.** Where the statute of limitations is set up in bar of a *right of action* by the plea of *actio non accrevit infra sex annos*, which is traversed, the burden of proof is on the plaintiff, to show both a cause of action, and the suing out of process within the period mentioned in the statute.[1] By suing out of process in

equity in the same way as on a court of law, but it is generally followed, in analogous cases. Often, however, a court of equity will treat a claim as barred by negligence in the complainant, when the statute of limitations would not bar a legal claim of the same nature: Castner *v.* Walrod, 83 Ill. 171; Neely's Appeal, 85 Pa. St. 387.] [When the cause of action is legal, the statute governs in equity; but when the cause of action is purely equitable, the statute is not necessarily applied: Riddle *v.* Whitehill, 135 U. S. 621.]

[2] Taylor *v.* Horde, 1 Burr. 60; Cowp. 689; Jerritt *v.* Weare, 3 Price 575; 4 Kent Comm. 482–489; Kennebec Propr's *v.* Springer, 4 Mass. 416; Kennebec Propr's *v.* Laboree, 2 Greenl. 273; Little *v.* Libby, ib. 242; Little *v.* Megquier, ib. 176; Norcross *v.* Widgery, 2 Mass. 506.

[3] Kennebec Propr's *v.* Springer, 4 Mass. 416; Coburn *v.* Hollis, 3 Met. 125; Bates *v.* Norcross, 14 Pick. 224; Prescott *v.* Nevers, 4 Mason 326.

[4] Poignard *v.* Smith, 6 Pick. 172; [Miller *v.* Rosenberger, 46 S. W. 167, Mo.]

[5] Brown *v.* Gay, 3 Greenl. 126; Gates *v.* Butler, 3 Humph. 447; Ross *v.* Gould, 5 Greenl. 204; [Pharis *v.* Jones, 122 Mo. 125; Schleicher *v.* Gatlin, 85 Tex. 270.]

[6] Small *v.* Proctor, 15 Mass. 495; Little *v.* Libby, 2 Greenl. 242; Peters *v.* Foss, 5 id. 182; Teller *v.* Burtis, 6 Johns. 197; [Smeberg *v.* Cunningham, 96 Mich. 378. As to what is exclusive claim, see Harrus *v.* Krausz, 167 Ill. 421.]

[1] Hurst *v.* Parker, 1 B. & Ald. 92; s. c. 2 Chitty 249; Wilby *v.* Henman, 7 Tyrw. 957; 2 Cr. & Mees. 658; [Leigh *v.* Evans, 64 Ark. 26; Graham *v.* O'Bryan, 120 N. C. 463. Changed by statute in some States: Thomas *v.* Glendinning, 44 P. 652, Utah.] [The modes of taking advantage of the statute of limitations, in the pleadings, have been variously considered. It is held by the Court of Claims, that if the statements of the complaint show on the record that the statute of limitations has barred the claim, a motion to dismiss will be granted: Campbell *v.* U. S., 13 Ct. of Cl. 108.

It is held in some States that, on such a record, the defendant should demur to the complaint: Lewis *v.* Alexander, 51 Tex. 578; Collins *v.* Mack, 31 Ark. 684; [Fulton *v.* Northern Ill. Coll., 158 Ill. 333.]

Probably, however, the better rule is to regard the statute as a defence which must be set up by plea, and that the burden of proof is on the defendant to establish this plea: [Goodell *v.* Gibbons, 91 Va. 608.] This he may of course do by using the allegations of the complaint as admissions of the plaintiff, and the burden of evidence will then be shifted to the plaintiff, to show some exception: Harper *v.* Terry, 70 Ind. 264; Hutchinson *v.* Hutchinson, 34 Ark. 164; Dezengremel *v.* Dezengremel, 24 Hun (N. Y.) 457; Hines *v.* Potts, 56 Miss. 346; Field *v.* Columbat, 4 Sawyer C. Ct. 523; People *v.* Herr, 81 Ill. 125; Green *v.* N. Carolina Ry. Co., 73 N. C. 524.

If the complaint or declaration shows on its face matter which avoids the statute of limitations, and the defendant traverses these allegations, the burden of proving these allegations is on the plaintiff: Capen *v.* Woodrow, 51 Vt. 106.]

these cases, is meant any resort to legal means for obtaining payment of the debt from the defendant; such as filing the claim in set-off, in a former action between the same parties, which was discontinued;[2] or filing it with the commissioners on an insolvent estate.[3] And the suit is commenced[4] by the first or incipient step taken in the course of legal proceedings, such as the actual filling up and completing the writ, or original summons, without showing it served;[5] the true time of doing which may be shown by extrinsic evidence, irrespective of the date of the process,[6] though the date of the process is *prima facie* evidence of the time when it was sued out.[7] So, the true time of filing the declaration may be shown, without regard to the term of which it is intituled.[8] The issuing of a *latitat* is the true commencement of a suit by bill of Middlesex;[9] and so is the issuing of a *capias* in the common pleas.[10] The filing of a bill in chancery is also a good commencement of an action, unless the bill is dismissed on the ground that the subject is cognizable only at law.[11]

[2] Hunt *v.* Spaulding, 18 Pick. 521.

[3] Guild *v.* Hale, 15 Mass. 455.

[4] [As to what law determines the sufficiency of the commencement of suit, see Collins *v.* Manville, 170 Ill. 614.]

[5] Gardiner *v.* Webber, 17 Pick. 407; Williams *v.* Roberts, 1 Cr. M. & R. 676; 5 Tyrw. 421; Burdick *v.* Green, 18 Johns. 14; Beekman *v.* Satterlee, 5 Cowen 519; Johnson *v.* Farwell, 7 Greenl. 370; Parker *v.* Colcord, 2 N. H. 36; Thompson *v.* Bell, 6 Monroe 560; [Fearing *v.* Glenn, 38 U. S. App. 424.] But see Bonnet *v.* Ramsey, 3 Martin 776; Jencks *v.* Phelps, 4 Conn. 149; Perkins *v.* Perkins, 7 id. 558; Day *v.* Lamb, 7 Vt. 426.

[6] Bilton *v.* Long, 2 Keb. 198, per Kelyng, C. J.; Johnson *v.* Smith, 2 Burr. 950, 959; Young *v.* Kenyon, 2 Day 252.

[7] Bunker *v.* Shed, 8 Met. 150.

[8] Granger *v.* George, 5 B. & C. 149; Snell *v.* Phillips, Peake's Cas. 209; Robinson *v.* Burleigh, 5 N. H. 225.

[9] Johnson *v.* Smith, 2 Burr. 950.

[10] Leader *v.* Moxon, 2 W. Bl. 925. Where the writ and declaration disagree, as where the writ is in trespass, and the declaration is in assumpsit, as is practised in the courts of king's bench and common pleas, it must be shown not only that the writ was seasonably issued, but that it was entered and continued down to the time of filing the declaration; for otherwise it will not appear that the writ was sued out for the present cause of action. But in the United States this is seldom necessary; and where the course of proceeding would seem to require it, the continuances are mere matters of form, and may be entered at any time. See Angell on Limitations, c. 28; Schlosser *v.* Lesher, 1 Dall. 311; Beekman *v.* Satterlee, 5 Cowen 519; Soulden *v.* Van Rensselaer, 3 Wend. 472; Davis *v.* West, 5 id. 63.

[11] Gray *v.* Berryman, 4 Munf. 181. See, further, Angell on Limitations, c. 28; [Johnson *v.* Davidson, 162 Ill. 232; Cowan *v.* Donaldson, 95 Tenn. 322; or a petition: McGrath *v.* St. Louis, etc. R., 128 Mo. 1. That the process must be delivered to the sheriff, see Wilkins *v.* Worthen, 62 Ark. 401; Morgan *v.* Morgan, 45 S. C. 323; Webster *v.* Sharpe, 116 N. C. 466; West *v.* Engel, 14 S. 333, Ala.

In the Federal courts there must be a *bona fide* attempt to serve process before the suit is regarded as begun: U. S. *v.* American Lumber Co., 80 F. 309.]

{After legal proceedings have once been instituted to enforce a claim, the fact that they have been discontinued because the form of action is incorrect, or for other matters of form, does not render a subsequent proceeding, if it is instituted with due despatch, barred by the statute of limitations accruing since the beginning of the former proceedings: Marsh *v.* Supervisors of St. Croix County, 42 Wis. 355. [This does not apply to a renewal of a suit in a State court after its dismissal by a Federal court: Constitution

§ 432. **New Suit after Failure of Former.** If writ is *abated* by the death of the plaintiff, or by her marriage, if a *feme sole*, the operation of the statute is prevented by the commencement of a *new suit* by the proper parties, within a *reasonable time;* and this, where it is not otherwise regulated by statute, is ordinarily understood to be one year, this period having been adopted from the analogy of the fourth section in the statute of limitations of James I., providing for the cases of judgments reversed or arrested.[1] But this rule does not apply to an action determined by voluntary abandonment by the plaintiff, as in case of a *nonsuit*.[2]

§ 433. **When Statute begins to Run; Tort.** In cases of *tort*, and in actions on the case sounding in tort, a distinction is to be observed between acts wrongful in themselves, which directly affect the rights

Pub. Co. *v.* De Laughter, 95 Ga. 17.] Nor will any lapse of time in the course of legal proceedings, if they are based on the original writ filed before the statute, bar the claim: Hemphill *v.* McClimans, 24 Pa. St. 367; Woods *v.* Houghton, 1 Gray (Mass.) 580. Nor will the introduction of amendments, provided a new cause of action is not thereby made a part of the claim: Atkinson *v.* Amador, etc. Canal Co., 53 Cal. 102; Illinois, etc. Ry. Co. *v.* Phelps, 4 Ill. App. 238; [Swift *v.* Foster, 163 Ill. 50; Texas, etc. R. *v.* Cox, 145 U. S. 593; Missouri, etc. R. *v.* McFadden, 33 S. W. 853, Tex.; Esrey *v.* Southern Pac. Co., 103 Cal. 541. So where greater damages are claimed: Bentley *v.* Standard Ins. Co., 40 W. Va. 729. But if a new cause of action is set up (Eylenfeldt *v.* Illinois Steel Co., 165 Ill. 185; Atchison, etc. R. *v.* Schroeder, 56 Kan. 731; Pratt *v.* Montcalm Circuit Judge, 63 N. W. 506, Mich.; Union Pac. R. *v.* Wyler, 158 U. S. 285), or if facts removing the bar of the statute are set up (Howard *v.* Windom, 86 Tex. 560), the statute applies. So if the two actions are in the courts of different jurisdictions: Elder *v.* McClaskey, 70 F. 529, U. S. App.] An amendment bringing in a new defendant on a joint contract is not a new cause of action, but on a joint and several contract it is, and he may plead the statute: Woodward *v.* Ware, 37 Me. 563. [Adding the jurisdictional averment of citizenship does not constitute a new cause of action in the Federal court: Carnegie *v.* Hulbert, 36 U. S. App. 81.]

Filing a claim in set-off is beginning to sue on the claim so as to avoid the statute: Hunt *v.* Spaulding, 18 Pick. 521; [Perkins *v.* West Coast Lumber Co., 48 P. 982, Cal.]

[Presenting a claim to a State board (Coxe *v.* State, 144 N. Y. 396), or any other proper application for redress where suit is not permitted, will operate to prevent the statute from running: Stanley *v.* Schwalby, 147 U. S. 508.]

If the defendant dies after suit brought, and, after the expiration of the time limited for suing the administrator, his administrator is summoned in, he cannot plead the statute, as his coming in to defend is not the commencement of suit: Bank of Brighton *v.* Russell, 13 Allen (Mass.) 221.}

[1] Kinsey *v.* Heyward, 1 Ld. Raym. 434, per Treby, C. J.; Forbes *v.* Lord Middleton, Willes 259, n. *c;* Matthews *v.* Phillips, 2 Salk. 424, 425; Angell on Limitations, c. 28; Huntington *v.* Brinkerhoff, 10 Wend. 278. {This provision is generally adopted in all the statutes of limitations in the United States, and is held by analogy to extend to like cases: McOmber *v.* Chapman, 42 Mich. 117; Coffin *v.* Cottle, 16 Pick. (Mass.) 386; Woods *v.* Houghton, 1 Gray (Mass.) 580; Downing *v.* Lindsay, 2 Pa. St. 385; Baker *v.* Baker, 13 B. Mon. (Ky.) 406; Givens *v.* Robbins, 11 Ala. 158. And where the statute provides for the commencement of a new action within one year, "if the writ shall be abated or the action otherwise defeated *for any matter of form*," the abatement or dismissal for want of jurisdiction of a trustee process brought in a county in which neither of the trustees resides, is an abatement or dismissal "for a matter of form" within the meaning of the statute: Woods *v.* Houghton, 1 Gray (Mass.) 580.}

[2] Richards *v.* Maryland Ins. Co., 8 Cranch 84, 93; Harris *v.* Dennis, 1 S. & R. 236. But see Cretien *v.* Theard, 2 Martin 747; [Siegfried *v.* Railway Co., 50 Ohio 294.] {See also Swan *v.* Littlefield, 6 Cush. (Mass.) 417; Bullock *v.* Dean, 12 Met. (Mass.) 15. The period of limitation is not prolonged where the writ is abated by being brought in the wrong county: Donnell *v.* Gatchell, 38 Me. 217; } [or in the wrong jurisdiction: Sweet *v.* Electric Light Co., 97 Tenn. 252.]

of the plaintiff, and for which, therefore, an action may be instantly maintained without proof of actual damages, and those cases where the injury is consequential, and the right of action is founded on the special damages suffered by the plaintiff. In the former class of cases, the statute period begins to run from the time when the act is done, without regard to any actual damages or to any knowledge by the party injured. But, in the latter cases, it runs from the time when the special damage accrued.[1] Thus, in slander, where the words impute an indictable offence, the time runs from the speaking of them; but if they are actionable only in respect of the special damage, as in slander of title, it runs from the time when this damage was sustained.[2] So in *trover*, the time is computed from the act of conversion of the goods.[3] And in actions for official or *professional negligence*, the cause of action is founded on the *breach of duty* which actually injured the plaintiff, and not on the consequential damage. Thus, in an action against an attorney for neglect of professional duty, it has been held that the statute of limitations begins to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued.[4] So, in an action against the sheriff for an insufficient return upon a writ, by reason whereof the judgment

[1] {Bank of Hartford County *v.* Waterman, 26 Conn. 324; Betts *v.* Norris, 22 Me. 314; Lesem *v.* Neal, 53 Mo. 412;} [Howard County *v.* Chicago, etc. R., 130 id. 652; Ridley *v.* Seaboard, etc. R., 118 N. C. 996; McCormick *v.* Winters, 94 Ia. 82; Savannah, etc. R. *v.* Buford, 106 Ala. 303; Augusta *v.* Lombard, 28 S. E. 994, Ga.; Chicago, etc. R. *v.* Emmert, 73 N. W. 540, Neb.; Smith *v.* Seattle, 18 Wash. 484; Houston *v.* Thornton, 29 S. E. 827, N. C.]

[2] Law *v.* Harwood, Cro. Car. 140; Saunders *v.* Edwards, 1 Sid. 95.

[3] Crompton *v.* Chandless, 4 Esp. 20, per Ld. Kenyon; Granger *v.* George, 5 B. & C. 149; Denys *v.* Shuckburg, 4 Y. & C. 42; [Blount *v.* Beall, 95 Ga. 182.]

[4] Howell *v.* Young, 2 C. & P. 238; s. c. 5 B. & C. 259, confirmed in Smith *v.* Fox, 12 Jur. 130; Brown *v.* Howard, 4 J. B. Moore 508; s. c. 2 B. & B. 73; Short *v.* McCarthy, 3 B. & Ald. 626. See also Leonard *v.* Pitney, 5 Wend. 30; Bank of Utica *v.* Childs, 5 Cowen 238; Stafford *v.* Richardson, 15 Wend. 302; Argall *v.* Bryant, 1 Sandf. 98; [Gould *v.* Palmer, 96 Ga. 798; Schade *v.* Gehner, 133 Mo. 252;] {White *v.* Reagan, 32 Ark. 281; Moore *v.* Juvenal, 92 Pa. St. 484. The same principle applies where one, having sold land and received the purchase-money, conveys to some third party. The wrong done is the conveying, and the action of the original purchaser is only barred after the statutory period has elapsed, beginning at such conveyance: Cochrane *v.* Oliver, 7 Ill. App. 176.

In an action against a carrier, the right of action accrues on the destruction of the goods, and the statute runs from that time: Merchants' Despatch Co. *v.* Topping, 89 Ill. 65. [But see Pennsylvania Co. *v.* Chicago, etc. R., 144 Ill. 197.] In an action against one for injuries caused by his negligence, the fact that the plaintiff's injuries extend over a longer time than that limited by statute does not extend the time for bringing the action. He should sue, and recover anticipatory damages based on the probable duration of his injuries: Fowlkes *v.* N. & D. Ry. Co., 5 Baxt. (Tenn.) 663; Piller *v.* Southern Pacific Ry. Co., 52 Cal. 42.

In an action for deceit, the statute runs from the time the plaintiff knew of the fraud: Marbourg *v.* McCormick, 23 Kan. 38.

The cause of action against an officer for the taking of insufficient bail by his deputy accrues on the return of *non est inventus* upon the execution against the principal, and the statute runs from that time: West *v.* Rice, 9 Met. (Mass.) 564.} [The cause of action for malicious prosecution begins when the prosecution has ended: Morgan *v.* Duffy, 94 Tenn. 686.]

was reversed, the statute begins to run from the time of the return, and not from the reversal of the judgment.[5] But in an action for taking insufficient bail, the injury did not arise to the plaintiff until he had recovered judgment, and the principal had avoided, for until then the bail might have surrendered the principal: and therefore the statute begins to run from the return of *non est inventus* on the execution.[6]

§ 434. **Same Subject; Act done.** The same distinction has been recognized, in expounding private and local statutes, which have limited the remedy to a certain period of time from the *act done.*[1] Where the act was in itself lawful, so far as the rights of the plaintiff were concerned, but occasioned a subsequent and consequential damage to him, the time has been computed from the commencement of the damage, this being the act done, within the meaning of the law. But where the original act was in itself a direct invasion of the plaintiff's rights, the time has been computed from such original act. Thus, where a surveyor of highways, in the execution of his office, undermined a wall adjoining a highway, and several months afterwards it fell, the statute period limiting the remedy was computed from the falling of the wall, this alone being the specific wrong for which an action was maintainable.[2] And the same principle has been applied to similar acts done by commissioners and others, acting under statutes.[3] On the other hand, where the action is for an illegal seizure of goods under the revenue laws, though they were originally stopped for examination only, and afterwards finally and absolutely detained, the time is computed from the original act of stopping the goods, and not from the commencement of special damages, or from the final detention, or from the redelivery of the goods.[4] So, where a trespass was committed by cutting down trees, which the defendant afterwards sold, it was held that the statute attached at the time of cutting the trees, and not at the time of sale.[5]

§ 435. **Same Subject; Contract.** In cases of *contract,* the general principle is, that the statute attaches as soon as the contract is

[5] Miller *v.* Adams, 16 Mass. 456.

[6] Rice *v.* Hosmer, 12 Mass. 127, 130; Mather *v.* Green, 17 id. 60.

[1] Whether a mere nonfeasance and omission can be regarded as an *act done,* so as to be within the protection of these statutes, has been much doubted. See Blakemore *v.* Glamorganshire Canal Co., 3 Y. & J. 60; Gaby *v.* Wilts. & Berks. Canal Co., 3 M. & S. 580; Umphelby *v.* McLean, 1 B. & Ald. 42; Smith *v.* Shaw, 10 B. & C. 277, per Bayley, J.

[2] Roberts *v.* Read, 16 East 215; 6 Taunt. 40, n. *b;* Wordsworth *v.* Harley, 1 B. & Ad. 391

[3] Gillon *v.* Boddington, 1 C. & P. 541; Lloyd *v.* Wigney, 6 Bing. 489; Sutton *v.* Clarke, 6 Taunt. 29. But see Smith *v.* Shaw, 10 B. & C. 277; Heard *v.* Middlesex Canal, 5 Met. 81.

[4] Gordon *v.* Ferris, 2 H. Bl. 14; Saunders *v.* Saunders, 2 East 254; Crook *v.* McTavish, 1 Bing. 167.

[5] Hughes *v.* Thomas, 13 East 474, 485.

broken; because the plaintiff may then commence his action. And though special damage has resulted, yet the limitation is computed from the time of the breach, and not from the time when the special damage arose.[1] If money is lent, and a bill of exchange is given for the payment at a future day, the latter period is the time when the limitation commences.[2] If a bill is payable at a certain time after sight,[3] or a note is payable at so many days after demand,[4] the statute attaches only upon the expiration of the time after presentment or demand. But where the right of action accrues after the death of the party entitled, the period of limitation does not commence until the grant of administration; for, until then, there is no person capable of suing.[5] Where the action is against a factor, for not accounting and paying over, the statute begins to run from the time of demand; for until demand made, no action accrued against him.[6] And where a contract of service is entire, as for a year, or for a voyage, the limitation does not commence until the whole term of service is expired.[7]

[1] Battery *v.* Faulkner, 3 B. & Ad. 290; Short *v.* McCarthy, ib. 626; [Manning *v.* Perkins, 86 Me. 419; Russell *v.* Polk, etc. Co., 87 Ia. 233.] If the right of action was in a trustee, it is barred by his neglect to sue, though the *cestui que trust* was under disability: Wyche *v.* E. Ind. Co., 3 P. Wms. 309.

[2] Wittersheim *v.* Countess of Carlisle, 1 H. Bl. 631; [Triplett *v.* Foster, 115 N. C. 335; Pinch *v.* McCulloch, 74 N. W. 897, Minn.]

[3] Holmes *v.* Kerrison, 2 Taunt. 323.

[4] Thorpe *v.* Booth, Ry. & M. 388; Thorpe *v.* Combe, 8 D. & R. 347; Anon., 1 Mod. 89.

[5] Murray *v.* E. I. Co., 5 B. & Ald. 204. And see Cary *v.* Stephenson, 1 Salk. 421; Pratt *v.* Swaine, 8 B. & C. 285; [Riner *v.* Riner, 166 Pa. 617.] In some of the United States cases of this kind are specially provided for by statutes, extending the period of limitation for a further definite time.

[6] Topham *v.* Braddick, 1 Taunt. 572. And see Pecke *v.* Ambler, W. Jones 329; [Stevens *v.* Rogers, 51 P. 261, Utah; Ewers *v.* White, 72 N. W. 184, Mich.]

[7] Ewer *v.* Jones, 6 Mod. 26. [In absence of fraud, ignorance of the existence of a claim will not avoid the statute: Steele *v.* Steele, 25 Pa. St. 154.

Where premium notes are given to an insurance company, payable at such times as the directors "shall from time to time assess and order," or "when required," the performance of these conditions settles the time when the statute begins to run: Bigelow *v.* Libby, 117 Mass. 359; *Re* Slater Mut. Fire Ins. Co., 10 R. I. 42.

The statute does not begin to run against an attorney's claims for services in a suit until the suit is ended, or his employment is otherwise terminated: Davis *v.* Smith, 48 Vt. 52; Eliot *v.* Lawton, 7 Allen (Mass.) 274.

The coupons attached to bonds are separate contracts, and the statute runs on them from the day when they are due: Galveston *v.* Loonie, 54 Tex. 517; Amy *v.* Dubuque, 98 U. S. 470; [Threadgill *v.* Anson County, 116 N. C. 616.]

The statute begins to run in favor of a bank for deposits only after demand made: Finkbone's Appeal, 86 Pa. St. 368; Howell *v.* Adams, 68 N. Y. 314. [So in any case where the money is deposited for safe custody, and not by way of loan: Tidd *v.* Overell, 1893, 3 Ch. 154; Campbell *v.* Whoriskey, 48 N. E. 1070, Mass.]

When a note is made payable on demand, the cause of action arises at once; for the note is payable at once, and the statute begins to run from the delivery of the note: Palmer *v.* Palmer, 36 Mich. 487. [But see Brown *v.* Brown, 1893, 2 Ch. 300.] So a promise in writing, attested by a witness, to pay a note "at any time within six years from this date," is a promise to pay on demand, and the statute of limitations begins to run against a claim founded on such written promise, from the date: Young *v.* Weston, 39 Me. 492; Colgate *v.* Buckingham, 39 Barb. 177.

Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place, and a dishonor there. Therefore the

§ 436. **Replications to Plea of Statute.** The bar of the statute of limitations may be avoided by showing, (1) that the plaintiff was under any *disability* mentioned in the statute; or, (2) that the claim has been recognized by the defendant as valid, by an *acknowledgment*, or a *new promise*, within the statute period; or, (3) that the cause of action was *fraudulently concealed* by the defendant, until within that period.

§ 437. (1) **Disabilities.** The *disabilities* of *infancy*, *coverture*, and *insanity* will be found treated under their appropriate heads.[1] The disability arising from absence out of the country is usually expressed by being *beyond sea;* but the principle on which this exception is founded is, that no presumption can arise against a party for not suing in a foreign country, nor until there is somebody within the jurisdiction whom he can sue;[2] and therefore the words "beyond sea," in the statute of any State, are expounded as equivalent to being "out of the State," and receive the same construction.[3] And the latter form of words is held equivalent to being "out of the actual jurisdiction;" that is, beyond the reach of process; so that where a part of the territory of a State in time of war is actually and exclusively occupied by the enemy, a person within the enemy's lines is out of the State within the meaning of the statute of limitations.[4] The rule, as applied to a defendant, has therefore been

statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor: Picquet *v.* Curtis, 1 Sumner 478.

Where the surety on a promissory note paid the holder before the note was payable by its terms, the cause of action against the principal for indemnity was held to accrue when the note became due according to its tenor, and not before: Tillotson *v.* Rose, 11 Met. (Mass.) 299. So, where a subsequent indorser pays a note, the statute, as against a prior indorser, begins to run on the payment of the money: Barker *v.* Cassidy, 16 Barb. (N. Y.) 177; Scott *v.* Nichols, 27 Miss. 94. Where there is a contract to save harmless from certain payments, the statute runs from the time of the payment, and not of the execution of the contract: Hall *v.* Thayer, 12 Metc. 130.} [This applies as between co-debtors: Gardner *v.* Brooke, 1897, 2 Ir. 6.]

[1] {When the *cestui que trust* is an infant, this does not constitute a disability which stops the statute of limitations, for the trustee can sue and be sued: Weaver *v.* Leiman, 52 Md. 508; [Patchett *v.* Pacific, etc. R., 100 Cal. 505; Ewing *v.* Shannahan, 113 Mo. 188.]

When by statute a married woman is allowed to do business on her own account, the statute of limitations runs against her and in her favor as if she were a *feme sole:* Castner *v.* Walrod, 83 Ill. 171; Kibbe *v.* Ditto, 93 U. S. 674; Cameron *v.* Smith, 50 Cal. 303;} [Irey *v.* Markey, 132 Ind. 546.]

[2] Per Best, C. J., in Douglas *v.* Forrest, 4 Bing. 686.

[3] Faw *v.* Roberdeau, 3 Cranch 177, per Marshall, C. J.; Murray *v.* Baker, 2 Wheat. 541; Angell on Limitations, c. 9; {Keeton *v.* Keeton, 20 Mo. 530; Thomason *v.* Odum, 23 Ala. 480; Ruckmaboye *v.* Mottichund, 32 Eng. Law & Eq. 84. But in N. Carolina, the term "beyond the seas" means out of the United States: Davie *v.* Briggs, 97 U. S. 628.} In some of the United States, the disability of the plaintiff is limited, by statute, to his absence from the United States; and that of the defendant to his absence from the particular State in which he resided.

[4] Sleght *v.* Kane, 1 Johns. Cas. 76, 81. {And war suspends the running of the statute, though it has been set in motion: Marks *v.* Borum, 57 Tenn. 87; Semmes *v.* Hartford Ins. Co., 13 Wall. (U. S.) 158; Perkins *v.* Rogers, 35 Ind. 124; Jackson Ins. Co. *v.* Stewart, C. Ct. U. S. Md. Dist., 6 Am. Law Rev. N. S. 732 and n.}

limited to the case where he was personally absent from the State, having no attachable property within it.[5] A foreigner, resident abroad, is not within the operation of the statute, even though he has an agent resident in the country.[6]

§ 438. **When Liability is Joint.** In the case of *partners* the absence of one from the country does not prevent the statute from attaching; for the others might have sued for all.[1] Nor does the disability of one *coparcener*, or *tenant in common*, preserve the title of the other; for each may sue for his part.[2] But in the case of *joint tenants* and *joint contractors*, it is otherwise.[3]

§ 439. **Statute once in Motion continues.** When the time mentioned in the statute has once begun to run, it is a settled rule of construction, that no disability subsequently arising will arrest its

[5] White *v.* Bailey, 2 Mass. 371; Little *v.* Blunt, 16 Pick. 359.

[The burden is on the defendant to show the existence of such property: Burnham *v.* Courser, 69 Vt. 183. The limitation begins running again on the defendant's death: Hibernian Banking Ass'n *v.* Commercial N. B., 157 Ill. 524.]

[6] Strithorst *v.* Græme, 2 W. Bl. 723; s. c. 3 Wils. 145; Wilson *v.* Appleton, 17 Mass. 180. [This rule applies to foreign corporations: Williams *v.* St. Louis, etc. R., 123 Mo. 573; Larson *v.* Aultman Co., 86 Wis. 281; Winney *v.* Sandwich Mfg. Co., 86 Iowa 608.] If a plaintiff be beyond sea at the time of the action accruing, he may sue at any time before his return, as well as within the time limited by statute for the commencement of a suit after his return: Le Veux *v.* Berkeley, 5 Ad. & El. N. S. 836. And see Townsend *v.* Deacon, 13 Jur. 366. {The reason of the disability being that the defendant is out of reach of process. The fact that he resides on a piece of land ceded by the State to the United States, is not such absence from the State if the right to serve civil process in such ceded land is reserved to the State: Maurice *v.* Worden, 52 Md. 283. See also Von Hemert *v.* Porter, 11 Met. 210; Lafonde *v.* Ruddock, 24 Eng. Law & Eq. 239; Townes *v.* Mead, 29 id. 271. [The fact that the debtor has executed a warrant of attorney under which judgment might be entered (Hibernian Banking Ass'n *v.* Commercial N. B., 157 Ill. 524); that the defendant has property in the State (Denny *v.* Sayward, 10 Wash. 422); or that leave to serve process outside the jurisdiction might be obtained (Musurus Bey *v.* Gadban, 1894, 2 Q. B. 352), does not bring the defendant within the operation of the statute.] A party who is absent from the State, but has a home therein to which he intends to return, does not so "reside without the State" as to interrupt the time limited for the commencement of an action: Drew *v.* Drew, 37 Me. 389; Buckman *v.* Thompson, 38 id. 171; [Farr *v.* Durant, 90 Wis. 341. And conversely, a return to the State by one who has left it, if for a visit or for casual business, does not bring him within the operation of the statute: Weille *v.* Levy, 74 Miss. 34; Lee *v.* McKoy, 118 N. C. 518. But see Powell *v.* Koehler, 52 Ohio 103; Wilson *v.* Daggett, 88 Tex. 375.] The disability to sue, arising from being without the United States, is removed by the return of the party to any one of the States: Varney *v.* Grows, 37 Me. 306. Where a debtor resides abroad when the cause of action accrues, and never returns, but dies abroad, the granting of letters of administration on his estate sets the statute in motion: Benjamin *v.* De Groot, 1 Denio (N. Y.) 151.}

[1] Perry *v.* Jackson, 4 T. R. 516, 519; Pendleton *v.* Phelps, 4 Day 476.

[2] Roe *v.* Rowlston, 2 Taunt. 441; Doolittle *v.* Blakesley, 4 Day 265; [Garrett *v.* Weinberg, 48 S. C. 28.]

[3] Marsteller *v.* McClean, 7 Cranch 156; Fannin *v.* Anderson, 9 Jur. 969; 14 Law Jour. N. S. 282; [Reybold *v.* Parker, 7 Houst. 526.] {Wherever the liability of the defendants is joint and not several, the claim of the plaintiff against both is barred if the statute of limitations protects one: Sturges *v.* Longworth, 1 Ohio St. 544; [*contra*, Fish *v.* Farwell, 160 Ill. 236.] And there is no right of contribution between defendants who have protected themselves against the demand by setting up the statute, and other defendants who might equally have set up the statute, but who, having neglected to do so, are found by the decree to be liable to the plaintiffs: Fordham *v.* Wallis, 17 Eng. Law & Eq. 182.}

progress.[1] If, therefore, the party be out of the jurisdiction when the cause of action accrues, and afterwards returns within it, the statute attaches upon his return. But in the case of a defendant, his return must be open, and such as would enable the plaintiff, by using reasonable diligence, to serve process upon him. If it was only temporary and transient, in a remote part of the State, so that it could not have been seasonably known to the plaintiff, or if the defendant concealed himself, except on Sundays, so that he could not be arrested, it is not such a return as to bring the case within the operation of the statute.[2]

§ 440. **New Promise.** (2) Where the statute is pleaded in bar, and the plaintiff would avoid the bar by proof of an acknowledgment of the claim, this can be done only under a special replication of a *new promise*, within the period limited.[1] It is to be observed, that the statute of limitations is regarded by the courts as a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.[2] Wherever, therefore, the bar of the

[1] Doe *v.* Jones, 4 T. R. 300, 310; Angell on Limitations, pp. 146, 147; Smith *v.* Hill, 1 Wils. 134; [De Arnaud *v.* U. S., 151 U. S. 483; Miller *v.* Texas, etc. R., 132 id. 662; Hibernian, etc. Ass'n *v.* Commercial N. B., 157 Ill. 524; Castro *v.* Geil, 110 Cal. 292; Oates *v.* Beckworth, 112 Ala. 356; McAuliff *v.* Parker, 10 Wash. 141; Asbury *v.* Fair, 111 N. C. 251; Munroe *v.* Wilson, 41 A. 240, N. H.; Satcher *v.* Grice, 31 S. E. 3, S. C. The burden of proof is on the plaintiff to show that the disability was in existence at the time the statute began to run: Gross *v.* Disney, 95 Tenn. 592.] In some of the United States, the rule is differently established, by statutes. See Rev. Stat. Massachusetts, c. 120, § 9; Rev. Stat. Maine, c. 156, § 28; [Riley *v.* Riley, 141 N. Y. 409; Mowry *v.* Harris, 18 R. I. 519; Roeder *v.* Keller, 135 Ind. 692; Redmond *v.* Pippen, 113 N. C. 90; Bauserman *v.* Blunt, 147 U. S. 647.]

[2] Fowler *v.* Hunt, 10 Johns. 464, 467; White *v.* Bailey, 3 Mass. 271, 273; Byrne *v.* Crowninshield, 1 Pick. 263; Little *v.* Blunt, 16 id. 359; Ruggles *v.* Keeler, 3 Johns. 264; Crosby *v.* Wyatt, 10 Shepl. 156. [The death of the debtor does not, in the absence of an express provision, suspend the running of the statute: Copeland *v.* Collins, 30 S. E. 315, N. C.; Hibernian, etc. Ass'n *v.* Commercial N. B., 157 Ill. 524. A change in circumstances rendering specific performance impossible does not create a new cause of action for damages, and the running of the statute is unaffected: Cooley *v.* Lobdell, 153 N. Y. 596. But a composition deed implies a new promise to pay the original debts upon default in performing the deed, and the statute does not begin to run until such default: *Re* Stock, 66 L. J. Q. B. 146, 75 L. T. N. S. 422.]

[1] {This rule applies only to those States where the common-law rules of pleading still exist.} In those States where general pleading is allowed in all cases, any evidence showing that the debt is or is not subject to the operation of the statute is of course admissible under such pleading. See Carshore *v.* Huyck, 6 Barb. S. C. 583; Henry *v.* Peters, 5 Ga. 311; Trymer *v.* Pollard, 5 Grat. 460. {In most States a traverse of the plea is sufficient to let in proof of any matter which avoids the statute: Frohock *v.* Pattee, 38 Me. 103; Theobald *v.* Stinson, ib. 149; Esselstyn *v.* Weeks, 2 Kernan (N. Y.) 635; Penfield *v.* Jacobs, 21 Barb. (N. Y.) 335; Bloodgood *v.* Bruen, 4 Selden (N. Y.) 362; [Noell *v.* Noell, 93 Va. 433.] Even an agreement by a maker of a promissory note, that he will not take advantage of the statute of limitations: Stearns *v.* Stearns, 32 Vt. 678; Hoffman *v.* Fisher, Supt. Ct. Pa. 2 Weekly Notes of Cases 17; Randon *v.* Tobey, 11 How. (U. S.) 493; Ruckham *v.* Marriott, 37 Eng. L. & Eq. 460; Burton *v.* Stevens, 24 Vt. 131. But see *contra*, Shepley *v.* Abbott, 42 N. Y. 443; Warren *v.* Walker, 10 Shep. (Me.) 453; Stockett *v.* Sasscer, 8 Md. 374; Sutton *v.* Burgess, 9 Leigh (Va.) 381.}

[2] Bell *v.* Morrison, 1 Peters S. C. 360, per Story, J.; Mountstephen *v.* Brooke, 3 B. & Ald. 141, per Abbott, C. J.; Tanner *v.* Smart, 6 B. & C. 603. The legal effect

statute is sought to be removed by proof of a new promise, the promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate.[3] In the absence of any express statute to the contrary, parol evidence of a new promise would be sufficient; but in England, and in several of the United States, no acknowledgment or promise is now sufficient to take any case out of the operation of this statute, unless such acknowledgment or promise is made or contained by or in some writing, signed by the party chargeable thereby.[4] It is not necessary, however, that the promise should be express: it may be raised by implication of law, from the *acknowledgment* of the party.[5] But such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; or, if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; it has been held that they ought not to go to a jury, as evidence of a new promise, to revive the cause of action.[6] If the new promise was coupled with any

of acknowledging a debt, barred by the statute, is that of a promise to pay the old debt; which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law. {In Illinois, it is held that the acknowledgment is not a rebuttal of the presumption of payment, but a new undertaking: Hayward *v.* Gunn, 4 Ill. App. 161. But another view is held in some States, that the acknowledgment is only a waiver of the bar interposed in behalf of the debtor by the statute, and a revival of the old debt. It is the original debt which constitutes the ground of action and forms the basis of a judgment: Frisbee *v.* Seaman, 49 Iowa 95; Ilsley *v.* Jewett, 3 Met. (Mass.) 439; Way *v.* Sperry, 6 Cush. (Mass.) 241; Foster *v.* Shaw, 2 Gray (Mass.) 153; Philips *v.* Peters, 21 Barb. (N. Y.) 351; Winchell *v.* Bowman, ib. 448. But see Kempshall *v.* Goodman, 6 McLean C. Ct. 189, which decides that the action must be on the new promise.

Where the courts hold that the action is brought on the new promise, the acknowledgment from which the new promise is inferred must have been given before suit brought. But if the acknowledgment is regarded only as a waiver of the statute, it may be made after suit brought: Carlton *v.* Ludlow Woollen Mill, 27 Vt. 496; Hazelbacker *v.* Reeves, 9 Pa. St. 258.} But if the promise is limited to payment at a particular time, or in a certain manner, or out of a specified fund, the creditor can claim nothing more than the new promise gives him; for the old debt is revived only so far as to form a consideration for the new promise: Phillips *v.* Phillips, 3 Hare 299. If, therefore, the new promise was not made until after action brought, it cannot prevent the operation of the statute: Bateman *v.* Pinder, 3 Ad. & El. N. S. 574.

[3] Bell *v.* Morrison, 1 Peters U. S. 362; Cambridge *v.* Hobart, 10 Pick. 232; Gardiner *v.* Tudor, 8 Pick. 206; Bangs *v.* Hall, 2 Pick. 368.

[4] 9 Geo IV. c. 14; Rev. Stat. Massachusetts, c. 120, § 13; Rev. Stat. Maine, c. 146, § 19; Ringgold *v.* Dunn, 3 Eng. 497; [Boone *v.* Colehour, 165 Ill. 305.] {This provision of the statute of frauds does not apply to the evidence by which a part-payment is proved. The oral admission of the defendant is sufficient to prove the *fact* of part-payment, which by operation of law avoids the statute. But if an acknowledgment of the debt is to be proved, the proof must conform to the requisitions of the statute of frauds: Blanchard *v.* Blanchard, 122 Mass. 558; Williams *v.* Gridley, 9 Met. (Mass.) 482. See also Cleave *v.* Jones, 4 Eng. Law & Eq. 514, overruling Willis *v.* Newham, 3 Y. & J. 518; Sibley *v.* Lambert, 30 Me. 353.}

[5] Angell on Limitations, c. 20; {Hall *v.* Bryan, 50 Md. 194.}

[6] Bell *v.* Morrison, 1 Peters U. S. 362–365; Bell *v.* Rowland, Hardin 301; Angell

condition, the plaintiff must show that the condition has been performed, or performance duly tendered.[7] And if it were a promise to pay when he is able, the plaintiff must show that he is able to pay.[8]

§ 441. **Same Subject; Acknowledgment.** Upon this general doctrine, which, after much conflict of opinion, is now well established, it has been held, that the acknowledgment must not only go to the original justice of the claim, but it must admit that it is *still due.*[1] No set form of words is requisite; it may be inferred even from facts, without words.[2] It is sufficient if made to a stranger;[3] or, in the case of a negotiable security, if made to a prior holder;[4] or, in any case, if made while the action is pending.[5] If it is made by the principal debtor, it binds the surety;[6] or if by the guardian of a spendthrift, it binds the ward;[7] and if by one of several joint

on Limitations, c. 21; Bangs *v.* Hall, 2 Pick. 368; Stanton *v.* Stanton, 2 N. H. 426, Ventris *v.* Shaw, 14 id. 422; Jones *v.* Moore, 5 Binn. 573; Perley *v.* Little, 3 Greenl. 97; Porter *v.* Hill, 4 id. 41; Deshon *v.* Eaton, ib. 413; Miles *v.* Moodie, 3 S. & R. 211; Eckert *v.* Wilson, 12 S. & R. 397; Purdy *v.* Austin, 3 Wend. 187; Sumner *v.* Sumner, 1 Met. 394; Allcock *v.* Ewen, 2 Hill (S. C.) 326; Humphreys *v.* Jones, 14 M. & W. 1; 9 Jur. 333; Robbins *v.* Farley, 2 Strobh. 348; Christy *v.* Flemmington, 10 Barr 129; Harman *v.* Clairborne, 1 La. Ann. 342; {Gibson *v.* Grosvenor, 4 Gray (Mass.) 606; Tucker *v.* Haughton, 9 Cush. (Mass.) 350; Brown *v.* Edes, 37 Me. 318; Phelps *v.* Williamson, 26 Vt. 230; Buckingham *v.* Smith, 23 Conn. 453; Bloodgood *v.* Bruen, 4 Selden (N. Y.) 362; Shitler *v.* Bremer, 33 Pa. St. 413; Beck *v.* Beck, 25 id. 124; Cheever *v.* Perley, 11 Allen 587.}

[7] Wetzell *v.* Bussard, 11 Wheat. 309; Kampshall *v.* Goodman, 6 McLean 189; [Keenan *v.* Keenan, 37 A. 632, R. I.]

[8] Davies *v.* Smith, 4 Esp. 36; Tanner *v.* Smart, 6 B. & C. 603; Scales *v.* Jacob, 3 Bing. 538; Ayton *v.* Bolt, 4 id. 105; Haydon *v.* Williams, 7 id. 163; Edmunds *v.* Downes, 2 C. & M. 459; Robbins *v.* Otis, 1 Pick. 368; 3 id. 4; Gould *v.* Shirley, 2 M. & P. 581; {Hammond *v.* Smith, 10 Jur. N. S. 117; Mattocks *v.* Chadwick, 71 Me. 313.} The statute will in such case begin to run from the time when the debtor became able to pay, without respect to the creditor's knowledge of that fact: Waters *v.* Thanet, 2 Ad. & El. N. S. 757.

[1] Clementson *v.* Williams, 8 Cranch 72.

[2] Whitney *v.* Bigelow, 4 Pick. 110; East Ind. Co. *v.* Prince, Ry. & M. 407.

[3] Ibid.; Halladay *v.* Ward, 3 Campb. 42; Mountstephen *v.* Brooke, 3 B. & Ald. 141; Sluby *v.* Champlin, 4 Johns. 461; {Dinguid *v.* Schoolfield, 32 Gratt. (Va.) 803; Minkler *v.* Minkler, 16 Vt. 194; Palmer *v.* Butler, 36 Iowa 376; Bird *v.* Adams, 7 Ga. 55. In these cases it was held that a promise or declaration to a stranger is insufficient to take the case out of the statute (McKinney *v.* Snyder, 78 Pa. St. 497; Taylor *v.* Hendrie, 8 Nev. 242). The new promise should be made to the plaintiff, or some one authorized by him to act for him in the matter: Katz *v.* Messinger, 7 Ill. App. 536; Allen *v.* Collier, 70 Mo. 138; Niblack *v.* Goodman, 67 Ind. 174.} It seems that in England, since the statute of 9 Geo. IV. c. 15, an acknowledgment made to a stranger would not be sufficient: Grenfell *v.* Girdlestone, 2 Y. & C. 622.

[4] Little *v.* Blunt, 9 Pick. 488.

[5] Yea *v.* Fouraker, 2 Burr. 1099; Danforth *v.* Culver, 11 Johns. 146.

[6] Frye *v.* Barker, 4 Pick. 382; [Copeland *v.* Collins, 30 S. E. 315, N. C. This rule holds good only where the payment is made before the bar has run: Cross *v.* Allen, 141 U. S. 528. Other cases reject the rule stated in the text: McMillan *v.* Leeds, 49 P. 159, 58 Kan. 815; Drake *v.* Stuart, 87 Ia. 341; Mozingo *v.* Ross, 50 N. E. 867, Ind. That the rule applies to a guarantor as well as to a surety, see Hooper *v.* Hooper, 81 Md. 155.] {So where the statute is barred by a partial payment by the principal (Green *v.* Greensboro Female College, 83 N. C. 449) or a payment of interest (Schindell *v.* Gates, 46 Md. 604). *Contra* by statute in Massachusetts: Faulkner *v.* Bailey, 123 Mass. 588.}

[7] Manson *v.* Felton, 13 Pick. 206.

debtors, it binds them all.[8] And where the plaintiff proves a general acknowledgment of indebtment, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy.[9] Nor is it necessary, unless so required by express statute, that the acknowledgment should be in writing, even though the original contract is one which was required to be in writing by the statute of frauds; for it was the original contract in writing which fixed the defendant's liability, and the verbal acknowledgment within six years only went to show that this liability had not been discharged.[10]

§ 442. **Same Subject.** It has been already observed, that an acknowledgment, in order to remove the bar of the statute, must be such as raises an implication of a promise to pay. It must be a distinct admission of present indebtment. If, therefore, the party at the time of the conversation, or in the writing, should state that he *had a receipt*, or other written discharge of the claim, which he would or could produce, this does not take the case out of the statute, even though he should fail to produce the discharge.[1] So, if he admits that the claim has been previously made, but denies that he is bound to pay it, whether because of its want of legal formality, as, for example, a stamp,[2] or of its want of consideration,[3] or the like. If the language is ambiguous, it is for the jury to determine whether it amounts to explicit acknowledgment of the debt, or not.[4]

[8] See *ante*, Vol. I. §§ 152 *a*, 174, 176, 184 *b*; Patterson *v.* Patterson, 7 Wend. 441; [Bailie *v.* Irwin, 1897, 2 Ir. 614.] But where one party was a *feme covert* at the time of the new promise by the other, it was held not sufficient to charge her and her husband: Pittam *v.* Foster, 1 B. & C. 248. The question whether an acknowledgment by one partner is sufficient to avoid the statute as to all, was raised in Clark *v.* Alexander, 8 Jur. 496, 8 Scott N. R. 147. But see Walton *v.* Robinson, 5 Ired. 341; Wheelock *v.* Doolittle, 3 Washb. 440, that it is, even after dissolution. *Semb.* that an acknowledgment by one of several executors is not: Scholey *v.* Walton, 12 M. & W. 510, per Parke, B. {An acknowledgment by one of two partners, after dissolution, will avoid the bar of the statute, if the plaintiff had had dealings with the firm, and did not know of the dissolution: Sage *v.* Ensign, 2 Allen 245; Tappan *v.* Kimball, 30 N. H. 136; [Davison *v.* Sherburne, 57 Minn. 355. Otherwise if the creditor has notice of the dissolution: Robinson *v.* Floyd, 159 Pa. 165.] The better doctrine now is, that neither a new promise, nor part-payment by a joint debtor, will bind another, whether made before or after the bar of the statute: Van Keuren *v.* Parmelee, 2 Const. (N. Y.) 523; Burke *v.* Stowell, 71 Pa. St. 208; Ang. Limitations, § 260 and n.;} [Pfenninger *v.* Kokesch, 70 N. W. 867, Minn.; Boynton *v.* Spofford, 162 Ill. 113; Bergman *v.* Bly, 27 U. S. App. 650; Coleman *v.* Ward, 85 Mo. 328. That the action of the executor binds the estate, see Waughop *v.* Bartlett, 165 Ill. 124; Bell *v.* Wood, 94 Va. 677; *contra*, Claghorn's Estate, 181 Pa. 608.]

[9] Whitney *v.* Bigelow, 4 Pick. 110; Frost *v.* Bengough, 1 Bing. 266; Baillie *v.* Lord Inchiquin, 1 Esp. 435. But see Sands *v.* Gelston, 15 Johns. 511; Clarke *v.* Dutcher, 9 Cowen 674.

[10] Gibbons *v.* McCasland, 1 B. & Ad. 690.

[1] Brydges *v.* Plumtre, 9 D. & R. 746; Birk *v.* Guy, 4 Esp. 184.

[2] A'Court *v.* Cross, 3 Bing. 329.

[3] Easterby *v.* Pullen, 3 Stark. 186; De la Torre *v.* Barclay, 1 id. 7; Miller *v.* Lancaster, 4 Greenl. 159; Sands *v.* Gelston, 15 Johns. 511.

[4] Lloyd *v.* Maund, 2 T. R. 760; East Ind. Co. *v.* Prince, Ry. & M. 407. In the Circuit Court of the United States, it has been held, that the sufficiency of the evidence to take a case out of the statute is a question of law for the court; and that the jury

But if it is in writing, and is clear, either as an acknowledgment, or otherwise, the judge will be justified in so instructing the jury.[5]

§ 443. **Same Subject.** The terms of the acknowledgment, moreover, must all be *taken together*, so that it may be seen whether, upon the whole, the party intended distinctly to admit a *present debt* or duty. If, in affirming that the debt, once due, has been discharged, he claims it to have been *discharged by a writing*, to which he particularly refers with such precision as to exclude every other mode, and the writing, being produced or proved, does not in law afford him a legal discharge, his acknowledgment will stand unqualified, and will bind him.[1] So if the defendant challenges the plaintiff to produce a particular mode of proof of his liability, such as to prove the genuineness of the signature, or the like, and he does so, the implied acknowledgment will be sufficient to take the case out of the statute.[2] But if the acknowledgment is accompanied with circumstances or declarations showing an intention to *insist on the benefit of the statute*, it is now held that no promise to pay can be implied.[3] And if the cause of action arose from the doing or omitting to do some *specific act* at a particular time, an acknowledgment, within six years, that the contract has been broken, is held insufficient to raise the presumption of a new promise to perform the duty.[4]

§ 444. **Part Payment.** Where a specific sum of money was due, as, upon a promissory note the *payment of a part* of the debt is also held at common law to be a sufficient acknowledgment that the whole debt is still due, to authorize the presumption of a promise to

are only to determine whether the evidence applies to the debt in suit, and to what part of it: Panaro *v.* Flournoy, 9 Law Reporter 269.

[5] College *v.* Horn, 3 Bing. 119; Brigstocke *v.* Smith, 1 C. & M. 483; 2 Tyrw. 445.

[1] Partington *v.* Butcher, 6 Esp. 66. This is doubtless the case alluded to by Gibbs, C. J., in Hellings *v.* Shaw, 1 J. B. Moore 340, 344, where he is made to confine his observation to the case of a discharge by a *written* instrument. His remarks, as reported in the same case, in 7 Taunt. 612, are general, and applicable to any other mode of discharge; but to this unlimited extent their soundness is questioned by Bailey, J., in Beal *v.* Nind, 4 B. & Ald. 568, 571. And see Dean *v.* Pitts, 10 Johns. 35.

[2] Hellings *v.* Shaw, 7 Taunt. 612, per Gibbs, C. J.; Seward *v.* Lord, 1 Greenl. 163; Robbins *v.* Otis, 1 Pick. 370; 3 id. 4. {In Moore *v.* Stevens, 33 Vt. 308, it was held that, where the defendant, after the commencement of the action and about the time of trial, admitted that the plaintiff's account was just when it accrued, but claimed that he had paid it to one E., and that E. was authorized by the plaintiff to receive such payment, and the defendant at the same time promised to pay the account to the plaintiff if he did not prove that he had paid it, and the auditor reported that he did not find that E. was authorized to receive payment of the account, and that the defendant failed to prove that he had ever paid it, there was not a sufficient acknowledgment to bar the statute; and the court say, "The promise — he insisting at the time that he had paid it — was more in the nature of a wager on the result of the suit than of such a conditional undertaking as would become absolute and binding when the condition was performed, and we regard it as insufficient to prevent the operation of the statute." See Goodwin *v.* Buzzell, on same subject, 35 Vt. 9.}

[3] Coltman *v.* Marsh, 3 Taunt. 380; Rowcroft *v.* Lomas, 4 M. & S. 457; Bangs *v.* Hall, 2 Pick. 368; Knott *v.* Farren, 4 D. & K. 179; Danforth *v.* Culver, 11 Johns. 146; Sanford *v.* Clark, 29 Conn. 457.

[4] Boydell *v.* Drummond, 2 Campb. 157; Whitehead *v.* Howard, 2 B. & B. 372; Wetzell *v.* Bussard, 11 Wheat. 309.

pay the remainder; though it seems it would not be sufficient, if no specific sum was due, but the demand was only for a *quantum meruit.*[1] But it is the payment itself, and not the indorsement of it on the back of the security, that has this effect;[2] though where the indorsement is proved to have been actually made before the cause of action was barred by the statute, and consequently against the interest of the party making it, the course is, to admit it to be considered by the jury among the circumstances showing an actual payment.[3] And if such payment be made by one of several *joint debtors*, who is not otherwise discharged from the obligation, it is evidence against them all.[4] But as this rule is founded on the community of interest among the debtors, and the presumption that no one of them would make an admission against his own interest, it results, that,

[1] Burn *v.* Bolton; 15 Law Journ. N. S. 97; Zent *v.* Hart, 8 Barr 337. But see Smith *v.* Westmoreland, 12 S. & M. 663; {Gilbert *v.* Collins, 124 Mass. 174. It seems that neither an acknowledgment nor part-payment made on Sunday will avoid the statute: Clapp *v.* Hale, 112 Mass. 368; Beardsley *v.* Hall, 36 Conn. 270. Payment of part of the debt would seem not to be conclusive in all cases to authorize the presumption of a promise to pay the remainder. The circumstances that attend such payment may wholly disprove a promise to pay any more: Wainman *v.* Kynman, 1 Welsb. H. & G. 118; Merriam *v.* Bayley, 1 Cush. (Mass.) 77; Bradfield *v.* Tupper, 7 Eng. Law & Eq. 541 and n. If an indorsement of part-payment is made, and no payment actually takes place, this is not such a partial payment as will avoid the statute. Whether it is sufficient evidence of an acknowledgment depends on the statute of frauds: Blanchard *v.* Blanchard, 122 Mass. 558. As to what evidence will prove part-payment: *ante*, § 440, note 4; [Glover *v.* Patten, 165 U. S. 394.] Part-payments of principal to bind surety: § 441, note 6.}

[2] [Curtis *v.* Nash, 88 Me. 476.]

[3] See *ante*, Vol. I. §§ 121, 122, 152 *a*; Whitney *v.* Bigelow, 4 Pick. 110; Hancock *v.* Cook, 18 Pick. 30, 33; Rose *v.* Bryant, 2 Campb. 321; Conklin *v.* Pearson, 1 Rich. 391. This subject is now regulated by statutes, in England, and in several of the United States, by which the indorsement, if made by the creditor or in his behalf, without the concurrence of the debtor, is of no avail to take the case out of the statute: Stat. 9 Geo. IV. c. 14; Rev. Stat. Massachusetts, c. 120, § 17; Rev. Stat. Maine, c. 146, § 23. {A payment was made by a debtor to a creditor, to whom he owed several distinct debts, without any direction as to its application, and the creditor immediately applied it to one of the debts which was barred by the statute of limitations, and it was held that this did not take the debt out of the statute: Pond *v.* Williams, 1 Gray (Mass.) 630; Krone *v.* Krone, 38 Mich. 661. To have that effect, it must be made by the defendant specifically on account of the debt thus barred: ibid.; Tippetts *v.* Heane, 1 C. M. & R. 252, and 4 Tyrw. 772; Mills *v.* Fowkes, 5 Bing. N. C. 455, and 7 Scott 444; Burn *v.* Boulton, 2 C. B. 485. An indorsement of payment on a promissory note by the creditor, by the express assent and request of the promisor, is sufficient proof of such payment to prevent the operation of the statute of limitations: Sibley *v.* Phelps, 6 Cush. (Mass.) 172. See also Howe *v.* Saunders, 38 Me. 350. The admission of the defendant, that the indorsement is in the handwriting of the obligee, is not enough; it must be shown that it was put on at the date at which it purports to have been written: Grant *v.* Burgwyn, 84 N. C. 560.}

[4] See [*contra*] *ante*, § 441; Vol. I. § 174. But the effect of such payment is now restricted by statutes, in some of the United States and in England, to the party paying: Stat. 9 Geo. IV. c. 14; Rev. Stat. Massachusetts, c. 120, §§ 14, 18; Rev. Stat. Maine, c. 146, §§ 20, 24; {Pierce *v.* Tobey, 5 Met. (Mass.) 168; Balcom *v.* Richards, 6 Cush. (Mass.) 360; Tappan *v.* Kimball, 30 N. H. 136; Winchell *v.* Bowman, 21 Barb. (N. Y.) 448. But the rule is otherwise where the payment is on a note on which the makers are jointly and severally liable: Shoemaker *v.* Benedict, 1 Kernan (N. Y.) 176. See Coleman *v.* Fobes, 22 Pa. St. 156. [*Sed qu.*] Or if it appears to have been made by the direction of the other joint promisor: Clark *v.* Burn, 86 Pa. St. 502; Haight *v.* Avery, 16 Hun (N. Y.) 252;} [*Re* Tucker, 1894, 3 Ch. 429. Payment by the holder of a life-estate does not bind the reversioner: Ætna Ins. Co. *v.* McNeely, 166 Ill. 540.]

where the party making the payment is no longer responsible, as, for example, where it is received under a dividend in bankruptcy, it raises no presumption against the others.[5]

§ 445. **Mutual Accounts.** The existence of *mutual accounts* between the parties, if there are items on *both sides* within the period of limitation, is such evidence of a mutual acknowledgment of indebtment as to take the case out of the operation of the statute.[1] And if the defendant's account contains an item within that period, this has been held sufficient to save the account of the plaintiff;[2] but if the items in the defendant's account are all of an earlier date, though some of those in the plaintiff's account may be within the statute period, the statute will bar all the claim, except the last-mentioned items.[3] If the account has been stated between the parties, the statute period commences at the time of stating it;[4] but a mere cessation of dealings, or any act of the creditor alone, or even the death of one of the parties, is not, in effect, a statement of the account.[5]

§ 446. **Acknowledgment does not revive Tort.** It may here be further observed, that, where the cause of action arises *ex delicto*, as in trespass and trover; or is given by positive statute, irrespective

[5] Brandram *v.* Wharton, 1 B. & Ald. 463; *ante*, Vol. I. § 174, n. (3). And see Bibb *v.* Peyton, 11 S. & M. 275.

[1] Coggswell *v.* Dolliver, 2 Mass. 217; Bull. N. P. 149; Chamberlain *v.* Cuyler, 9 Wend. 126; Tucker *v.* Ives, 6 Cowen 193; Fitch *v.* Hilleary, 1 Hill (S. C.) 292. See also Rev. Stat. Massachusetts, c. 120, § 5. A similar effect has been attributed to continuity of service of a domestic, until a short time previous to the suit: Viens *v.* Brickle, 1 Martin 611. If the items are all on one side, those within six years will not save the others from the operation of the statute: Hadlock *v.* Losee, 1 Sandf. 220.

[2] Davis *v.* Smith, 4 Greenl. 337; Sickles *v.* Mather, 20 Wend. 72.

[3] Gold *v.* Whitcomb, 14 Pick. 188; Bull. N. P. 149. In England, since Lord Tenterden's Act (9 Geo. IV. c. 14), the existence of items within six years, in an open account, will not operate to take the previous portion of the account out of the statute of limitations: Cottam *v.* Partridge, 4 M. & G. 271. {The Massachusetts statute provides that, in actions brought "to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account." This does not apply exclusively to such actions as are brought on accounts in which debits and credits are stated and a balance struck, but extends also to cases in which the plaintiff seeks to recover the balance due to him, though he declares only on the debit side of the account. And in the latter case, if the defendant does not file an account in set-off, nor prove items on his side of the account by way of payment, but relies on the statute of limitations, the plaintiff may avoid the statute by showing that there was a mutual and open account current, and proving an item on either side, within six years. Thus, where the plaintiff opened an account with the defendant in 1830, and continued to make charges until 1833, and brought an action on his account in 1838, and proved on the trial that the defendant delivered to him an article on account in 1830, it was held that there was a mutual and open account current, and that no part of the plaintiff's charges were barred by the statute of limitations: Penniman *v.* Rotch, 3 Met. (Mass.) 216. [See Adams *v.* Holland, 101 Ga. 43.]

A statute in New York (N. Y. Code, § 386) makes a similar provision for accounts in which there have been "reciprocal demands." This expression is equivalent to "mutual accounts" (Green *v.* Disbrow, 79 N. Y. 1), and it is so held in Kansas (Waffle *v.* Short, 25 Kan. 503).}

[4] Farrington *v.* Lee, 1 Mod. 269; 2 id. 311; Cranch *v.* Kirkman, Peake's Cas. 121 and n. (1), by Day; Union Bank *v.* Knapp, 3 Pick. 96; [Morse *v.* Minton, 101 Iowa, 603.]

[5] Trueman *v.* Hurst, 1 T. R. 40; Mandeville *v.* Wilson, 5 Cranch 15; Bass *v.* Bass, 5 Pick. 187; McLellan *v.* Crofton, 5 Greenl. 307.

of any promise or neglect of duty by the party, as in the case of actions against executors and administrators upon the contracts of their testators or intestates; if the action is once barred by lapse of time, no admission or acknowledgment, however unequivocal and positive, will take it out of the operation of the statute.[1]

§ 447. **Merchants' Accounts.** The statute of limitations of 21 Jac. I. c. 16, which has been copied nearly *verbatim*, in its principal features, in most of the United States,[1] contains an exception of "such *accounts* as concern the *trade of merchandise* between *merchant and merchant*, their factors or servants." To bring a case within this exception, it must be alleged in the replication, and shown by proof, to conform to the statute in each of those particulars; every part of the exception being equally material. The exception is not of actions, nor of special contracts, nor of any other transactions between merchants, but is restricted to that which is properly *matter of account*, or consists of debits and credits properly arising in account.[2] It has therefore been held, that such claims as bills of exchange,[3] or a contract to receive half the profits of a voyage in lieu of freight,[4] were not merchants' accounts, within this exception. And as the exception was intended to be carved out of cases for which an action of account lies, and as this action does not lie where an account has already been stated between the parties, it has been held, that a *stated account* is not within the exception in the statute.[5] But an account *closed* by a mere cessation of dealings, we have just seen, is not deemed an account stated. Whether any but *current accounts*, that is, those which contain items within the statute period, are within this exception, is a point upon which the authorities, both in England and America, are not uniform. On the one hand, it is maintained upon the language of the statute, that, if the accounts come within its terms, it is sufficient to save them, though there have been no dealings within the six years.[6]

[1] Hurst *v.* Parker, 1 B. & Ald. 92; 2 Chitty 249; Oothout *v.* Thompson, 20 Johns. 277; Brown *v.* Anderson, 13 Mass. 201; Thompson *v.* Brown, 16 Mass. 172; Dawes *v.* Shed, 15 Mass. 6; *Ex parte* Allen, ib. 58; Parkman *v.* Osgood, 3 Greenl. 17.

[1] {This statute was repealed in England, 19 & 20 Vict. c. 97, § 9, and it is retained by but few of the States: Angell on Limitations (6th ed.), § 152, and Appendix, *passim*.}

[2] Spring *v.* Gray, 5 Mason 505, per Story, J.; s. c. 6 Peters 155; Cottam *v.* Partridge, 4 M. & G. 271; 4 Scott N. R. 819. A mere open account without any agreement that the goods delivered on one side shall go in payment of those delivered on the other, is not *therefore* an account of merchandise, between merchants: ibid. It has recently been held in England, that the exception as to merchants' accounts does not apply to an action of *indebitatus assumpsit*, but only to the action of account, or perhaps to an action on the case for not accounting: Inglis *v.* Haigh, 5 Jur. 704; 8 M. & W. 769.

[3] Chievly *v.* Bond, 4 Mod. 105; Carth. 226; s. c. 1 Show. 341.

[4] Spring *v.* Gray, 5 Mason 505; s. c. 6 Peters 155.

[5] Webber *v.* Tivill, 2 Saund. 124, 127, notes (6), (7), by Williams; 5 Mason 526, 527.

[6] Mandeville *v.* Wilson, 5 Cranch 15; Bass *v.* Bass, 6 Pick. 362, confirmed in 8 Pick. 187, 192; McLellan *v.* Crofton, 6 Greenl. 307. Such is now the rule in England. See Robinson *v.* Alexander, 8 Bligh N. S. 352; Inglis *v.* Haigh, 5 Jur. 704; s. c. 8 M. & W. 769.

On the other hand, it has been held, that where all accounts have ceased for more than six years, the statute is a bar; and that the exception applies only to accounts running within the six years; in which last case the whole account is saved as to the antecedent items.[7] The account, also, to be within the exception, must be such as concerns the *trade of merchandise;* that is, such as concerns traffic in merchandise, where there is a buying and selling of goods, and an account properly arising therefrom.[8] The existence of mutual debits and credits, there being no agreement that the articles delivered on one side shall go in payment for those delivered on the other, has been held insufficient to constitute the accounts intended in this exception.[9] And it is nceessary, moreover, that the parties to the account be *merchants*, or persons who traffic in merchandise, their factor or servants.[10]

§ 448. **Fraud and Concealment.** The bar of this statute may also be avoided by proof of *fraud* in the defendant, committed under such circumstances as to *conceal* from the plaintiff all knowledge of the fraud, and thus prevent him from asserting his right, until a period beyond the time limited by the statute. But such fraudulent concealment can be shown only under a proper replication of the fact. And it must be alleged and proved, not only that the plaintiff did not know of the existence of the cause of action, but that the defendant had practised fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period.[1]

[7] Wilford *v.* Liddel, 2 Ves. 400; Coster *v.* Murray, 5 Johns. Ch. 522; Spring *v.* Gray, 5 Mason 505, 528; 6 Peters 155. See Angell on Limitations, c. 14; Ramchander *v.* Hammond, 2 Johns. 200.

[8] Spring *v.* Gray, 5 Mason 529, per Story, J.; 6 Peters 155. And see Sturt *v.* Mellish, 2 Atk. 612; Bridges *v.* Mitchell, Bunb. 217; Gilb. Eq. 224.

[9] Cottam *v.* Partridge, 4 M. & G. 271; s. c. 4 Scott N. R. 819.

[10] 5 Mason 530, per Story, J., and authorities there cited; 5 Com. Dig. 52, tit. Merchant, A.; 2 Salk. 445; Hancock *v.* Cook, 18 Pick. 32; Wilkinson on Limitations, pp. 21–30; Angell on Limitations, c. 15.

[1] Angell on Limitations, c. 18; Bree *v.* Holbeck, 2 Doug. 654, confirmed in Brown *v.* Howard, 2 B. & B. 73, 75; s. c. 4 J. B. Moore 508; and in Clark *v.* Hougham, 2 B. & C. 149, 153; Short *v.* McCarthy, 3 B. & Ald. 626; Granger *v.* George, 5 B. & C. 149. And see Macdonald *v.* Macdonald, 1 Bligh 315. See also Sherwood *v.* Sutton, 5 Mason 143, where all the authorities are reviewed by Story, J.; First Mass. Turnp. Co. *v.* Field, 3 Mass. 201; Homer *v.* Fish, 1 Pick. 435; Welles *v.* Fish, 3 id. 74; Farnham *v.* Brooks, 9 id. 212; Jones *v.* Conoway, 4 Yeates 109; Bishop *v.* Little, 3 Greenl. 405; Walley *v.* Walley, 3 Bligh 12. [See also Moore *v.* Greene, 2 Curtis C. C. 202; Carr *v.* Hilton, 1 id. 390; Rouse *v.* Southard, 39 Me. 404; Douglass *v.* Elkins, 8 Foster (N. H.) 26; Livermore *v.* Johnson, 27 Miss. 284; { [Woodfolk *v.* Marley, 98 Tenn. 467; Norris *v.* Haggin, 136 U. S. 386; Felix *v.* Patrick, 145 id. 317; Bates *v.* Preble, 151 id. 149; Scranton Gas Co. *v.* Lackawanna Co., 167 Pa. 136; Jackson *v.* Jackson, 47 N. E. 963, Ind. Cf. Lewey *v.* Fricke Co., 166 Pa. 536. Evading the service of process is not fraud: Amy *v.* Watertown, 130 U. S. 320; nor conspiring to deny the plaintiff's case: Sanborn *v.* Gale, 162 Mass. 412. Fraud of a third person is immaterial: Hayden *v.* Thompson, 71 F. 60, U. S. App. For the rule as to fraudulent concealment as between partners, see Betjemann *v.* Betjemann, 1895, 2 Ch. 474.] In New York, fraudulent concealment of the cause of action will not prevent the operation of the statute: Troup *v.* Smith, 20 Johns. 40; Allen *v.* Mille, 17 Wend. 202. [The New York rule is now changed: Mason *v.* Henry, 152 N. Y. 529; Higgins *v.* Cronse, 147 id. 411.]

MALICIOUS PROSECUTION.

§ 449. **Grounds of Action.** To maintain an action for this injury, the plaintiff must prove, (1) that he has been prosecuted[1] by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; (2) that it was instituted maliciously, and without probable cause; (3) that he has thereby sustained damage. It is not necessary that the whole proceedings be utterly groundless; for if groundless charges are maliciously and without probable cause coupled with others which are well founded, they are not on that account the less injurious, and therefore constitute a valid cause of action.[2] Nor is the form of the prosecution material; the *gravamen* being, that the plaintiff has improperly been made the subject of legal process to his damage.[3] If, therefore, a commission of bankruptcy has been sued out against him, though it was afterwards superseded;[4] or his house has been searched under a warrant for smuggled or stolen goods;[5] or, if a commission of lunacy has been taken out against him;[6] or, if special damage has resulted from a false claim of goods;[7] or, if goods have been extorted from him by duress of imprisonment, or abuse of legal process;[8] or, if he has been arrested and held to bail for a debt not due, or for more than was due,[9] and it was done maliciously and without probable cause, — he may have this remedy for the injury. The action, moreover, is to be brought against the party who actually caused the injury, and not against one who was only a nominal party. And therefore, if one commence a suit in the name of another, without his authority, and attach the goods of the defendant, with malicious intent to vex and harass him, this action lies, though the

[1] [As to what constitutes the commencement of prosecution, see Strehlow *v.* Pettit, 96 Wis. 22.]

[2] Reed *v.* Taylor, 4 Taunt. 516; Wood *v.* Buckley, 4 Co. 14; Pierce *v.* Thompson, 6 Pick. 193; Stone *v.* Crocker, 24 id. 81.

[3] {Cotterell *v.* Jones, 7 Eng. L. & Eq. 475; Barron *v.* Mason, 31 Vt. 198;} [Kolka *v.* Jones, 6 N. D. 461; Lipscomb *v.* Shofner, 96 Tenn. 112; Taverner *v.* Morehead, 41 W. Va. 116; Buethner *v.* Ellinger, 90 Wis. 439; *contra*, Terry *v.* Davis, 114 N. C. 31; Smith *v.* Michigan Buggy Co., 175 Ill. 619.]

[4] Brown *v.* Chapman, 3 Burr. 1418; Chapman *v.* Pickersgill, 2 Wils. 145; {Farlie *v.* Danks, 30 Eng. L. & Eq. 115.}

[5] Boot *v.* Cooper, 1 T. R. 535.

[6] Turner *v.* Turner, Gow 20.

[7] Green *v.* Button, 2 C. M. & R. 707; 1 Tyr. & Gr. 118.

[8] Grainger *v.* Hill, 4 Bing. N. C. 212; 3 Scott 561; Plummer *v.* Dennett, 6 Greenl. 421.

[9] Savage *v.* Brewer, 15 Pick. 453; Wentworth *v.* Bullen, 9 B. & C. 840; Ray *v.* Law, 1 Peters C. C. 210; Somner *v.* Wilt, 4 S. & R. 19.

suit was for a just cause of action.[10] But where the suit was commenced by the attorney of the party, in the course of his general employment, though without the knowledge or assent of his client, it seems that the party himself is liable.[11] The attorney is not liable unless he acted wholly without authority, or conspired with his client to oppress and harass the plaintiff.[12] Nor is it material that the plaintiff was prosecuted by an insufficient process, or before a court not having jurisdiction of the matter; for a bad indictment may serve all the purposes of malice as well as a good one, and the injury to the party is not on that account less than if the process had been regular, and before a competent tribunal.[13]

§ 450. **Proof of Prosecution.** (1) The fact of the *prosecution* will be proved by duly authenticated copies of the record and proceedings.[1] Some evidence must also be given that the defendant was the prosecutor. To this end, a copy of the indictment, with the defendant's name indorsed as a witness, is admissible as evidence that he was sworn to the bill; but this fact may also be proved by one of the grand jury, or other competent testimony.[2] It may also be shown, that the defendant employed counsel or other persons to assist in the prosecution; or, that he gave instructions, paid expenses, procured witnesses, or was otherwise active in forwarding it.

§ 451. **Arrest.** Where the suit is for causing the plaintiff to be maliciously arrested and detained until he gave bail, it is sufficient for him to show a detention, without proving that he put in bail; for the detention is the principal *gravamen*, and is in itself *prima facie* evidence of an arrest,[1] though the mere giving of bail is not.[2]

[10] Pierce *v.* Thompson, 6 Pick. 193.

[11] Jones *v.* Nichols, 3 M. & P. 12.

[12] Bicknell *v.* Dorion, 16 Pick. 468.

[13] Chambers *v.* Robinson, 1 Stra. 691; Anon., 2 Mod. 306; Saville *v.* Roberts, 1 Ld. Raym. 374, 381; Jones *v.* Givin, Gilb. Cas. 185, 201–206, 221; Pippet *v.* Hearn, 5 B. & Ald. 634; {Stone *v.* Stevens, 12 Conn. 219; Morris *v.* Scott, 21 Wend. (N. Y.) 281; Hays *v.* Younglove, 7 B. Mon. (Ky.) 545; [Minneapolis, etc. Co. *v.* Regier, 51 Neb. 402; Strehlow *v.* Pettit, 96 Wis. 22; Schattgen *v.* Holnback, 149 Ill. 646; Finn *v.* Frink, 84 Me. 261; *contra*, Collum *v.* Turner, 102 Ga. 534.] But it has also been held that if the prosecution is brought in a court which has no jurisdiction of the crime, the accused cannot have an action against the complainant for malicious prosecution, though if he has been arrested he may have an action for false imprisonment: Painter *v.* Ives, 4 Neb. 122; Bixby *v.* Brundige, 2 Gray (Mass.) 129; [Vinson *v.* Flynn, 64 Ark. 453.]

In Sweet *v.* Negus, 30 Mich. 406, the distinction was drawn that if the lack of jurisdiction is not apparent on the face of the record, but only shown by evidence *aliunde*, an action for malicious prosecution may be sustained.}

[1] {Sayles *v.* Briggs, 4 Met. (Mass.) 421.{ For the law respecting *variance* between the allegation and the proof, see *ante*, Vol. I. §§ 63–65. If the prosecution was in a foreign country, a copy of the record is not indispensably necessary, but other evidence of the facts may be received: Young *v.* Gregory, 3 Call 446.

[2] R. *v.* Commerell, 4 M. & S. 203; R. *v.* Smith, 1 Burr. 54; R. *v.* Kettleworth, 5 T. R. 33; Johnson *v.* Browning, 6 Mod. 216. See, as to the competency of grand jurors, *ante*, Vol. I. § 252.

[1] Bristow *v.* Haywood, 1 Stark. 48; s. c. 4 Campb. 213; Whalley *v.* Pepper, 7 C. & P. 506.

[2] Berry *v.* Adamson, 6 B. & C. 528; s. c. 2 C. & P. 503.

But if the declaration is framed upon the fact of maliciously causing the plaintiff to be held to bail, no evidence of a previous arrest is necessary.[3]

§ 452. **Termination of Suit.** It must also appear that the *prosecution is at an end.*[1] If it was a *civil suit*, its termination may be shown by proof of a rule to discontinue on payment of costs, and that the costs were taxed and paid, without proof of judgment or production of the record;[2] but an order to stay proceedings is not alone sufficient.[3] If it was terminated by a judgment, this is proved by the record.[4] But where the action is for abusing the process of law, in order illegally to compel a party to do a collateral thing, such as to give up his property, it is not necessary to aver and prove that the process improperly employed is at an end, nor that it was sued out without reasonable or probable cause.[5] So, if it was a *criminal prosecution*, the like evidence must be given of its termination. And it must appear that the plaintiff was *acquitted* of the charge; it is not enough that the indictment was ended by the entry of a *nolle prosequi*, though if the party pleaded not guilty, and the Attorney-General confessed the plea, this would suffice.[6]

[3] Berry *v.* Adamson, 6 B. & C. 528; 2 C. & P. 503; Small *v.* Gray, ib. 605.

[1] Arundell *v.* Tregono, Yelv. 116; Hunter *v.* French, Willes 517; Lewis *v.* Farrell, 1 Stra. 114; Shock *v.* McChesney, 2 Yeates 473, 475.

[2] Bristow *v.* Haywood, 4 Campb. 213; French *v.* Kirk, 1 Esp. 80; Brook *v.* Carpenter, 3 Bing. 297; Watkins *v.* Lee, 6 M. & W. 270.

[3] Wilkinson *v.* Howell, 1 M. & Malk. 495. Nor is an order to supersede the commissioner sufficient, in a case of bankruptcy: Poynton *v.* Forster, 3 Campb. 60.

[4] [See Vol. I. § 538. A final judgment is sufficient, though the right to petition for a new trial remains: Foster *v.* Denison, 19 R. I. 351.]

[5] Grainger *v.* Hill, 4 Bing. N. C. 212; s. c. 3 Scott 561.

[6] Goddard *v.* Smith, 1 Salk. 21; s. c. 6 Mod. 261; Smith *v.* Shackelford, 1 Nott & M'C. 36; Fisher *v.* Bristow, 1 Doug. 215; Morgan *v.* Hughes, 2 T. R. 225; {Bacon *v.* Towne, 4 Cush. (Mass.) 217; Parker *v.* Farley, 10 Cush. (Mass.) 279. [But see *post*, § 455, n. 2.] And where the magistrate has authority only to bind over or discharge a person accused, and he discharges him, the discharge is equivalent to an acquittal, and will avail as evidence to support an allegation of acquittal in a declaration for malicious prosecution: Sayles *v.* Briggs, 4 Met. (Mass.) 421; [Welch *v.* Cheek, 115 N. C. 310; Rider *v.* Kite, 38 A. 754, N. J. L. But if the prosecutor with due diligence follows up the prosecution in a court having jurisdiction to try the case on its merits, this is a continuance of the original prosecution: Hartshorne *v.* Smith, 30 S. E. 666, Ga.] Nothing short of an acquittal is sufficient, where the prosecutor has progressed to a trial before a petit jury: Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288.

Where one held on a criminal charge was discharged on writ of *habeas corpus*, this was held not to be a termination of the suit so as to authorize a suit for malicious prosecution: Merriman *v.* Morgan, 7 Or. 68.

The termination of the malicious prosecution in favor of the defendant, who thereupon sues for malicious prosecution, is merely a fact necessary to give him a right to sue. It has no tendency to support the allegation of malice, or of lack of probable cause: Stewart *v.* Sonneborn, 98 U. S. 187; Allman *v.* Abrams, 9 Bush (Ky.) 738.

Where the grand jury finds no bill, but parol evidence shows that it was on account of the absence of a material witness and that the case was not ended, an action for malicious prosecution will not lie: Knott *v.* Sargent, 125 Mass. 95. Morton, J., says: "If the prosecution alleged to be malicious was by complaint to a magistrate, upon which the plaintiff was bound over to appear at the superior court, he must show that he has been discharged by order of that court. Until such discharge the prosecution is not at an end, but he and his sureties remain liable upon his recognizance. The *dictum* of Mr. Justice Buller, in Morgan *v.* Hughes, 2 T. R. 225, that if

So, if he was acquitted because of a defect in the indictment it is sufficient.[7] If the party has been arrested and bound over on a criminal charge, but the grand jury did not find a bill against him, proof of this fact is not enough, without also showing that he has been regularly discharged by order of court; for the court may have power to detain him, for good cause, until a further charge is preferred for the same offence.[8] But, in other cases, the return of *ignoramus* on the bill, by the grand jury, has been deemed sufficient.[9]

§ 453. **No Probable Cause.** (2) The plaintiff must also show that the prosecution was instituted *maliciously, and without probable cause;* and both these must concur.[1] If it were malicious and unfounded, but there was probable cause for the prosecution, this action cannot be maintained.[2] The question of *malice* is for the jury; and to sustain this averment the charge must be shown to have been wilfully false.[3] In a legal sense, any unlawful act, done wilfully and purposely to the injury of another, is, as against that person, malicious.[4] And if the immediate act be done unwillingly

the accused was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution, does not necessarily imply that the grand jury's not finding a bill at the term to which the accused is bound over would be an end of the prosecution. It rather implies that the prosecution is not ended unless he is discharged by reason of the grand jury's finding no bill. See Thomas *v.* De Graffenreid, 2 Nott & McC. 143."

The entry of "neither party" is not such a termination as will support an action: Hamilburgh *v.* Shepard, 119 Mass. 30.}

[7] Wicks *v.* Fentham, 4 T. R. 247.

[8] Thomas *v.* De Graffenreid, 2 Nott & McC. 143. And see Weinberger *v.* Shelly, 6 W. & S. 336.

[9] Morgan *v.* Hughes, 2 T. R. 225; Anon., Sty. 372; Atwood *v.* Monger, Sty. 378; Jones *v.* Givin, Gilb. Cas. 185, 220.

[1] Farmer *v.* Darling, 4 Burr. 1971; Stone *v.* Crocker, 24 Pick. 81, 83; Bell *v.* Graham, 1 Nott & McC. 278; Hall *v.* Suydam, 6 Barb. S. C. 83; {Stacey *v.* Emery, 97 U. S. 642; Anderson *v.* Coleman, 53 Cal. 188; Turner *v.* O'Brien, 11 Neb. 108; Ritchey *v.* Davis, 11 Iowa 124; Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288;} [Kolka *v.* Jones, 6 N. D. 461; Foster *v.* Pitts, 63 Ark. 387; Crescent City, etc. Co. *v.* Butchers' Co., 120 U. S. 141; Womack *v.* Fudicker, 47 La. Ann. 33; Barber *v.* Scott, 92 Ia. 52; Mesker *v.* McCourt, 44 S. W. 975, Ky.; Weaver *v.* Montana, etc. R., 20 Mont. 163.] Whether, therefore, this action lies against a corporation, *quære;* and see McLellan *v.* Bank of Cumberland, 9 Law Rep. 82. {It seems settled now that such an action will lie: Stevens *v.* Mid. Co. R. R. Co., 10 Exch. 352; Green *v.* London, etc. Co., 7 C. B. N. S. 290; Henderson *v.* Mid. R. R. Co., 24 L. T. N. S. 881. And see also Coulter *v.* Dublin & Belfast R. R. Co., Irish L. T. (1875) 209; Philadelphia, etc. R. R. Co. *v.* Quigley, 21 How. (U. S.) 202; Fenton *v.* Sewing Machine Co., Leg. Int., April 24, 1874.}

[2] Arbuckle *v.* Taylor, 3 Dowl. 160; Turner *v.* Turner, Gow 20.

[3] Cohen *v.* Morgan, 6 D. & R. 8; Johnstone *v.* Sutton, 1 T. R. 540; Jackson *v.* Burleigh, 3 Esp. 34; Austin *v.* Debnam, 3 B. & C. 139; Burley *v.* Bethune, 5 Taunt. 580; Grant *v.* Duel, 3 Rob. (La.) 17.

[4] Com. *v.* Snelling, 15 Pick. 321, 330; Stokley *v.* Harnidge, 8 C. & P. 11; {Bacon *v.* Towne, 4 Cush. (Mass.) 217; Parker *v.* Farley, 10 id. 281; Parker *v.* Huntington, 2 Gray (Mass.) 125; McGurn *v.* Brackett, 33 Me. 331; Beach *v.* Wheeler, 24 Pa. St. 212; Lang *v.* Rodgers, 19 Ala. 321; Stevens *v.* Midland Co. Railway Co., 26 Eng. Law & Eq. 410; Wheeler *v.* Nesbitt, 24 How. (U. S.) 545;} [Peterson *v.* Reisdorph, 49 Neb. 529; Noble *v.* White, 103 Ia. 352.] The law, as to malice, was clearly illustrated by Parke, J., in Mitchell *v.* Jenkins, 7 B. & Ad. 588, 594, in the following terms: "I have always understood, since the case of Johnstone *v.* Sutton, 1 T. R. 510, which was decided long before I was in the profession, that no point of law was more clearly settled than that, in every action for a malicious prosecution or arrest, the

and by coercion, as, where the party preferred an indictment because he was bound over so to do, yet, if he was himself the cause of the coercion, as, by originally making a malicious charge before the magistrate, this will sustain the averment of malice.[5] The proof of malice need not be direct; it may be inferred from circumstances, but it is not to be inferred from the mere fact of the plaintiff's acquittal for want of the prosecutor's appearance when called;[6] nor, in the case of a civil suit, from the parties suing out the writ, or neglecting to countermand it, after payment of the debt.[7] But it may be inferred by the jury, from the want of probable cause.[8] Malice may also be proved by evidence of the defendant's conduct and declarations, and his forwardness and activity in exposing the plaintiff, by a publication of the proceedings against him, or by any other publications by the defendant on the subject of the

plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious, and without reasonable or probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration; and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term 'malice,' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing *bona fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bona fide* under a wrong notion of the law, and pursuant to legal advice." And see Haddrick *v.* Heslop, 12 Ad. & El. N. S. 267. [See also Vol. I. §§ 14 *o*, 14 *q*, 18, 34.]

[5] Dubois *v.* Keates, 4 Jur. 148; s. c. 3 P. & D. 306.

[6] Purcell *v.* Macnamara, 9 East 361; s. c. 1 Camph. 199; Sykes *v.* Dunbar, ib. 202, n.

[7] Gibson *v.* Chaters, 2 B. & P. 129; Scheibel *v.* Fairbain, 1 id. 388; Page *v.* Wiple, 3 East 314. Nor from the action being non-prossed or discontinued (Sinclair *v.* Eldred, 4 Taunt. 7); unless coupled with other circumstances (Bristow *v.* Heywood, 1 Stark. 48; Nicholson *v.* Coghill, 4 B & C. 21; 6 D. & R. 12.) [Nor from plaintiff's appealing the case: Foster *v.* Denison, 19 R. I. 351.]

[8] Murray *v.* Long, 1 Wend. 440; Crozer *v.* Pilling, 4 B. & C. 26; Mitchell *v.* Jenkins, 5 B. & Ad. 588; 1 Nev. & M. 301; Turner *v.* Turner, Gow 20; Merriam *v.* Mitchell, 1 Shepl. 439; Hall *v.* Suydam, 6 Barb. S. C. 83. *Crassa ignorantia* has been held to amount to malice: Brookes *v.* Warwick, 2 Stark. 389. {Malice is not a necessary inference for want of probable cause, but it is for the jury to decide, upon all the circumstances of the case, whether the want of probable cause gives rise to an inference of malice: Herschi *v.* Mettelman, 7 Ill. App. 112; Carson *v.* Edgeworth, 43 Mich. 241; Kingsbury *v.* Garden, 45 N. Y. Super. Ct. 224; [Ellis *v.* Simonds, 47 N. E. 116, Mass.; Parker *v.* Parker, 102 Ia 500; Kolka *v.* Jones, 6 N. D. 461; Brown *v.* Vittur, 47 La. Ann. 607; O'Neal *v.* McKinna, 22 S. 905, Ala.; Cole *v.* Andrews, 73 N. W. 3, Minn.; Wuest *v.* American, etc. Co., 73 N. W. 903, S. D. Hence a special verdict finding want of probable cause will not support a judgment for the plaintiff: Hehrig *v.* Beckner, 46 N. E. 644, Ind.]

Malice cannot be inferred from the termination of the prosecution in favor of the accused: Allman *v.* Abrams, 9 Bush (Ky.) 738;} [Hehrig *v.* Beckner, 46 N. E. 644, Ind.; Philpot *v.* Lucas, 101 Ia. 478.]

charge.[9] And if the prosecution was against the plaintiff jointly with another, evidence of the defendant's malice against the other party is admissible, as tending to show his bad motives against both.[10]

§ 454. **Same Subject.** The want of *probable cause* is a material averment; and, though negative in its form and character, it must be proved by the plaintiff by some affirmative evidence;[1] unless the defendant dispenses with this proof by pleading singly the truth of the facts involved in the prosecution.[2] It is independent of malicious motive, and cannot be inferred, as a necessary consequence, from any degree of malice which may be shown.[3] Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives.[4] In the case of a private suit, it may consist of such facts and circumstances as lead to the inference that the party was actuated by an honest and reasonable conviction of the justice of the suit. And, in either case, it must appear that the facts, or so much of them as was sufficient to induce the belief, were communicated to the defendant before he commenced the prosecution or suit.[5] In revenue and admiralty

[9] Chambers *v.* Robinson, 1 Stra. 691.

[10] Caddy *v.* Barlow, 1 M. & Ry. 275.

[1] *Ante*, Vol. I. § 78; Purcell *v.* Macnamara, 1 Campb. 199; 9 East 361; McCormick *v.* Sisson, 7 Cowen 715; Murray *v.* Long, 1 Wend. 140; Gorton *v.* De Angelis, 6 id. 418; Incledon *v.* Barry, 1 Campb. 203, n.; Taylor *v.* Williams, 2 B. & Ad. 845; 6 Bing. 183; [Monroe *v.* Western Lumber Co., 50 La. Ann. 158.] Where the declaration alleged a prosecution of the plaintiff for perjury in a certain cause, and the indictment was set forth containing two several assignments of perjury, it was held that the declaration was supported by proof of malice and the want of probable cause as to one only of the assignments: Ellis *v.* Abrahams, 10 Jur. 593.

[2] Morris *v.* Corson, 7 Cowen 281. See also Sterling *v.* Adams, 3 Day 411.

[3] 1 Campb. 206, n. *a*; Sykes *v.* Dunbar, ib. 502, n. *a*; Horn *v.* Boon, 3 Strobh. 307; Hall *v.* Suydam, 6 Barb. S. C. 83; {Bacon *v.* Towne, 4 Cush. (Mass.) 217; Parker *v.* Farley, 10 id. 281; Heslop *v.* Chapman, 22 Eng. Law & Eq. 296; Kidder *v.* Parkhurst, 3 Allen (Mass.) 393;} [Lacey *v.* Porter, 103 Cal. 597; Hicks *v.* Brantley, 102 Ga. 264.]

[4] Ulmer *v.* Leland, 1 Greenl. 135. Or, such a suspicion as would induce a reasonable man to commence a prosecution: Cabaness *v.* Martin, 3 Dev. 454. Or, a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offence: Munns *v.* Dupont, 3 Wash. C. C. 31; Foshay *v.* Ferguson, 2 Denio 617. {The terms "reasonable cause" and "probable cause" are synonymous: Stacey *v.* Emery, 97 U. S. 642. But, it seems, the word "just," or "proper," is not equivalent: Van De Weile *v.* Callanan, 7 Daly (N. Y.) 74.

Probable cause is such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty. By Shaw, C. J., in Bacon *v.* Towne, 4 Cush. (Mass.) 238; McGurn *v.* Brackett, 33 Me. 331. The plaintiff must show that the conduct of the defendant was such as to lead to the inference that the prosecution was not undertaken from public purposes: Cecil *v.* Clarke, 17 Md. 508. The plaintiff may give evidence of his good character and reputation, and of the defendant's knowledge thereof at the time of the prosecution, as tending to show want of probable cause: Blizzard *v.* Hays, 46 Ind. 166.}

[5] Delegal *v.* Highley, 8 Bing. N. C. 950; Seibert *v.* Price, 5 Watts & Serg. 438; Foshay *v.* Ferguson, 2 Denio 617; Bacon *v.* Towne, 4 Cush. 238. {Proof of the plaintiff's innocence of the charge on which the prosecution was brought, and any

cases, probable cause for a seizure or a capture is made out when the officer shows such reasons for the act as were sufficient to warrant a prudent, intelligent, and cautious man in drawing the same conclusion.[6] Thus, where the commander of a national vessel was prosecuted for the capture of a vessel on the coast of Africa, on suspicion of her being a slaver, proof that he "acted with intelligent and honorable discretion," in arresting and sending her to this country for adjudication, was held sufficient evidence of probable cause.[7] The question of probable cause is composed of law and fact; it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause.[8] Regularly, the facts

facts which tend to show such innocence, are only admissible as tending to show the defendant's lack of probable cause in bringing the prosecution, and therefore it should be shown that the defendant knew of such innocence or such facts when he brought the charge: King *v.* Colvin, 11 R. I. 582. So, circumstances of suspicion which would justify the charge must be shown to have been known to the defendant: Angelo *v.* Faul, 85 Ill. 106. So, it has been held that facts not known to defendant at the time of his procurement of plaintiff's arrest are not competent to show presence or absence of probable cause: Cecil *v.* Clarke, 17 Md. 508; [Smith *v.* King, 62 Conn. 515; Nachtman *v.* Hammer, 155 Pa. 200; *contra,* Thurber *v.* Eastern Building Ass'n, 116 N. C. 73.]

The plaintiff in making out his *prima facie* case must adduce some evidence of lack of probable cause: Scott *v.* Shelor, 28 Gratt. (Va.) 891; Lavender *v.* Hudgens, 32 Ark. 763; [Womack *v.* Fudicker, 47 La. Ann. 33; Smith *v.* Eastern Building Ass'n, 116 N. C. 73.] And if evidence in rebuttal is given by the defendant, the plaintiff must make out the lack of reasonable cause by a preponderance of evidence: Palmer *v.* Richardson, 70 Ill. 544; Calef *v.* Thomas, 81 id. 478; [Barber *v.* Scott, 92 Ia. 52.]

[6] Shattuck *v.* Maley, 1 Wash. C. C. 247, 249.

[7] Lovett *v.* Bispham, 2 Am. Law Journ. N. S. 97, 108.

[8] Johnstone *v.* Sutton, 1 T. R. 545; s. c. 1 Bro. P. C. 76; Blatchford *v.* Dod, 2 B. & Ad. 184; Ulmer *v.* Leland, 1 Greenl. 135; Stone *v.* Crocker, 24 Pick. 81; Panton *v.* Williams, 1 G. & D. 504; 2 Ad. & El. N. S. 169; Watson *v.* Whitmore, 8 Jur. 964; 14 Law Journ. N. S. 41; Hall *v.* Suydam, *supra;* Horn *v.* Boon, *supra:* Newell *v.* Downs, 8 Blackf. 523; Sims *v.* McLendon, 3 Strobh. 557; [Taylor *v.* Godfrey, 36 Me. 525; Bulkley *v.* Smith, 2 Duer (N. Y.) 261; Bulkley *v.* Keteltas, 2 Selden (N. Y.) 384; Carpenter *v.* Shelden, 5 Sandf. (N. Y.) 77; Jacks *v.* Stimpson, 13 Ill. 701; Ash *v.* Marlow, 20 Ohio 119; Kidder *v.* Parkhurst, 3 Allen (Mass.) 393; [Drumm *v.* Cessnum, 58 Kan. 331; Kolka *v.* Jones, 6 N. D. 461; Stricker *v.* Penn. R., 37 A. 776, N. J. L.; Seabridge *v.* McAdam, 108 Cal. 345; Smith *v.* Munch, 65 Minn. 256; Lancaster *v.* McKay, 45 S. W. 887, Ky.; Rogers *v.* Olds, 75 N. W. 933, Mich.; Hess *v.* Oregon, etc. Co., 31 Or. 503. See also Vol. I. § 81*f*.] Judge Redfield, in his edition of this book, gives the following valuable note on this point: "Having had occasion to consider the subject of malicious prosecution very thoroughly in the case of Barron *v.* Mason, reported in 31 Vt. 189, we take the liberty of inserting here a large part of the opinion in that case, as embodying our views of the present law on this subject.

"The books upon this point all concur in saying that the plaintiff must prove (and of course the defendant may disprove) both want of probable cause and malice. And it is the duty of the court to instruct the jury fully and correctly upon the whole case, as the testimony tends to show the facts.

"If it be admitted that testimony that the plaintiff had been guilty of other similar offences, or that he was reputed guilty, and that this had come to the knowledge of the defendant before he instituted the prosecution, has no legal tendency to show either probable cause or want of malice in ordinary cases, such as larceny, it must also be admitted, we think, that in that class of offences where the gist of the crime consists in the bad purpose with which an act otherwise innocent is done, this kind of testimony is admissible, even upon the question of actual guilt, and much more upon that of probable cause. For probable cause is not to be confounded with actual guilt. Probable cause is only such a state of facts and circumstances as would lead a careful and con-

material to this question are first to be found by the jury, and the judge is then to decide, as a point of law, whether the facts, so

scientious man to believe that the plaintiff was guilty. This can only require that the defendant, upon prudent and careful inquiry, shall find the reputed or declared existence of such facts as indicate guilt, with reasonable certainty. Mere general reputation will not alone constitute probable cause. For a prudent man, in instituting an important criminal prosecution, would ordinarily look farther, and inquire for testimony. But this he might fairly believe existed short of being told so by the witnesses themselves. It is not often the case, perhaps, that the public prosecuting officers, before making complaint, have opportunity to converse personally with the witnesses. But they should know something more than a mere vague general report of guilt. They should have information, with such directness and certainty as to gain credit with prudent men, of the existence and susceptibility of proof of such facts as show guilt; or which the defendant, upon proper advice, supposed would constitute guilt. This is the fair result of the decided cases, and of common experience upon the subject.

"Now, in the class of cases referred to, where the guilt or innocence of the act depends upon the motive, the conduct and declarations of the party, as to other similar transactions about the same time, are always admissible to prove actual guilt. As, for instance, in cases of passing, or having in possession with intent to pass, counterfeit coin or bills, it is familiar law that the prosecutor may give in evidence other similar offences committed by the accused about the same time, for the purpose of showing his intent in the particular transaction. So also in cases of embezzlement, and some other similar offences. And this rule would no doubt extend to the proof of the very facts which the court in this case told the jury had no other effect but to mitigate damages. . . .

"We should infer that the court below did not regard the question of malice as directly and independently involved in the case. From what of the charge is given, the question of malice seems to have been treated as a mere inference from the proof of the want of probable cause. And so it is, *prima facie*. But nevertheless, it may be disproved by a great variety of proof of a much lower grade than that which is requisite to show probable cause. For this purpose common repute, not only as to general bad character, but also as to the particular offence, may, we incline to think, be shown. For this latter is nothing less than the declaration of third parties that the plaintiff was guilty of the particular offence, which is declared admissible in the case of French *v.* Smith, 4 Vt. 363. It is undeniable that the general belief of one's guilt, in regard to a particular offence, will influence to a certain extent the conduct of the most prudent prosecutor in regard to instituting proceedings. How then can it be said that it has no legitimate bearing upon the question of malice? We think it impossible to so hold, without violating the most obvious principles of human experience and human conduct: 1 Phil. Ev. 115; Rodriguez *v.* Tadmire, 2 Esp. Cases, 720. And general bad reputation is often a direct element in the proof of the respondent's guilt, when he offers proof of good character in exculpation.

"This testimony was admitted to go to the jury upon the question of damages. But its chief, if not its only legitimate bearing upon that question, must have depended upon its tendency to rebut the inference of malice, and so far as it had any such tendency, it was, for that very reason, competent evidence upon the main issue in the case. It is said, indeed, in Hall *v.* Suydam, 6 Barb. 83, that good faith merely is not enough to protect the party from liability for malicious prosecution in regard to a criminal charge. But from the whole case, it is obvious that this is said wholly in regard to the proof of probable cause. For it is found in almost every book upon the subject, that if the defendant, however causelessly, did really act in good faith and without malice in preferring the charge, he cannot be made liable for a malicious prosecution. The question of malice is always one of intent, and open to the jury in this class of cases. But it is not so in actions of slander. The law then implies malice, and will not allow it to be rebutted by general evidence, but only by specific proof, which the law declares a justification or excuse, as the truth of the words, or that they were spoken confidentially and upon a justifiable occasion. So, too, in regard to probable cause, the facts being admitted or proved without controversy, it becomes a mere question of law to be determined by the court. And for this purpose the same proof is required in all cases. It is not enough to show that the case appeared sufficient to this particular party, but it must be sufficient to induce a sober, sensible, and discreet person to act upon it, or it must fail as a justification for the proceeding, upon general grounds.

"But upon the question of malice the law is more tender towards the inexperience

found, establish probable cause or not.[9] But if the matter of fact and matter of law, of which the probable cause consists, are inti-

or the infirmities or the idiosyncrasies of parties. Malice is judged of with reference to the party; and whatever fairly tends to show that he acted with good faith, and without malice, must be received.

"There is no necessary or even natural connection between probable cause and the want of malice. One may, and often does, act with malice, when there is probable cause, or may act without malice, where there is no probable cause shown, but in neither of these cases is he liable to this action. Want of probable cause and malice must concur to make the party liable: Turner *v.* Ambler, 10 Q. B. 252, Denman, C. J.

"It is true, the want of probable cause need not be shown to extend to all the particulars charged. Nor is it any defence that there was probable cause for part of the prosecution: Ellis *v.* Abrahams, 8 Q. B. 709; Reed *v.* Taylor, 4 Taunt. 615. But the importance of the questions in this case will justify a more extended examination of the cases upon the subject, and a more minute discussion of the principles involved.

"The history of the common law in regard to this action is well stated in the elaborate note of Messrs. Hare & Wallace to Munns *v.* Dupont, 2 Wash. C. C. 31–34; 1 Am. Lead. Cases, 200. The law is defined in Farmer *v.* Darling, 4 Burrows 1971, 1974, where all the judges agree that, to maintain the action, malice (either express or implied) and the want of probable cause must concur. The case of Johnstone *v.* Sutton, 1 Term 510, s. c. ib. 493, 1 Brown's P. C. 76, is also a most important and satisfactory case upon this subject, maintaining the general view above stated.

"And it seems to be admitted in all the cases where the question has arisen, that proof of the want of probable cause is not sufficient alone to maintain the action, provided the defendant can satisfy the jury that in his conduct he acted in good faith, and without malice, which is much the same thing as applied to this subject. For although the word 'malice,' in popular language, is often used to indicate anger or vindictiveness, in the law it is held to import nothing more than bad faith, and, as applied to the subject of malicious prosecution, the want of sincere belief of the plaintiff's guilt of the crime for which the prosecution was instituted.

"The difference, then, between proof of probable cause and of malice consists chiefly in this: that probable cause has reference to the common standard of human judgment and conduct, and malice regards the mind and judgment of the defendant, in the particular act charged, as a malicious prosecution.

"If the defendant can show that he had probable cause for his conduct, that is, that from such information as would induce a reasonable and prudent man to believe the plaintiff guilty of a crime, he instituted the prosecution, he is not liable, whatever may have been his own personal malice for setting it on foot. Probable cause, in this sense, is a defence to the action, without regard to motive. To this point he must show that he was told or knew of the existence of specific facts, which either would constitute crime, or which upon competent advice he supposed would constitute crime: French *v.* Smith, *supra*.

"But if the party fail in showing such ground of action as would have induced prudent and careful men to have believed in the plaintiff's guilt, and to have instituted the prosecution, he may nevertheless, if he choose, show that in fact he did act upon what he at the time regarded as good cause, either from common report or remote circumstances, such as excited suspicions in his mind to the extent of creating belief of guilt, although short of probable cause.

"If this were not so, then want of probable cause and malice would be equivalent terms, which the cases show they are not. The only distinction which can be supposed to exist in regard to them is, that one is general and the other is particular; one has reference to the common standard, and the other to the mind and motive of the defendant. But how can that mind be reached without receiving proof of every fact which existed, and which may be presumed to have influenced the conduct of the defendant? If the subject were *res integra*, I should certainly regard common repute, both of the plaintiff's general bad character, and of his being guilty of the particular offence, good evidence of probable cause. Upon principle it should so be held. But

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[9] Turner *v.* Ambler, 10 Ad. & El. N. S. 252; {Emerson *v.* Skaggs, 52 Cal. 246; Johns *v.* Marsh, 52 Md. 323; Speck *v.* Judson, 63 Me. 207.}

mately blended together, the judge will be warranted in leaving the question to the jury.[10] Thus, where the question was whether the

in regard to common report of guilt of the particular offence, we are not prepared to say the decisions justify us in regarding it as evidence of probable cause.

"General reputation of guilt, in regard to the particular offence, may be no sufficient ground, in itself alone, for instituting proceedings against one in regard to criminal offences. But in doubtful cases, where the testimony is conflicting, and especially where it is expected to be drawn from those in the confidence or under the influence of the party accused, and where consequently there is difficulty of learning the full extent of testimony which can be obtained, until the witnesses are put upon giving testimony, and where, of course, a preliminary inquiry is often justified partly upon suspicion, and as an experiment, it is no doubt undeniable that the general belief in the guilt of the accused in regard to the particular offence will influence almost any one in deciding upon the propriety of instituting the prosecution. It is therefore, upon principle, I think, admissible as part of the ground constituting probable cause, and is, as we have before said, in point of character equivalent to hearsay, or the declarations of third persons in regard to the guilt of the plaintiff, which seems to be admitted everywhere in this class of cases: French *v.* Smith, *supra;* Bacon *v.* Towne, 6 Cush. 217. In this last case a new trial was awarded, among others, upon the ground that testimony was rejected at the trial, that some third party informed a fourth party of his knowledge of a fact tending to show the plaintiff guilty of the offence for which he was prosecuted, and requested this to be communicated to the defendant, which was done before the prosecution was instituted. This seems to us quite as remote, and rather less reliable, as a ground of instituting criminal proceedings, than that of common reputation and belief.

"But notwithstanding the satisfactory basis upon which the proposition seems to rest, that this evidence of common reputation, in regard to the particular offence, is, upon general principles, admissible, among other things, to show probable cause even, and especially to rebut the inference of malice in the defendant, the decisions do not show that such proof has been received or offered. This may have resulted from two reasons: that the same kind of evidence is obtainable by showing the general bad reputation of the plaintiff at the time of the prosecution; and also, that we do not always distinguish between the class of proof which is admissible in this action, when the issue is in regard to suspicion of guilt and probable cause to believe one guilty, and proof of the very fact of guilt. The general rule undoubtedly is, that general reputation of guilt in regard to a particular offence is not admissible to prove the fact of guilt, and never, unless it be upon the question of damages in regard to reputation in ordinary actions. Hence it is natural to throw this case of actions for malicious prosecution into the general class. These two grounds may account for this kind of proof not having been offered. Prudent counsel do not often desire to offer testimony in one form when its admissibility is questionable, if there is a safe ground upon which it is clearly admissible. It may not, therefore, be important to decide this point here, since it is really involved in the next point. But if it were necessary, we must certainly hold the proof admissible.

"This brings us to the question of the admissibility of evidence of the general reputation of the plaintiff, at the time of instituting the prosecution, in regard to whether he would be easily induced into the commission of any similar offence, for this is the view in which character has any proper bearing in regard to crime. If the offence is one of outrage and violence, whether the accused is commonly reputed a peaceable, quiet, and orderly behaved citizen, or a noisy, boisterous, and quarrelsome one. And if, on the other hand, the offence is one involving fraud, collusion, dishonesty, and secret practices, whether the man is of a fair, frank, honest, and outspoken character, or the contrary. Some of the cases go to exclude all evidence of this kind: Newsam *v.* Carr, 2 Stark. Cases, 69.

"But it seems to us there can be no doubt that to this extent it is admissible upon the strictest principles, and for the purpose of showing probable cause. It is precisely that kind of proof which the accused might show in his own defence, and its absence must weigh more or less against him in regard to the very offence for which the prosecution was instituted. To say then that a prosecutor, in calculating the reason-

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[10] McDonald *v.* Rooke, 2 Bing. N. C. 217; s. c. 2 Scott 359; *ante*, Vol. I. §§ 49, [81*f*.] And see Taylor *v.* Willans, 2 B. & Ad. 45.

defendant believed that there was reasonable and probable cause for preferring the indictment, and the judge left this question to the jury, who found that the defendant preferred the indictment from improper motives, and the judge thereupon held that there was evidence of malice, it was adjudged that this direction was

able and probable grounds of instituting a prosecution for crime, is not to take into account one of the very elements of the defence, and, in one event, of the prosecution also, is simply absurd. It is a proposition admitting of no question whatever, and which could never have been made a question, had its proper application to the subject, in the view just alluded to, been fully appreciated. And the decided cases, notwithstanding some exceptional ones, fully sustain this view. In the elaborate case of Bacon *v.* Towne, 4 Cush. 217, this subject is discussed by Chief Justice Shaw, and the same conclusion arrived at which we here adopt, citing Rodriguez *v.* Tadmire, 2 Esp. 721; Wood *v.* U. S., 6 Pet. 342, 366; 2 Greenl. Ev. § 458. That it is evidence to rebut malice is beyond all doubt, if the party can show that he believed it.

"That the English courts regard the question of malice as a distinct question, and in issue in every case of this kind tried upon the general issue, or which may always be put in issue by the defendant, the cases abundantly prove. In Williams *v.* Taylor, 6 Bing. 183, Tindal, C. J., said: 'What shall amount to such a combination of malice and want of probable cause is so much matter of fact in each individual case as to render it impossible to lay down any general rule upon the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his own desire to injure the accused.' In Mitchell *v.* Jenkins, 5 B. & Ad. 588, Denman, C. J., said: 'It is still incumbent upon the plaintiff to allege and prove malice, *as an independent fact.* They [the jury], however, are to decide, as matter of fact, whether there be malice or not.' Parke, J., said the defendant is excused, if 'acting *bona fide* under a wrong notion of the law, and pursuant to legal advice.' Patterson, J., said, 'and the jury [are to decide] that there is malice.' And in Mitchell *v.* Williams, 11 M. & W. 205, Parke, B., said that, in the absence of reasonable or probable cause, 'that may throw the burden of proof on the defendant that *he believed there was.*'

"The text-writers lay it down as settled practice upon this point, that the question of malice in the defendant's mind in doing the act is a distinct issue in the action; and whatever tends to prove or disprove it is competent to be received: 2 Greenl. Ev. § 453.

"Under the foregoing rule of requiring the distinct finding of the jury upon the question of malice, and granting a new trial, because this question was withdrawn from the consideration of the jury, when there was confessedly no just cause shown for instituting the prosecution, as was done in Mitchell *v.* Jenkins, *supra*, it seems to us impossible to maintain that good faith in the defendant is not a sufficient justification. It is not always equivalent to probable cause; one may act in good faith, and not from any reasonable or probable cause. But how one can be said to act from malice in the lowest sense of the term, and at the same time act in good faith, is certainly not easy of comprehension.

"To illustrate the point more fully. One may have an idiosyncrasy or a delusion, whereby he believes in the advice of his minister or schoolmaster upon legal matters, or in the changes of the moon, or the flight of birds, in regard to secret facts and the hidden purposes of others, or in mesmerism, or spiritualism, and by some of these means may sincerely believe he has detected the guilt of the plaintiff, and the mode of proving it, and in all good faith may have acted upon this fallacy in instituting the prosecution. Here is certainly no *probable cause* for the prosecution. But can the party be found guilty of instituting the prosecution from motives of malice? Certainly not, if words are to have their ordinary signification.

"Any defence in actions of this kind, based upon the want of common comprehension and sagacity in the party offering it, will not be likely often to occur in court. Men do not like to stultify themselves, and for a long time in the history of the common law were not allowed to do so, even to avoid contracts made in a state of mental alienation. But the rule is now otherwise. And although insanity ordinarily is no defence against actions for torts, it must be, we think, in regard to torts of this class, where the liability consists in the motive of the act. If this view be correct, it is competent for the party to show facts which operated upon him, in order to establish good faith, even although they would not have produced the same effect upon all minds, or the majority even."}

right.[11] If the judge, upon the plaintiff's evidence, is of opinion that there was not probable cause for the prosecution, but, upon proof of an additional fact by the defendant, by a witness who is not impeached or contradicted, he is of opinion that there was probable cause, he is not bound to submit the evidence to the jury, but may well nonsuit the plaintiff.[12] But where the prosecution was founded on a charge of menaces of the prosecutor's life, it is not for the judge alone to determine whether the menaces justified the charge, but it is for the jury first to determine whether the defendant believed them; for his disbelief is material to the question of fact, as it goes directly to the motive of the prosecution.[13]

§ 455. **Probable Cause.** What will or will not amount to probable cause will depend on the circumstances of each particular case. If express malice is proved, and the cause of the former proceedings was peculiarly within the knowledge of the defendant, slight evidence on the part of the plaintiff of the absence of probable cause will be deemed sufficient.[1] The discharge of the plaintiff, by the examining magistrate, is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary.[2] But in ordinary cases it will not be sufficient to show that the plaintiff was acquitted of an indictment by reason of the non-appearance of the defendant, who was the prosecutor;[3]

[11] Wren *v.* Heslop, 12 Jur. 600.

[12] Davis *v.* Hardy, 6 B. & C. 225. In considering whether there was probable cause for an arrest, the judge will not regard any expressions of general malice on the part of the defendant: Whalley *v.* Pepper, 7 C. & P. 506.

[13] Venafra *v.* Johnson, 10 Bing. 301; s. c. 6 C. & P. 50; Broad *v.* Ham, 5 Bing. N. C. 722; Foshay *v.* Ferguson, 2 Denio 617. And see Haddrick *v.* Heslop, 12 Ad. & El. N. S. 267.

[1] Incledon *v.* Berry, 1 Campb. 203, n. (*a*); Bull. N. P. 14; Nicholson *v.* Coghill, 4 B. & C. 21.

[2] Secor *v.* Babcock, 2 Johns. 203; Johnston *v.* Marlin, 2 Murphy 248; Bostick *v.* Rutherford, 4 Hawks 83; [Brown *v.* Vittur, 47 La. Ann. 607; Hidy *v.* Murray, 101 Ia. 65; Barhight *v.* Tammany, 158 Pa. 545.] But see *contra*, Stone *v.* Crocker, 24 Pick. 81, 88; Scott *v.* Simpson, 1 Sandf. S. C. 601; [Farwell *v.* Laird, 49 P. 518, Kan. This evidence is not conclusive: Rankin *v.* Crane, 104 Mich. 6.] {See also Israel *v.* Brooks, 23 Ill. 575, where this question is discussed by Breese, J., and it is decidedly held that the discharge of the accused by the examining magistrate is not sufficient evidence of the want of probable cause. See Smith *v.* Ege, 52 Pa. St. 419, *contra*. [Acquittal on a criminal charge is not evidence of want of probable cause: Eastman *v.* Monnaster, 51 P. 1095, Or.] In Ricord *v.* Central Pacific R. R. Co., 15 Nev. 167, it was held that proof of the arrest, committal, and indictment of the plaintiff is *prima facie* proof of probable cause. So, of the fact that the plaintiff was committed by the magistrate on the preliminary hearing: Womack *v.* Circle, 29 Gratt. (Va.) 192. [That this evidence is conclusive see Morrow *v.* Wheeler Mfg. Co., 165 Mass. 349; Holliday *v.* Holliday, 53 P. 42, Cal.; but that it is not see Johnston *v.* Meagher, 47 P. 861, Utah; Flackler *v.* Norak, 94 Ia. 634; Wholing *v.* Wells, 23 S. 447, La. Ann.; Hess *v.* Oregon, etc. Co., 31 Or. 503.] Malicious prosecution may be supported when the prosecution is terminated by *nolle prosequi*, as well as by acquittal (Kelley *v.* Sage, 12 Kan. 109; Brown *v.* Randall, 36 Conn. 56); but see Bacon *v.* Towne, 4 Cush. (Mass.) 417; [*ante*, § 452, n. 6;] or a suit terminated by neglect to enter, Cardinal *v.* Smith, 109 Mass. 158.} [Waiver of preliminary examination is evidence of probable cause: Brady *v.* Stiltner, 40 W. Va. 289; Barber *v.* Scott, 92 Ia. 52. But this evidence is not conclusive: Hess *v.* Oregon Co., 49 P. 803, Or.]

[3] Purcell *v.* Macnamara, 1 Campb. 199; s. c. 9 East 361. [Or of the prosecuting attorney: Wakely *v.* Johnson, 73 N. W. 238, Mich.]

nor, that the defendant, after instituting a prosecution, did not proceed with it;[4] nor, that the grand jury returned the bill "not found."[5] Nor will the mere possession of goods, supposed to have been stolen, afford sufficient probable cause for prosecuting the possessor, if no inquiry was made of him, nor any opportunity given him to explain how his possession was acquired. And, on the other hand, the fact that the party's goods have not been stolen, but were accidentally mislaid, will not alone establish the want of probable cause for prosecuting one as having stolen them.[6] Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting.[7] It must appear that the defendant knew of the existence of those facts which tended to show reasonable and probable cause, because, without knowing them, he could not act upon them; and also that he believed that the facts amounted to the offence which he charged, because, otherwise, he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. And whether he did so believe, or not, is rather a fact to be found by the jury, than an inference of law to be made by the judge, to whom only the legal effect of the facts is properly referred.[8] Yet if this belief, however confident and strong, was induced by the prosecutor's own error, mistake, or negligence,

[4] Wallis *v.* Alpine, 1 Campb. 204, n. And see Roberts *v.* Bayles, 1 Sandf. S. C. 47.

[5] Byne *v.* Moore, 5 Taunt. 187; Freeman *v.* Arkell, 2 B. & C. 494; s. c. 3 D. & R. 669; [Brady *v.* Stiltner, 40 W. Va. 289.] But the prosecutor may still be liable for slander: Bull. N. P. 13.

[6] Swain *v.* Stafford, 4 Iredell 392, 398.

[7] James *v.* Phelps, 11 Ad. & El. 489; Delegal *v.* Highley, 3 Bing. N. C. 950; Seibert *v.* Price, 5 Watts & Serg. 438; Swain *v.* Stafford, 4 Iredell 389; Plummer *v.* Gheen, 3 Hawks 66; [Goldstein *v.* Foulkes, 19 R. I. 291.] Though the indictment were for an assault and battery, yet if there were no excess of force beyond what was necessary for the occasion, and the defendant preferred the indictment with a consciousness that he was in the wrong, the prosecution was without probable cause: Hinton *v.* Heather, 14 M. & W. 131. {To show probable cause and rebut the allegation of malice, the defendant may prove that a certain person communicated to another, with a request that the latter would make it known to the defendant, the fact that the former saw the plaintiff do the criminal act of which he was accused, and that this information was communicated to the defendant before the complaint against the plaintiff was made: Bacon *v.* Towne, 4 Cush. (Mass.) 217. So he may prove for this purpose, by the magistrate before whom the prosecution was instituted, what the testimony before him was on the part of the government; and it is not necessary for this purpose that the witnesses by whom the testimony was given, or their depositions, should be produced; and if produced, and the witnesses are not able to recollect what their testimony was, it may nevertheless be proved by the magistrate: ibid.; Goodrich *v.* Warner, 21 Conn. 432; Gardner *v.* Randolph, 18 Ala. 685. But see Larrence *v.* Lanning, 2 Carter (Ind.) 256. The defendant, to protect himself by advice of counsel, must have fully laid before his adviser all the facts which he knows and all the facts which he believes to be true, and can be established by evidence: [Parker *v.* Parker, 102 Ia. 500.] If he is then advised by counsel that the facts constitute a legal cause of action, and he acts on this advice in good faith, he is not liable to an action for malicious prosecution: Donnelly *v.* Daggett, 145 Mass. 314. [See *post*, § 459.] Upon the question of probable cause, evidence that the defendant had the opinion of experts in his favor, in a case which involved facts calling for the opinion of experts, is admissible: Allen *v.* Codman, 139 Mass. 137.}

[8] Turner *v.* Ambler, 11 Jur. 346, per Ld. Denman, C. J. [See Vol. I. § 81 *f*.]

without any occasion for suspicion given by the party prosecuted, it will not amount to probable cause.[9]

§ 456. **Damages.** (3) As to the *damages*. Whether the plaintiff has been prosecuted by indictment or by civil proceedings, the principle of awarding damages is the same, and he is entitled to indemnity for the peril occasioned to him in regard to his life or liberty, for the injury to his reputation,[1] his feelings,[2] and his person, and for all the expenses[3] to which he necessarily has been subjected.[4] And if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only.[5] Where the prosecution was by suit at common law, no damages will be given for the ordinary taxable costs, if they were recovered in that action; but if there was a malicious arrest,[6] or the suit was malicious and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defence, are to be taken into the estimate of damages.[7] Whatever was admissible in evidence to defeat the original malicious suit is admissible for the plaintiff in this action to maintain his right to recover for the injury sustained.[8]

§ 457. **Defences.** The *defence* of this action usually consists in disproving the charge of malice, or in showing the existence of probable cause for the prosecution. And, in proof of probable cause for a criminal prosecution, it seems that the testimony of the defendant himself, to facts peculiarly within his own knowledge,

[9] Merriam *v.* Mitchell, 1 Shepl. 439.

[1] [Minneapolis, etc. Co. *v.* Regier, 51 Neb. 402.]

[2] [Davis *v.* Seeley, 91 Ia. 583.]

[3] [Kolka *v.* Jones, 6 N. D. 461.]

[4] Bull. N. P. 13, 14; Thompson *v.* Mussey, 3 Greenl. 305.

[5] Tripp *v.* Thomas, 3 B. & C. 427. [Proof of actual damage is unnecessary to sustain an action in admiralty for wrongful arrest of a ship: The Walter D. Wallet, 1893, P. 202.]

[6] [The plaintiff's voluntary surrender when arrested as defendant in the former suit may be shown in mitigation of damages: Chatfield *v.* Bunnell, 69 Conn. 511.]

[7] Sandback *v.* Thomas, 1 Stark. 306; Gould *v.* Barratt, 2 M. & Rob. 171. And see Doe *v.* Davis, 1 Esp. 358; Nowell *v.* Roake, 7 B. & C. 404; [Wheeler *v.* Hanson, 161 Mass. 370; Killebrew *v.* Carlisle, 97 Ala. 535; Mitchell *v.* Davies, 51 Minn. 168.] In Sinclair *v.* Eldred, 4 Taunt. 7, it was decided that the extra costs of defence could not be recovered, unless there had been a malicious arrest of the person; and Best, C. J., in Webber *v.* Nicholas, Ry. & M. 417, reluctantly felt himself bound by this decision; but said he thought Lord Ellenborough's opinion, in Sandback *v.* Thomas, the correct one.

[8] Hadden *v.* Mills, 4 C. & P. 486. [Damages for maliciously suing may be recovered, notwithstanding a bond is given to pay all damages arising out of it; and these will include injury to business credit and reputation, counsel fees, and expenses incident to the defence: Lawrence *v.* Hagerman, 56 Ill. 68; [Wheeler *v.* Hanson, 161 Mass. 370; Slater *v.* Kimbro, 91 Ga. 217.] The action may be maintained though the defendant was dismissed with costs, and neither the person nor property of the plaintiff disturbed: Marbourg *v.* Smith, 11 Kan. 554; Classon *v.* Staple, 42 Vt. 209; Pangborn *v.* Ball, 1 Wend. (N. Y.) 345; Whipple *v.* Fuller, 11 Conn. 581. Recovery of damages in an action for false imprisonment is no bar to an action for malicious prosecution: Guest *v.* Warren, 23 L. J. Ex. 121. Punitive damages may be given when there is proof of express malice: Cooper *v.* Utterback, 37 Md. 282; *ante*, § 275.]

given upon the trial, *diverso intuitu*, is admissible in the action against him for causing that prosecution.[1] But the testimony of other witnesses given on that occasion cannot be proved but by the witnesses themselves, or, if they are dead, by the usual secondary evidence.[2] Probable cause may also be proved by evidence that the acquittal of the plaintiff, in the suit or prosecution against him, was the result of deliberation by the jury, the testimony having been sufficient to induce them to pause;[3] or, that he had been convicted of the offence before a justice of the peace, who had jurisdiction of the case, though he was afterwards acquitted on an appeal from the sentence.[4] If the original suit was for the recovery of money claimed as a debt, and the defendant, submitting to the demand, obtains a suppression of the process by the payment of part of the sum demanded, this, under ordinary circumstances, is a conclusive admission of the existence of a probable cause for the suit.[5]

§ 458. **Character.** Ordinarily, the character of the plaintiff is not in issue in this action. But in one case, where the charge against him was for larceny, the defendant was allowed, in addition to the circumstances of suspicion, which were sufficient to justify his taking the plaintiff into custody, to prove that he was a man of notoriously bad character.[1] Circumstances

[1] See *ante*, Vol. I. § 352; Bull. N. P. 14. Or, the evidence of his wife: Johnson *v.* Browning, 6 Mod. 216. And see Burlingame *v.* Burlingame, 6 Cowen 141; Jackson *v.* Bull, 2 M. & Rob. 176; Scott *v.* Wilson, Cooke 315; Moodey *v.* Pender, 2 Hayw. 29; Guerrant *v.* Tinder, Gilmer, 36; Watt *v.* Greenlee, 2 Murphy 246.

[2] Burt *v.* Place, 4 Wend. 591. {But see *contra*, Bacon *v.* Towne, 4 Cush. (Mass.) 217, where it is held that what the witnesses said may be proved by the magistrate.}

[3] Smith *v.* Macdonald, 3 Esp. 7; Grant *v.* Duel, 3 Rob. (La.) 17; [Morrow *v.* Wheeler Mfg. Co., 165 Mass. 349.]

[4] Whitney *v.* Peckham, 15 Mass. 243; Griffis *v.* Sellers, 2 Dev. & Bat. 492; Com. *v.* Davis, 11 Pick. 433, 438; {Ulmer *v.* Leland, 1 Greenl. (Me.) 135; Reynolds *v.* Kennedy, 1 Wils. 232.} Such conviction is conclusive evidence of probable cause, unless it was obtained chiefly or wholly by the *false* testimony of the defendant: Witham *v.* Gowan, 2 Shepl. 362; Payson *v.* Caswell, 9 Shepl. 212. {As to the prosecution and acquittal before a magistrate who has no jurisdiction, see *ante*, § 449. A verdict of guilty in a criminal prosecution, founded upon correct legal instructions, is conclusive evidence of probable cause in a subsequent action for malicious prosecution, although such verdict was set aside for newly discovered evidence, and a *nolle prosequi* finally entered: Parker *v.* Farley, 10 Cush. (Mass.) 279; Parker *v.* Huntington, 2 Gray (Mass.) 125.}

[5] Savage *v.* Brewer, 16 Pick. 453.

[1] Rodriguez *v.* Tadmire, 2 Esp. 721. And see 12 Rep. 92; 2 Inst. 51, 52; 2 Phil. Evid. 258; {Bacon *v.* Towne, 4 Cush. 240; Martin *v.* Hardesty, 27 Ala. 458.} In Newsam *v.* Carr, 2 Stark. 69, upon the question being put to one of the witnesses, whether he had not searched the plaintiff's house on a former occasion, and whether he was not a person of suspicious character, it was objected to; but it is said that "Wood, B., overruled the objection;" though the observations attributed to him by the reporter seem to show that in his opinion the question was improper. {In Blizzard *v.* Hays, 46 Ind. 166, evidence of the plaintiff's good character, and that it was known to the defendant, was admitted on the question of probable cause. Cf. Palmer *v.* Richardson, 70 Ill. 544; Israel *v.* Brooks, 23 Ill. 575; Wade *v.* Walden, ib. 425. In Bays *v.* Herring, 51 Iowa 286, it was doubted whether evidence of character was admissible. Evidence of the commission by the plaintiff of other crimes, different from that for which the arrest was made, is inadmissible: Patterson *v.* Garlock, 39 Mich. 447; Sutton *v.* McConnell, 45 Wis. 269; Tillotson *v.* Warner, 3 Gray (Mass.) 574. So, evidence of the plaintiff's bad reputation, offered to show probable cause for an arrest: Eschbach *v.* Hurtt, 47 Md. 61. But when the general

of suspicion are also admissible in evidence, in mitigation of damages.[2]

§ 459. **Advice of Counsel.** How far the *advice of counsel* may go to establish the fact of probable cause for the prosecution, is a point upon which there has been some diversity of opinion. It is agreed, that if a full and correct statement of the case has been submitted to legal counsel, the advice thereupon given furnishes sufficient probable cause for proceeding accordingly.[1] But whether the party's omission to state to his counsel a fact, well known, but honestly supposed not to be material, or his omission, through ignorance, to state a material fact which actually existed, will render the advice of counsel unavailable to him as evidence of probable cause, does not appear to have been expressly decided.[2] The rule, however, as recognized in an early American case, seems broad enough to protect any party acting in good faith and without gross negligence. For it is laid down, that if the party "did *not withhold* any information from his counsel, *with the intent* to pro-

report in the community was that the plaintiff had committed the crime, evidence of this report, *if it was known to the defendant* when he preferred the charge, is admissible on the question of probable cause: Pullen *v.* Glidden, 68 Me. 559. It has also been held, however, that it is not competent for the defendant, for the purpose of proving probable cause, to show that the accused (*i. e.*, the plaintiff in the action for malicious prosecution) was generally suspected, or generally believed guilty, of the crime charged: Brainerd *v.* Brackett, 33 Me. 580. The belief of the defendant and the neighbors generally, that the plaintiff had no title to the property for the taking of which he was arrested, rebuts the inference of malice, though the belief was based upon an error in the law: Cecil *v.* Clarke, 17 Md. 508. The declarations of one who assisted the plaintiff in the taking, made at the taking, and tending to persuade defendant that plaintiff acted without right, are competent evidence. Ib.} [See Vol. I. §§ 14 *d*, 14 *h*, 14 *p*.]

[2] Hitchcock *v.* North, 5 Rob. (La.) 328.

[1] Hewlett *v.* Cruchley, 5 Taunt. 277. And see Snow *v.* Allen, 1 Stark. 502; Ravenga *v.* McIntosh, 2 B. & C. 693. {Smith *v.* Davis, 3 Mont. 109; Wicker *v.* Hotchkiss, 62 Ill. 107; Walter *v.* Sample, 25 Pa. St. 275; Laird *v.* Davis, 17 Ala. 27.} [Fletcher *v.* Chicago, etc. R., 109 Mich. 363; Bell *v.* Atlantic, etc. R., 58 N. J. L. 227; Le Clear *v.* Perkins, 103 Mich. 131; Womack *v.* Fudicker, 47 La. Ann. 33; Atchison, etc. R. *v.* Brown, 57 Kan. 785; Goldstein *v.* Foulkes, 19 R. I. 291; McClafferty *v.* Philp, 151 Pa. 86. *Contra*, Smith *v.* Eastern B'ld'g Ass'n, 116 N. C. 73. This holds good though the defendant is himself an able lawyer: Terre Haute, etc. R. *v.* Mason, 46 N. E. 332, Ind. The advice of a magistrate or commissioner, however, is insufficient: (Trnax *v.* Pennsylvania R., 58 N. J. L. 218; Lueck *v.* Heisler, 87 Wis. 644; Beihofer *v.* Loeffer, 159 Pa. 374; Finn *v.* Frink, 84 Me. 261), though the magistrate be an attorney (Mack *v.* Hastings, 101 Ala. 465). But see Hahn *v.* Schmidt, 64 Cal. 284; Cole *v.* Andrews, 76 N. W. 962, Minn.] {Where counsel is called to testify what advice he gave, he may be asked upon cross-examination what facts were communicated to him upon which his advice was given: Cooper *v.* Utterback, 37 Md. 282.} [The burden of proof is in the defendant when he sets up advice of counsel as a defence: Wuest *v.* American Tobacco Co., 73 N. W. 103, S. D.]

[2] In Thompson *v.* Mussey, 3 Greenl. 305, 310, the defendant had prosecuted the plaintiff for misconduct as an assessor, in not giving public notice, *in the warrant* calling a town meeting, of the time and place of the meeting of the assessors, to receive evidence of the qualifications of voters whose names were not on the public list. The county attorney had advised the defendant that the notice was required by law to be inserted in the warrant; but in this case it was contained in a separate paper, posted up by the side of the warrant; but this fact, though known to the defendant, he did not state to the grand jury. And the court seemed to think, that if this omission had not been intentional and fraudulent, the opinion of the county attorney would have furnished probable cause for the prosecution.

cure an opinion that might operate to shelter and protect him against a suit, but, on the contrary, if he, being doubtful of his legal rights, consulted learned counsel with a view to ascertain them, and afterwards pursued the course pointed out by his legal adviser, he is not liable to this action, notwithstanding his counsel may have mistaken the law." [3]

[3] Stone *v.* Swift, 4 Pick. 393. In this case, however, no question was made whether any material fact had been omitted. See acc. Hall *v.* Suydam, 6 Barb. S. C. 83; Thompson *v.* Mussey, 3 Greenl. 310; [Hicks *v.* Brantley, 29 S. E. 459, Ga.; Mesker *v.* McCourt, 44 S. W. 975, Ky.] See also Blunt *v.* Little, 3 Mason 102; Com. *v.* Bradford, 9 Met. 268. If any material fact were culpably withheld from the counsel, or if a contrary opinion were given by another of his legal advisers, or if the prosecution were malicious, it is held that the advice of counsel will not be a sufficient defence: Stevens *v.* Fassett, 14 Shepl. 266; [Peterson *v.* Reisdorph, 49 Neb. 529; Billingsley *v.* Maas, 93 Wis. 176; Willard *v.* Pettitt, 153 Ill. 663; Thurber *v.* Eastern Building Ass'n, 21 S. E. 193, 116 N. C. 75; Flora *v.* Russell, 138 Ind. 153; Wuest *v.* American Tobacco Co., 73 N. W. 903, S. D. Lack of diligence in ascertaining the facts is immaterial: Dunlap *v.* New Zealand Ins. Co., 109 Cal. 365. The defendant must act in good faith on the advice: O'Neal *v.* McKinna, 22 S. 905, Ala.] {If the advice of counsel was given maliciously and not in good faith (Sherburne *v.* Rodman, 51 Wis. 474; Hamilton *v.* Smith, 39 Mich. 222); or if he is interested in the subject-matter of the suit or prosecution (White *v.* Carr, 71 Me. 555), — his advice is no defence. If the defendant tries to consult his attorney before causing an arrest, and fails to find him, this evidence is competent on the question of malice: Hopkins *v.* McGillicuddy, 69 Me. 273.}

MARRIAGE.

§ 460. **Contract, how made.** Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law.[1] If the contract is made *per verba de præsenti*, though it is not consummated by cohabitation, or, if it be made *per verba de futuro*, and to be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary.[2] And though in most, if not all, the United States there are statutes regulating the celebration of the marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.[3] A marriage celebrated in any country according to its own

[1] {By the common law, both in England and in this country, the age of consent is fixed at twelve in females and fourteen in males. Contracts of marriage between infants, being both of the age of consent, if executed, are as binding as if made by adults: Co. Lit. 79 *b*; Reeve's Dom. Rel. 236, 237; 20 Am. Jur. 275; 2 Kent Comm. (6th ed.) 78; Pool *v.* Pratt, 1 Chip. 254; Governor *v.* Rector, 10 Humph. 61. This rule, originally engrafted into the common from the civil law (1 Bl. Comm. 436; Macph. on Inf. 168, 169), is undoubtedly an exception to the general principles regulating the contracts of infants, and might at first seem to disregard the protection and restraint with which the law seeks to surround and guard the inexperience and imprudence of infancy. But in regulating the intercourse of the sexes, by giving its highest sanctions to the contract of marriage, and rendering it, as far as possible, inviolable, the law looks beyond the welfare of the individual and a class, to the general interests of society; and seeks, in the exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the manifold evils which would result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, seduction, and illegitimacy, the common law has fixed that period in life when the sexual passions are usually first developed, as the one when infants are deemed to be of the age of consent, and capable of entering into the contract of marriage. By Bigelow, J., Parton *v.* Hervey, 1 Gray (Mass.) 121; Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Governor *v.* Rector, 10 Humph. (Tenn.) 57; Godwin *v.* Thompson, 2 Greene (Iowa) 329. See Shafher *v.* State, 20 Ohio 1.}

[2] 2 Kent Comm. p. 87; Fenton *v.* Reed, 4 Johns. 52; Jackson *v.* Winne, 7 Wend. 47; {Hallet *v.* Collins, 10 How. (U. S.) 174; Clayton *v.* Wardell, 4 Comst. (N. Y.) 230; Graham *v.* Bennett, 2 Cal. 503; Bishop on Mar. & Div. 5th ed. §§ 246–268.}

[3] 2 Kent Comm. pp. 90, 91; Reeve's Dom. Rel. pp. 196, 200, 290; Milford *v.* Worcester, 7 Mass. 55, 56; Londonderry *v.* Chester, 2 N. H. 268; Cheseldine *v.* Brewer, 1 Har. & McH. 152; Hantz *v.* Sealey, 6 Binn. 405. It has more recently been held in England, by Dr. Lushington, that prohibitory words in a *marriage* act will not authorize an inference of nullity of the marriage, unless the nullity was declared in the act: Catterall *v.* Sweetman, 1 Rob. Eccl. 304. In a subsequent cause between the same

laws is recognized and valid in every other country whose laws or

persons, it appeared that they had been married in New South Wales, by a minister of the Scotch Presbyterian Church, according to the forms of the statute provided for members of that church alone, in that colony; but that neither of the parties belonged to that church, and so were not within the terms of the statute. But the same learned judge held that the marriage, nevertheless, was sufficiently valid, as between the parties, to found thereon a decree of divorce for a violation of the marriage vow. His observations on this delicate question were as follows: "The question which I have to decide on the present occasion is, whether the marriage which has taken place between these parties is a sufficient marriage to enable the court to pronounce a sentence of separation by reason of adultery, which it is admitted on all hands has been committed by the wife. It is true, that the allegation given in the case commences by pleading the local act of the legislature of New South Wales, from which it would appear to follow, that it was intended to plead that the marriage was held in pursuance of the local act. Whether that is so or not, if the court is satisfied that the marriage is sufficiently valid to enable it to pronounce for a separation, it will not be necessary to enter into a consideration of this act. I shall not give my judgment at length, for this obvious reason: when the case came for my consideration in July, 1845 (9 Jur. 951; 1 Rob. 304), I then stated, after great consideration, all the reasons that occurred to me to bring my mind to the conclusion that the marriage in question was not void. Now, if I could not pronounce that the marriage in question was void, it seems to me that I must pronounce it valid for certain purposes; and if valid for certain purposes, valid for the husband or the wife, as the case might be, to obtain a separation for a violation of the marriage vow. How does the case stand? New South Wales is a colony of Great Britain, amenable, according to all the authorities, to all those acts of Parliament, and all that law, which belonged to the mother-country, and which were considered to be applicable to a new colony. No doubt very great difficulties have from time to time arisen, both as to what common law and what acts of Parliament should be imported into a colony. But it is unnecessary to discuss this question, because it has been discussed over and over again by more able judges than myself. And there can be no doubt that the ancient law of Great Britain must have been carried to this colony, because Lord Hardwicke's Act, being expressly confined to England and Wales, could not be imported to a colony; and consequently, the law that existed in New South Wales was the original law of England, as it existed before Lord Hardwicke's Act. Upon that has been engrafted, under the authority of an act of Parliament, this act of the local legislature. I have already determined, and I shall not repeat my reasons, that, whatever may be the effect of the local act, it does not render the marriage invalid; then the simple question is, if the local act does not render it invalid, whether, according to the ancient law of England, a marriage before a Presbyterian minister is valid, and valid only to the extent upon which I am required to pronounce an opinion, namely, to pronounce a separation *a mensa et thoro*. When I consider how much that was discussed in the celebrated case of The Queen *v.* Millis (10 Cl. & Fin. 534), when all the authorities that could be adduced were brought to bear in the opinions of the learned judges on that occasion, I am justified in saying this: there was nothing fell from any one of the judges in the House of Lords — I am not speaking of the opinion of the common-law judges, but of the law lords — which in any way intimated that the marriage would not be sufficient to enable the court to proceed to a separation *a mensa et thoro*. I am not disposed to make the decision of The Queen *v.* Millis any authority further than it goes, and for two reasons: first, the law lords were divided, and it was only in consequence of the form in which the case came before them, that it could be considered a judgment at all. In the next place, and for a reason equally strong, that, throughout the whole of our colonies, at various times and various places, if I were to hold that the presence of a priest in the orders of the Church of England was necessary to the validity of a marriage, I should be going the length of depriving thousands of married couples of a right to resort to this court for such benefit as it can give in cases of adultery or cruelty. It is notorious that, till within a few years, there were no chaplains belonging to the East India Company; and if I were to adopt another principle, the result would be this: that, as to all those marriages had by the collectors in the service of the East India Company, and had by judges when no priest was procured, I should be entering into this disquisition, — a disquisition impossible to follow, — namely, whether there was a marriage *ex necessitate*, because no clergyman was to be found. Now, until I am controlled by a superior authority, I unquestionably, in this case, and in all others, wherever I find, in any of the colonies, no local law prohibiting a marriage of this description, and no act of Parliament reaches it, — in all these cases

policy it may not contravene;[4] but the converse of this rule is not universally true.[5]

I shall look at the marriage according to the ancient canon law; and where it has been had, not before a clergyman, but consent is had *de facto*, I shall hold that sufficient to enable the court to pronounce a decree, when it is necessary to pronounce one. I have no right to postpone my decision and give a more deliberate judgment; because I do not know that any time I could give would throw light on the question beyond what is to be collected from former decisions; and I am certain that no examination into the cases will induce me to change my opinion, until I am overruled by an authority superior to mine." See Catterall *v.* Catterall, 11 Jur. 914; {Parton *v.* Hervey, 1 Gray (Mass.) 119; [State *v.* Zichfeld, 23 Nev. 304; Bailey *v.* State, 55 N. W. 241, Nev.; Simon *v.* State, 31 Tex. Cr. R. 186; Connors *v.* Connors, 5 Wyo. 433; Poole *v.* People, 52 P. 1025, Col. *Contra*, McLaughlin's Estate, 4 Wash. 570; Morrill *v.* Palmer, 68 Vt. 1; Robinson *v.* Redd, 43 S. W. 435, Ky.; Norman *v.* Norman, 54 P. 143, Cal.] And in a recent case in New Jersey, it was held that a marriage which is valid according to the laws of the place where the marriage takes place is valid everywhere, except in cases involving a breach of the generally recognized laws of marriage, or in cases contravening express prohibitory and invalidating words of the statute. This is true, even where the parties, being residents of one State, for the sake of evading the law, go into another State where their marriage is valid, and there are married and immediately return to the place of their residence: Smith *v.* Smith, 52 N. J. L. 213; [Com. *v.* Graham, 31 N. E. 106, Mass.; State *v.* Shattuck, 69 Vt. 403. *Contra*, Stubb's Estate, 183 Pa. 625; and now in Massachusetts by statute: Whippen *v.* Whippen, 51 N. E. 174, Mass.] A marriage taking place after one of the parties has obtained a divorce nisi, but before the entry of the decree absolute, is void: Cook *v.* Cook, 144 Mass. 163; Duncan *v.* Cannan, 23 Eng. Law & Eq. 288. The presumption is very cogent in favor of the validity of a marriage which has been celebrated *de facto:* Piers *v.* Piers, 2 H. of L. Cas. 331; Sechel *v.* Lambert, 15 C. B. N. S. 781.}

[4] Scrimshire *v.* Scrimshire, 2 Hagg. Consist. 407, 419; 2 Kent Comm. 91, 92; [Jackson *v.* Jackson, 82 Md. 17.] The exceptions to the generality of the rule, that the *lex loci* governs the contract of marriage, are of three classes: (1) In cases of incest and polygamy; (2) When prohibited by positive law; (3) When celebrated in desert or barbarous countries, according to the law of the domicile: Story Confl. Laws, §§ 114–119; [*Re* Lum Lin Ying, 59 F. 682;] {Bishop on Mar. & Div. 5th ed. §§ 353–400. A foreign marriage is *prima facie* established by proof of the ceremony, the certificates of which may be put in evidence, without first proving the foreign law on the subject. There is a common law of marriage, which prevails in all Christian countries: Hutchins *v.* Kimmel, 31 Mich. 126.}

[5] Per Ld. Stowell, 2 Hagg. Consist. 390, 391; Story Confl. Laws, §§ 119–121; {Bishop on Mar. & Div. 5th ed. §§ 353–400.} If parties go abroad for the purpose of contracting in a foreign State a marriage which could not have been contracted in their own country, but is not in violation of good morals, it seems, that it is to be held valid, if not made invalid by express statute: Medway *v.* Needham, 16 Mass. 157; Putnam *v.* Putnam, 8 Pick. 433; Bull. N. P. 113, 114; Phillips *v.* Hunter, 2 H. Bl. 412; Story Confl. Laws, §§ 123 *a*, 123 *b*, 124. {A marriage in Massachusetts by a woman previously married in another State, and there divorced for acts of hers which would not be a cause of divorce in Massachusetts, is valid in Massachusetts, though contracted while her former husband is still living: Clark *v.* Clark, 8 Cush. (Mass.) 385. In giving the opinion of the court, Shaw, C. J., said: "Marriage originates in a contract; and whether the contract be valid or not, depends, *prima facie*, upon the law of the place where the contract is entered into. But marriage, where lawfully contracted and valid, establishes a relation between the parties, universally recognized in all civilized and Christian communities, from which certain rights, duties, and obligations are derived; these rights and duties attach to the persons of the parties, as husband and wife, and follow them when they change their domicile from one jurisdiction to another. Among these rights is that of seeking the dissolution of the conjugal relation in the manner and for the causes allowed by the law of the place where they have *bona fide* and without any sinister purpose taken up their domicile; and the tribunals of such government, acting in conformity to its laws, have jurisdiction of the persons of the parties and of the subject-matter of the complaint, which is their conjugal relation, and their duties in it; and therefore a decree of divorce there pronounced, in due course of law, must be regarded as valid to effect the dissolution of the bond of matrimony everywhere: Barber *v.* Root, 10 Mass. 260." See True *v.* Ranney, 21 N. H. 52; Harrison *v.* Harrison, 20 Ala. 629; Com. *v.* Hunt, 4 Cush. (Mass.) 50.}

§ 461. **Proof of Marriage.** The *proof of marriage*, as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery, and in actions for criminal conversation;[1] it being necessary, in such cases, to prove a marriage valid in all respects. It is not sufficient to prove that the parties went through a religious ceremony purporting to be a marriage, unless it is also shown that it was recognized by the law of the country as the form of contracting a valid marriage;[2] but in all other cases any other satisfactory evidence is sufficient. The affirmative sentence of a court having jurisdiction of the question of marriage or no marriage is conclusive evidence of the marriage.[3] Other direct proof is made either by the testimony of a witness present at the celebration, or of either of the parties themselves, where they are competent; or by an examined or certified copy of the register of the marriage, where such registration is required by law, with proof of the identity of the parties.[4] It is not necessary, in other cases, to prove any license, publication of banns, or compliance with any other statute formality, unless the statute expressly requires it as preliminary evidence.[5]

§ 462. **Same Subject.** Marriage may also be proved, in civil cases, other than actions for seduction, by *reputation, declarations, and conduct* of the parties, and other circumstances usually accompanying that relation. The nature and admissibility of the evi-

[1] Morris *v.* Miller, 4 Burr. 2059; Leader *v.* Barry, 1 Esp. 353; Com. *v.* Norcross, 9 Mass. 492; Com. *v.* Littlejohn, 15 id. 163; People *v.* Humphrey, 7 Johns. 314; {Hutchins *v.* Kimmel, 31 Mich. 126. See *ante*, § 49.} On the trial of an indictment for polygamy or adultery, the prisoner's deliberate declaration that he was married to the alleged wife is admissible as sufficient evidence of the marriage: R. *v.* Upton, 1 C. & Kir. 165, n. Especially if the marriage was in another country: R. *v.* Simmonsto, ib. 164; R. *v.* Newton, 2 M. & Rob. 503; Cayford's Case, 7 Greenl. 57; Truman's Case, 1 East P. C. 470. So in an action for criminal conversation: Rigg *v.* Curgenven, 2 Wils. 399, citing Morris *v.* Miller, 4 Burr. 2057; Forney *v.* Hallacher, 8 S. & R. 159; Alsleger *v.* Erb, 2 Am. Law J. N. S. 49. But see *contra*, People *v.* Miller, 7 Johns. 314; State *v.* Roswell, 6 Conn. 446. {See also *post*, §§ 464, 579, note.} In Massachusetts, in all cases where the fact of marriage is required or offered to be proven, evidence of general repute, or of cohabitation as married persons, and any circumstantial or presumptive evidence from which the fact may be inferred, shall be competent evidence for consideration. Stat. 1840, c. 84; Stat. 1841, c. 20; Knower *v.* Wesson, 13 Met. 143; {Pub. Stat. c. 145, § 31; Meyers *v.* Pope, 110 Mass. 314.}

[2] Catherwood *v.* Caslon, 13 M. & W. 261; State *v.* Hodgskins, 1 Applet. 155.

[3] *Ante*, Vol. I. §§ 484, 493, 544, 545.

[4] *Ante*, Vol. I. §§ 484, 493, 544, 545. See, as to proof by the parties themselves, Cowp. 593; Lomax *v.* Lomax, Cas. temp. Hardw. 380; Hubback, Evidence of Succession, pp. 241, 242, 244; Standen *v.* Standen, Peake's Cas. 32; {Maxwell *v.* Chapman, 8 Barb. (N. Y.) 579. Identity of name is evidence of identity of persons, in proving a marriage by certificate: Hutchins *v.* Kimmel, 31 Mich. 126. The rule of law, *Omnia rite acta præsumuntur*, applies with particular force to cases of presumption in favor of marriage and legitimacy: Harrison *v.* Southampton, 21 Eng. Law & Eq. 343; Ward *v.* Dulaney, 23 Miss. 410.}

[5] Hubback, Evid. of Succession, p. 239.

dence of *reputation* has already been considered in the preceding volume.[1] In regard to the language and *conduct of the parties,* it is competent to show their conversation and letters, addressing each other as man and wife;[2] their elopement as lovers, and subsequent return as married persons;[3] their appearing in respectable society, and being there received as man and wife,[4] their observance of the customs and usages of society peculiar to the entry upon or subsistence of that relation;[5] the assumption by the woman of the name of the man, the wedding-ring, the apparel (where such difference exists) appropriate to married women, and any other conduct, *sciente, vidente, et patiente viro,* indicative of her marriage to him.[6] Their cohabitation, also, as man and wife, is presumed to be lawful until the contrary appears.[7] The like inference is drawn from the baptism,

[1] *Ante,* Vol. I. §§ 103, 104, 106, 107, 131–134, [140c]; {Camden *v.* Belgrade, 78 Me. 209; Lyle *v.* Ellwood, L. R. 19 Eq. Ca. 106; Murray *v.* Milner, L. R. 12 Ch. Div. 845; Dunbarton *v.* Franklin, 19 N. H. 257; State *v.* Winkley, 14 id. 480; Clayton *v.* Wardell, 4 Comst. (N. Y.) 230; Hicks *v.* Cochran, 4 Edw. Ch. (N. Y.) 107; Thorndell *v.* Morrison, 25 Pa. St. 326; Copes *v.* Pearce, 7 Gill (Md.) 247; Martin *v.* Martin, 22 Ala. 86; Harman *v.* Harman, 16 Ill. 85; Trimble *v.* Trimble, 2 Carter (Ind.) 76; Northfield *v.* Vershire, 33 Vt. 110.} It has been stated, in a work of distinguished merit (Hubback, Evid. of Succession, p. 244), that reputation of marriage, unlike that of other matters of pedigree, may proceed from persons who are not members of the family. But in the principal case cited to this point (Evans *v.* Morgan, 2 C. & Jer. 453), the chief reason for admitting the sufficiency of such evidence, after verdict, was. that the witness was not cross-examined, and that the defendant did not put the want of proof of the marriage to the judge as a ground of nonsuit, so that the plaintiff might have had an opportunity of supplying the defect by other evidence. See Johnson *v.* Lawson, 9 Moore 187; s. c. 2 Bing. 88; Roe *v.* Gore, 9 Moore 187, n.; Donelly *v.* Donelly, 8 B. Monr. 113; Stevenson *v.* McReary, 12 S. & M. 9; Taylor *v.* Robinson, 16 Shepl. 323. {In Hoggan *v.* Craigie, 2 Macl. & Rob. 942, 965, Ld. Cottenham says: "It is not necessary to prove the contract itself [of marriage]. It is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle, the acknowledgment of the parties, their conduct toward each other, and the repute consequent upon it, may be sufficient to prove a marriage." See Goodman *v.* Goodman, 28 L. J. Ch. 745. So, Ld. Cranworth, in the Breadalbane Case, L. R. 1 H. L. (Sc.) 182, p. 199: "By the law of England, and I presume of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbors, there is a *prima facie* presumption that they are and have been what they profess to be."}

[2] Alfray *v.* Alfray, 2 Phillim. Eccl. 547; {Gaines *v.* Relf, 12 How. (U. S.) 472. In Walmsley *v.* Robinson, 63 Ill. 41, the instruction that the jury might find a promise to marry, "first, from the conduct of the parties; second, from the circumstances, which usually attend an engagement to marry, as visiting, the understanding of friends and relatives, preparations for marriage, and the reception of the defendant by the family of the plaintiff as a suitor," was held to be too broad, and to give the jury too much latitude. "It by no means follows," say the court, "because a gentleman is the suitor of a lady, and visits her frequently, that a marriage engagement exists between them." If the promise is conditional, it must be alleged and proved, with its conditions: Hook *v.* George, 108 Mass. 324.}

[3] Cooke *v.* Lloyd, Peake's Cas. App. lxxiv.

[4] Hubback, Evid. of Succession, p. 247.

[5] Eaton *v.* Bright, 2 Phillim. Eccl. 85; Fownes *v.* Ettricke, ib. 257.

[6] Hubback, Evid. of Succession, pp. 247, 248. {Evidence that a woman occupies the same bed with defendant in his tenement, and was seen getting dinner and performing other household duties there, in his absence, is competent to prove her to be his wife: Com. *v.* Hurley, 14 Gray (Mass.) 411.}

[7] [See Vol. I. §§ 27, 207.] {If the cohabitation is shown to have been illicit in its beginning, it seems that no presumption of marriage arises from its subsequent con-

acknowledgment, and treatment of their children by them as legitimate;[8] and from their joining as man and wife in the conveyance of her real estate, or her joining with him in a deed or other act releasing her right of dower in his estate;[9] and from the disposition of property to a party by a mode of assurance which is operative only where legal consanguinity exists; such as, a covenant to stand seised, and the like, or by the devolution upon and enjoyment by children of property to which, unless they were legitimate, they would not have been entitled.[10] The recognition or proof of collateral relationship, also, is admissible as evidence of the lawful marriage of those through whom that relationship is derived.[11]

§ 463. **Where Contract is in Writing.** Where a *contract in writing* is by the law of the country, or of the religious community, made essential to the marriage, as is the case among the Jews, it should be produced as the proper evidence of the fact.[1] And where written contracts are not requisite nor usual, yet if they have been in fact made, though by words *de futuro*, these, as well as marriage articles, and other antenuptial and dotal acts, are admissible in evidence, as tending to raise a presumption that the contemplated marriage took effect.[2] A *certificate of marriage*, also, by the officiating clergyman or magistrate, though ordinarily not in itself evidence of the fact it recites, yet if proved to have been carefully kept in the custody of the party whom it affects, and produced from the proper custody, it may be read as collateral proof, in the nature of a declaration and assertion, by the party, of the facts stated in the paper.[3] Such certificate, also, or a copy of the parish register or other document of the like character, may be read as evidence

tinuance, and that nothing short of proof of actual marriage, or such a total change in the character of the cohabitation as will amount to the proof of marriage by *habit and repute*, as it is called in the English law, will be sufficient to prove the marriage: Cunningham *v.* Cunningham, 2 Dowl. 483; Lapsley *v.* Grierson, 1 H. L. C. 498. These cases, however, were criticised in the Breadalbane Peerage Case, L. R. 1 H. L. (Sc.) 182, but their principle was followed in Blackburn *v.* Crawford, 3 Wall. (U. S.) 176, Swayne, J., saying, "Under such circumstances the law makes no presumption." The question to be determined is one of fact, not of law. To the same effect are Grimm's Est., 131 Pa. St. 202; Reading Fire Ins. & Tr. Co.'s App., 113 id. 204. When it is shown that the relationship began with a formal marriage, which is in effect invalid, because one of the contracting parties was previously married and had a wife living at the time of the marriage, the existence of the relationship does not afford any presumption of a second legal marriage after the death of the existing wife of the contracting party: Randlett *v.* Rice, 141 Mass. 391. And to the same effect are Collins *v.* Voorhees, 47 N. J. Eq. 555, and Voorhees *v.* Voorhees, 46 id. 411. Cf. Clayton *v.* Wardwell, 4 N. Y. 230; [*Contra*, Poole *v.* People, 52 P. 1025, Col.].

[8] Doe *v.* Fleming, 4 Bing. 266; Hubback, Evid. of Succession, pp. 248–251, 262; Bond *v.* Bond, 2 Phillim. Eccl. 45; People *v.* Humphrey, 7 Johns. 314; Newburyport *v.* Boothbay, 9 Mass. 414.

[9] Hervey *v.* Hervey, 2 W. Bl. 877; Hubback, Evid. of Succession, p. 248.

[10] Slaney *v.* Wade, 1 My. & C. 358; Hubback, Evid. of Succession, pp. 248, 254.

[11] Eaton *v.* Bright, 2 Phillim. Eccl. 85; s. c. ib. 161. See *ante*, Vol. I. § 194.

[1] *Semb.* Horn *v.* Noel, 1 Campb. 61. See, as to the Jewish contract, Lindo *v.* Belisario, 1 Hagg. Consist. 225, 247, App. 9; Goldsmid *v.* Bromer, ib. 324.

[2] Hubback, Evid. of Succession, p. 257.

[3] Ibid. pp. 258, 259.

confirmatory of the proof by reputation and cohabitation.[4] And where the marriage appeared to have been solemnized by one who publicly assumed the office of a priest, in a public chapel, and was followed by long cohabitation of the parties, this was held sufficient to warrant the presumption that he was really a priest, and that the marriage was therefore valid.[5]

§ 464. **Rebuttal.** The evidence of marriage may be *rebutted* by proof that any circumstances, rendered indispensably necessary by law to a valid marriage, were wanting.[1] Thus, it may be shown that either of the parties had another husband or wife living at the time of the marriage in question; or, that the parties were related within the prohibited degrees; or, that consent was wanting, the marriage having been effected by force or fraud; or, that one of the parties was at the time an idiot, or *non compos mentis*, or insane.[2] And where marriage is inferred from cohabitation, the presumption may be destroyed by evidence of the subsequent and long-continued separation of the parties.[3]

[4] Doe *v.* Grazebrook, 4 Ad. & El. N. S. 406.

[5] R. *v.* Brampton, 10 East 287.

[1] Milford *v.* Worcester, 7 Mass. 48; {Gaines *v.* Relf, 12 How. (U. S.) 472; True *v.* Ranney, 1 Foster (N. H.) 52; Keyes *v.* Keyes, 2 id. 553; Heffner *v.* Heffner, 23 Pa. St. 104; Martin *v.* Martin, 22 Ala. 86; Powell *v.* Powell, 27 Miss. 783; Robertson *v.* Cole, 12 Texas 356; Bishop on Mar. & Div. §§ 63–123, and §§ 176–271. The admission of the husband, that, at the time of contracting his present marriage, he had a former wife living, is not competent evidence, even in a civil action, to prove the nullity of his second marriage: Gaines *v.* Relf, 12 How. (U. S.) 472. See also *ante*, § 461, n.}

[2] 2 Kent Comm. pp. 76, 77; 1 Bl. Comm. 438; Gathings *v.* Williams, 5 Ired. 487; {Weatherford *v.* Weatherford, 20 Ala. 548. But if a marriage was duly solemnized between parties capable of contracting, it cannot be annulled, nor any of its consequences as to third persons be relieved against, although it was contracted and solemnized for the purpose of preventing such persons from receiving property which they would otherwise have been entitled to: McKinney *v.* Clark, 2 Swan (Tenn.) 321. Marriage cannot be presumed between two persons on the ground of cohabitation, when this would oblige the presumption of bigamy on the part of either of them: Case *v.* Case, 17 Cal. 598. But in Brewer *v.* Bowen, it was held that cohabitation was proof of marriage, even though it had the effect to annul a subsequent marriage and bastardize the issue: 1 Abb. (N. Y.) App. Dec. 214. But see *ante*, Vol. I. § 35.} Where the marriage is invalidated on the ground of want of consent, the subject must have been investigated and the fact established, in a suit instituted for the purpose of annulling the marriage: 2 Kent Comm. p. 77; Wightman *v.* Wightman, 4 Johns. Ch. 343. See also Middleborough *v.* Rochester, 12 Mass. 363; Turner *v.* Myers, 1 Hagg. Consist. 414.

[3] Van Buskirk *v.* Claw, 18 Johns. 346.

NUISANCE.

§ 465. **Nuisance defined.** Nuisance, in its largest sense, signifies "anything that worketh hurt, inconvenience, or damage."[1] It is either public, annoying all the members of the community; or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual. The latter only will be here considered.

§ 466. **To Houses.** Nuisances in one's *dwelling-house* are all acts done by another from without, which render the enjoyment of life within the house uncomfortable; whether it be by infecting the air with noisome smells, or with gases injurious to health;[1] or by exciting the constant apprehension of danger, whether by keeping great quantities of gunpowder near the house, or by deep and dangerous excavation of the neighboring soil, or by suffering the adjoining tenement to be ruinous, and in danger of falling upon or otherwise materially injuring the neighboring house and its inmates;[2] or, by the exercise of a trade by machinery, which produces continual noise and vibration in the adjoining tenement; or, by so exercising a trade as naturally to produce strife, collision, and disorderly conduct among the persons resorting to the premises.[3] So, it is a nuisance, if one overhangs the roof of his neighbor, throwing the water

[1] 3 Bl. Comm. 215; {Coker *v.* Birge, 9 Ga. 425. An action on the case for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff: Call *v.* Buttrick, 4 Cush. 345.}

[1] [Frost *v.* Berkeley, etc. Co., 42 S. C. 402.] {In Kearney *v.* Farrell, 28 Conn. 317, it was held that in an action on the case for a nuisance, where the question was whether a certain privy and pig-sty placed by the defendant near the dwelling-house of the plaintiff were nuisances, witnesses who had examined the premises and were acquainted by personal observation with the effect upon the air in such cases, might properly testify in connection with the facts, to their opinions founded on the facts that the effluvia from the privy and sty must necessarily render the plaintiff's house uncomfortable as a place of abode, and that, for the purpose of showing that the offensive smells were an annoyance to his family, the plaintiff might introduce evidence of complaints made by his wife, since dead, while suffering from the offensive smells, and at a time when they were perceived by others.}

[2] Keilw. 98 *b*, pl. 4; Co. Lit. 56 *a*, n. (2), 56 *b*; Loring *v.* Bacon, 4 Mass. 575, 578.

[3] {The following have been held not to be nuisances unless some evidence is given that they affect the neighborhood injuriously, — a burial ground (Monk *v.* Packard, 71 Me. 309); a hospital (Bessonies *v.* Indianapolis, 71 Ind. 189); a Chinese laundry (Warwick *v.* Wah Lee, 10 Phila. (Pa.) 160); a slaughter-house (Sellers *v.* Pennsylvania, etc. Ry. Co., 10 Phila. (Pa.) 319);} [a brick factory with a gas well supplying fuel (Windfall Mfg. Co. *v.* Patterson, 148 Ind. 414). It is a nuisance to use rooms in a boarding-house for immoral purposes: Sullivan *v.* Waterman, 39 A. 243, 20 R. I. As to nuisance caused by music, see Christie *v.* Davey, 1893, 1 Ch. 316; by drawing a crowd, see Barber *v.* Penley, 1893, 2 Ch. 447. A saloon in a residence district has been held a nuisance: Haggart *v.* Stehlin, 137 Ind. 43.]

upon it from his own; or, if he obstructs his neighbor's ancient lights; or, if, without due precaution, he pulls down his own walls or vaults, whereby injury is caused to the buildings or wall of his neighbor. But the mere circumstance of juxtaposition does not oblige him to give notice to his neighbor of his intention to remove his own walls; nor is he bound to use extraordinary caution, where he is ignorant of the existence of the adjacent wall, as, if it be under the ground.[4]

§ 467. **To Lands.** In regard to *lands*, it is a nuisance to carry on a trade in the vicinity, by means of which the corn and grass or the cattle are injured;[1] or to neglect to repair and keep open ditches, by means of which the land is overflowed. It is also a nuisance to stop or divert water, that uses to run to another's mill, or through or by his lands;[2] or to corrupt a watercourse and render it offensive or less fit for use.[3] For every man is entitled to the enjoyment of the air in its natural purity, of his ancient lights without obstruction, of the flow of waters in their natural course and condition through his own land; and to the support of the neighboring soil, both to preserve the surface of his own in its natural state, unbroken, and to uphold his ancient buildings thereon.[4] But it is not a nuisance to

[4] Trower *v.* Chadwick, 3 Bing. N. C. 334; s. c. 3 Scott 699; Chadwick *v.* Trower, 6 Bing. N. C. 1; Panton *v.* Holland, 17 Johns. 92; People *v.* Cunningham, 1 Denio 524.

[1] [Fogarty *v.* Junction City, etc. Co., 50 Kan. 478.]

[2] [Or in front of them: Sweet *v.* Conley, 39 A. 326, R. I.] {So it is a nuisance to artificially accumulate water upon one's own land, whereby water is forced upon or kept away from another's land: Wilson *v.* New Bedford, 108 Mass. 261.} [Or to deposit noxious matter so that natural drainage of rain will pass through it (Livezey *v.* Schmidt, 96 Ky. 441; Beatrice Gas Co. *v.* Thomas, 41 Neb. 662); or to cause waste matter to flow on another's land (Price *v.* Oakfield, etc. Co., 87 Wis. 536). The fact that from natural causes only the evaporation of water gives off noxious gases does not constitute a nuisance: Roberts *v.* Harrison, 101 Ga. 773. The encroachment of boughs and roots is a nuisance: Lemmon *v.* Webb, 1894, 3 Ch. 1; 11 Rep. 64. The percolation of oil from a pipe-line is a nuisance: Hauck *v.* Tide Water Co., 153 Pa. 366.]

[3] 3 Bl. Comm. 216–218; {Walter *v.* Selfe, 4 Eng. Law & Eq. 15; Newhall *v.* Ireson, 8 Cush. (Mass.) 592, 599. "Where it has been considered that a riparian proprietor had authority to make use of the stream for purposes of irrigation, and thus by that use divert a portion of it, it has been held, under the condition, that such diversion was, under all the circumstances, a reasonable use of the stream, and that the surplus of the water thus used must be returned into its natural channel. These cases carry a strong implication that a diversion of the entire stream, or of a considerable part of it, is prejudicial to the proprietor below, and is not justifiable: Weston *v.* Alden, 8 Mass. 136; Colburn *v.* Richards, 13 id. 420; Cook *v.* Hall, 3 Pick. (Mass.) 269; Embrey *v.* Owen, 6 Welsb. H. & Gord. 353." By Shaw, C. J., in Newhall *v.* Ireson, 8 Cush. (Mass.) 599.}

[4] Wyatt *v.* Harrison, 3 B. & Ad. 871; Dodd *v.* Holme, 1 Ad. & El. 493; 3 N. & M. 739. And see the learned notes of Mr. Rand, to the opposing case of Thurston *v.* Hancock, 12 Mass. 212, 227 *a*, 228 *a*; Gale & Whatley on Easements, pp. 216–227. {Where one does a lawful act on his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence; that is, if in doing it he did not use such care and caution as men of common prudence usually exercise in the management of their own concerns: Rockwood *v.* Wilson, 11 Cush. (Mass.) 221, 226; [Booth *v.* Rome, etc. Co., 140 N. Y. 267.] Thus, if one brings upon his own land a steam boiler, which, without fault on his part, explodes and injures his neighbor, he is not liable: Losee *v.* Buchanan, 51 N. Y. 476. But see Cahill *v.* Eastman, 18 Minn. 324. Otherwise, if he is at fault:

divert a subterranean flow of water under another's land, by lawful operations on one's own.[5]

§ 468. **To Incorporeal Hereditaments.** In regard to *incorporeal hereditaments*, nuisances consist in obstructing or otherwise injuriously affecting a way, which one has annexed to his estate, over the lands of another; or in impairing the value of his fair, market, ferry, or other franchise, by any act causing a continuing damage.[1]

§ 469. **To Reversions.** If the nuisance is injurious to the *reversion*, the reversioner, and the tenant in possession, may each have an action for his separate damage;[1] and in the action by the former, the tenant is a competent witness.[2] And though the nuisance might

Knight *v.* Globe, etc. Co., 38 Conn. 438. In an action for a nuisance to a messuage, dwelling-house, and premises, caused by noxious vapors proceeding from smelting works upon lands of the defendants, to which they pleaded the general issue, the judge directed the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless by the lapse of a certain period of time he has acquired a prescriptive right to do so. But that the law does not regard trifling inconveniences, everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property by noxious vapors rising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. Held, no misdirection: St. Helen's Smelting Co. *v.* Tipping, 4 B. & S. 608, 616, Exch. Cham., and 11 Jur. N. S. 785, House of Lords. See also Bamford *v.* Turnley, 3 B. & S. 66; S. C. 9 Jur. N. S. 377, where these questions are very fully discussed. Also Cavey *v.* Ledbitter, 3 F. & F. 14. Carrying on a lawful trade in the ordinary and obvious manner is not necessarily carrying it on in a proper manner: Stockport Waterworks Company *v.* Potter, 7 Jur. N. S. 880. See also Barnes *v.* Hathorne, 54 Me. 124. However lawful the business may be in itself, and however suitable in the abstract the location may be, these things cannot avail to authorize the carrying on of the business in a way which directly, palpably, and substantially damages the property of others, at least in the absence of anything conferring any prescriptive right, or of any grant, covenant, license, or privilege: [Baltimore *v.* Fairfield, etc. Co., 39 A. 1081, Md.;] yet, on the other hand, a resident of a trading or manufacturing neighborhood is bound to submit to such ordinary personal annoyances and little discomforts as are fairly incidental to legitimate trading and manufacturing carried on in a reasonable way: Robinson *v.* Baugh, 30 Mich. 291;} [Ladd *v.* Granite Co., 37 A. 1041, N. H.; McCann *v.* Strang, 97 Wis. 551.]

[5] Acton *v.* Blundell, 12 M. & W. 324.

[1] 3 Bl. Comm. 218, 219; {Boston & Lowell, etc. Corp. *v.* Salem, etc. Railroad Co., 2 Gray (Mass.) 1. If a party suffers special damage from a public nuisance, he may have his action therefor against the person maintaining the nuisance: [Hill *v.* New York, 139 N. Y. 495; Page *v.* Mille Lacs, etc. Co., 53 Minn. 492;] Stetson *v.* Faxon, 19 Pick. (Mass.) 147. In this case, the defendant had erected a warehouse that projected several feet into the street, and beyond the plaintiff's warehouse, which stood near on the line of the street, by means of which the plaintiff's warehouse was obscured from the view of the passengers, and travel was diverted to a distance from it, and it was rendered less eligible as a place of business, and the plaintiff was obliged to reduce the rent, and it was held to be such special damage as would give the plaintiff a right to action: Cole *v.* Sprowl, 35 Me. 161; Baxter *v.* Winooski Turnpike Co., 22 Vt. 114; Frink *v.* Lawrence, 20 Conn. 117. No action will lie against a town by an owner of land who is prevented from a convenient access thereto, and is thereby damaged by reason of a defect in the highway, which the town is obliged to keep in repair: Smith *v.* Dedham, 8 Cush. (Mass.) 522.}

[1] Biddlesford *v.* Onslow, 3 Lev. 209; Shadwell *v.* Hutchinson, 4 C. & P. 333.

[2] Doddington *v.* Hudson, 1 Bing. 257.

be abated before the estate comes into possession, yet, if it is capable of continuance, the reversioner may maintain an action.[3]

§ 470. **Proof of Nuisance.** In an action upon the case for a nuisance, the plaintiff must prove, (1) his *possession* of the house or land, or his *reversionary interest* therein, if the action is for an injury to this species of interest; or, his title to the *incorporeal right* alleged to have been injured; (2) the *injurious act* alleged to have been done by the defendant; and (3) the *damages* thence resulting. The action is local; but, ordinarily, the allegation of the place will be taken merely as *venue*, unless a local description is precisely and particularly given, in which case it must be proved as laid.[1]

§ 471. **Title by Prescription.** (1) If the injury is done to the plaintiff's *incorporeal* right, and the title is alleged by *prescription*, such title must be proved; but though it was formerly held necessary to allege specially a right by prescription, it is now deemed sufficient to allege the right generally, as incident to the plaintiff's possession of the house or land.[1] A legal title to an incorporeal hereditament is proved by an uninterrupted adverse enjoyment for twenty years;[2] and it may be presumed by the jury, from such enjoyment for a shorter period, if other circumstances support the presumption. It may also be claimed by a *quasi* estoppel; as, if one build a new house on his land, and afterwards sell it to another, neither the vendor, nor any one claiming under him, can obstruct the lights.[3] In either case, the extent of the right is ascertained by the extent and nature of the enjoyment. Therefore, if an *ancient window* to a shop or malt-house is somewhat darkened, no action lies, if there is still light enough for the purpose for which it has been used.[4] And if an ancient window is enlarged, the adjoining

[3] Jesser *v.* Gifford, 4 Burr. 2141; Shadwell *v.* Hutchinson, 3 C. & P. 615.

[1] Hamer *v.* Raymond, 5 Taunt. 789. {A remedy in equity lies to restrain a person by injunction from establishing a nuisance or continuing it, but the case must show that the damage resulting from the erection will be serious, and it must also appear that the injury will be of such a nature that actions at law will not afford an adequate remedy: Dilworth's Appeal, 91 Pa. St. 247; Owen *v.* Phillips, 73 Ind. 284; Larsater *v.* Garrett, 4 Baxt. (Tenn.) 368; Brown *v.* Carolina Central Ry. Co., 83 N. C. 128.

The test of whether an injunction will be granted is said in Dittman *v.* Repp, 50 Md. 516, to be whether a nuisance complained of does or will produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomforts to persons of ordinary sensibilities and of ordinary tastes and habits, and as in view of the circumstances of the case is unreasonable and in derogation of the rights of the complainant.}

[1] 1 Chitty on Pl. 330; 2 Saund. 175 *a*, n.; Yelv. 216, *a*, n. (1), by Metcalf; Story *v.* Odin, 12 Mass. 157. Proof of the plaintiff's possession of part of the premises is sufficient to support the general allegation that he was possessed of a certain messuage and premises: Fenn *v.* Grafton, 2 Bing. 617. And see, as to *user*, Page *v.* Hatchett, 10 Jur. 634.

[2] Lewis *v.* Price, cited 2 Saund. 175 *a*; Winchelsea Causes, 4 Burr. 1963; R. *v.* Dawes, ib. 2022; Bealey *v.* Shaw, 6 East 215; Hill *v.* Crosby, 2 Pick. 466; Angell on Adverse Enjoyment, pp. 23–29, 62, 63; *ante*, Vol. I. § 17, and cases there cited.

[3] *Ante*, Vol. I. §§ 39, 45; Best on Presumptions, pp. 102, 103, 106; Palmer *v.* Fletcher, 1 Lev. 122; Compton *v.* Richards, 1 Price 27; Riviere *v.* Bower, Ry. & M. 24; Contts *v.* Gorham, 1 M. & Malk. 396; Story *v.* Odin, 12 Mass. 157.

[4] Martin *v.* Goble, 1 Campb. 320, 322.

owner cannot obstruct the passage of light through the old window, notwithstanding the party may derive an equal quantity of light from the new one.[5] But to maintain this action, there must be a substantial privation of light, so as to render the occupation of the house uncomfortable, or impair its value; the merely taking off a ray or two is not sufficient.[6] So, in regard to a *way* by prescription; the extent of the enjoyment determines the extent of the right. If, therefore, such a way has always been used for one purpose, as, to cart fuel, it cannot be used for a different purpose, as, to cart stones; and if it has been used only for a way to Black-Acre, it cannot be used for a way to White-Acre, which lies adjoining and beyond it, though belonging to the same person.[7]

§ 472. **Cause of Injury.** (2) As to the proof that the injury was *caused by the defendant* it is sufficient to show that it was done by his authority, or, that, having acquired the title to the land after the nuisance was erected, he has continued it.[1] Thus, if the nuisance is erected on the defendant's land, by his permission, he is liable.[2] And if the defendant, after judgment against him for the nuisance, lets the same land to a tenant with the nuisance continuing upon it, he, as well as his tenant, is liable for its continuance, in another action.[3] So, if the plaintiff has purchased a house,

[5] Chandler *v.* Thompson, 3 Campb. 80; Bealey *v.* Shaw, 6 East 208.

[6] Back *v.* Stacey, 2 C. & P. 465; Pringle *v.* Wernham, 7 id. 377; Wells *v.* Ody, ib. 410.

[7] Senhouse *v.* Christian, 1 T. R. 569, per Ashhurst, J.; Howell *v.* King, 1 Mod. 190; 39 H. VI. 6; Davenport *v.* Lamson, 21 Pick. 72.

[1] Penruddock's Case, 5 Co. 100; Dawson *v.* Moore, 7 C. & P. 25.

[2] Winter *v.* Charter, 3 Y. & J. 308. If the injury is caused by a wall erected partly on the defendant's land, case lies for the nuisance; though the wall is erected in part on the plaintiff's land, by an act of trespass: Wells *v.* Ody, 1 M. & W. 452.

[3] Rosewell *v.* Prior, 2 Salk. 460; Staple *v.* Spring, 10 Mass. 72; {Hodges *v.* Hodges, 5 Met. (Mass.) 205; Brown *v.* Cayuga, etc. R. R., 2 Kernan (N. Y.) 486; Gandy *v.* Jubber, 10 Jur. N. S. 652.

To maintain an action against a lessee for continuing a nuisance, begun by his lessor before the lease, knowledge of the existence of the nuisance is enough: Dickson *v.* Chicago, Rock Island, etc. Ry. Co., 71 Mo. 575; Conhocton, etc. *v.* Buffalo, etc. R. R. Co., 51 N. Y. 573. But in some cases it is held that actual notice to remove it must be given: McDonough *v.* Gilman, 3 Allen 264; Slight *v.* Gutzlaff, 35 Wis. 675.

A person who erects a nuisance is liable for its continuance, after he has sold the land, if he conveys with covenants of warranty: Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683.

A municipal corporation is liable for a nuisance in the same way as an individual, if it exercises its granted powers in an illegal way, and a nuisance is the result; as where a city discharged its sewers on land which it was not empowered to use for such purposes, it was held that the owner of the land had a remedy against the city for the nuisance: Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Bessonies *v.* Indianapolis, 71 Ind. 189; Mootry *v.* Danbury, 45 Conn. 550.} [See Hill *v.* New York, 139 N. Y. 495. One who erects a nuisance on land which he sells to one who continues the nuisance is jointly liable with his grantee: Hyde Park, etc. Co. *v.* Porter, 167 Ill. 276. The grantor remains liable until the nuisance is abated: East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201. The grantee, however, unless he actively continues the nuisance, is not liable in damages for its continuance until after a request for its abatement: Staples *v.* Dickson, 88 Me. 362; Philadelphia, etc. R. *v.* Smith, 28 U. S. App. 134; Castle *v.* Smith, 36 P. 859, Cal. After such request he becomes liable if he fails to abate the nuisance: Townes *v.* Augusta, 29 S. E. 851, S. C.]

against which a nuisance has been committed, he may maintain this action for the continuance of the nuisance, after request to abate it.[4] If the premises were let for the purpose of carrying on a trade or business which is necessarily injurious to the adjoining proprietors, the lessor is liable, as the author of the nuisance, upon proof of the injurious nature of the business. But if the purpose for which the premises were let was lawful, and the business was not necessarily injurious except when conducted in a particular manner, the plaintiff must show that the lessor, who is sued, either knew or had reason to believe that it would be so conducted.[5]

§ 473. **Plaintiff must be without Fault or Laches.** Ordinarily, every person is bound to use reasonable care to avoid or prevent danger or damage to his person and property. Wherever, therefore, the injury complained of would never have existed but for the misconduct or *culpable neglect of the plaintiff*, as in the case of an obstruction within the limits of the highway, but outside of the travelled path, against which he negligently drove his vehicle;[1] or, in the case of a collision at sea, wholly imputable to his own negligence;[2] or, of his neglect to shore up his own house, for want of which it was injured by the pulling down of the defendant's adjoining house, notwithstanding due care taken by the latter;[3] in these and the like cases the plaintiff cannot recover, but must bear the consequences of his own fault. So, if the act of the defendant was at first no annoyance to the plaintiff, but has become so by his own act, as by opening a new window in his house, this being the proximate cause of the annoyance, he cannot recover.[4] This rule, however, admits of some qualification, where the nuisance affects the

[4] Penruddock's Case, 5 Co. 100, 101; Willes 583.

[5] Fish *v.* Dodge, 4 Denio 311. {"By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep the buildings in repair that they may be safe for the public. And such occupier is, *prima facie*, liable to third persons for damages arising from any defect: R. *v.* Watts, 1 Salk. 357; s. c. 2 Ld. Raym. 856; s. c. 3 id. 18; Cheetham *v.* Hampson, 4 T. R. 318. But if there be an express agreement between landlord and tenant, that the former shall keep the premises in repair, so that, in case of a recovery against the tenant, he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord: Payne *v.* Rogers, 2 H. Bl. 350 But such agreement must be distinctly proved." By Shaw, C. J., Lowell *v.* Spaulding, 4 Cush. (Mass.) 278; Oakham *v.* Holbrook, 11 id. 302. If the tenant covenants to repair, and the injury proceeds from the roof of the building, of which it does not appear that the tenants have control, the landlord will be liable: Shepley *v.* Fifty Associates, 101 Mass. 251; s. c. 106 Mass. 194.}

[1] Smith *v.* Smith, 2 Pick. 621. See also Flower *v.* Adam, 2 Taunt. 314; Steele *v.* Inland W. L. Nav. Co., 2 Johns. 283; Lebanon *v.* Olcott, 1 N. H. 339.

[2] Vanderplank *v.* Miller, 1 M. & Malk. 169. And see Butterfield *v.* Forrester, 11 East 60.

[3] Peyton *v.* Mayor, etc. of London, 9 B. & C. 725. And see Blyth *v.* Topham, Cro. Jac. 158; Whitmore *v.* Wilks, 3 C. & P. 364; Massey *v.* Goyner, 4 id. 161; Armsworth *v.* S. East. Railw. Co., 11 Jur. 758; *supra*, tit. Carriers, § 220.

[4] Lawrence *v.* Obee, 3 Camph. 514. [There is no nuisance where the defendant's act on his own land has rendered the ventilation of the plaintiff's premises so difficult that the smells on the plaintiff's premises have become intolerable: Chastey *v.* Ackland, 1895, 2 Ch. 389.]

entire dwelling; for the right of habitancy is paramount to the exigencies of trade. Thus, where a slaughter-house was erected in the open fields adjacent to a growing city, but not at that time near to any dwelling-house; but afterwards, in the progressive increase of the city, dwellings were erected near to the slaughter-house, insomuch that it rendered them unfit for comfortable habitation; it was held a nuisance, for which the owners of the houses might have remedy against the proprietor of the slaughter-house for its continuance.[5] If the injury is wholly *imputable to the defendant*, it is perfectly clear that he is liable. The case of *faults on both sides*, is one of greater embarrassment; but the result of the authorities seems to be this, that the burden of proof is on the plaintiff to show that, notwithstanding any neglect or fault on his part, the injury is in no respect attributable to himself, but is wholly attributable to the misconduct on the part of the defendant, as the *proximate cause*.[6] Thus, if injury results to the plaintiff's house by the actual negligence or misconduct of the defendant in pulling down his own, the plaintiff may recover his damages, notwithstanding he has not himself used the precautions of shoring up his walls.[7] If the fault was *mutual*, the plaintiff cannot recover.[8] Thus, where the injury was occasioned by negligence in taking down a party-wall, and the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, both of whom were to blame, it was held that neither could impute negligence to the other.[9] If the injury resulted from an omission of duty by the defendant, such as to repair a way, or a fence, his obligation must be proved.[10]

§ 474. **Damages.** (3) In proof of the *damages*, it is sufficient for the plaintiff to show that, by reason of the injurious act or omission of the defendant, he cannot enjoy his right in as full and ample a manner as before, or, that his property is substantially impaired in value. If the injury is a direct infringement of his absolute right, abridging his power and means of exercising it, such as diverting or polluting a watercourse flowing through his land, or obstructing his private way, or projecting a roof so as to overhang his grounds, or the like, no evidence of special damage will be necessary in order

[5] Brady *v.* Weeks, 3 Barb. S. C. 157. And see acc. Cooper *v.* Barber, 3 Taunt. 99; Dana *v.* Valentine, 5 Met. 8; Gale & Whatley on Easements, p. 186 [277].

[6] Walters *v.* Pfeil, 1 M. & Malk. 362; Dodd *v.* Holme, 2 Ad. & El. 493; 3 N. & M. 739; Bradley *v.* Waterhouse, 3 C. & P. 318; Brock *v.* Copeland, 1 Esp. 203; Bird *v.* Holbrook, 4 Bing. 628; Ilott *v.* Wilkes, 3 B. & Ald. 304; Flower *v.* Adam, 2 Taunt. 314; Hawkins *v.* Cowper, 8 C. & P. 473.

[7] Walters *v.* Pfeil, 1 M. & Malk. 362.

[8] Vanderplank *v.* Miller, 1 M. & Malk. 169. See the interesting case of Dean *v.* Clayton, 7 Taunt. 489; 2 Marsh. 577; 1 Moore 203, commented on in Bird *v.* Holbrook, 4 Bing. 628; White *v.* Winnisimmet Co., 5 Monthly Law Rep. 203 [7 Cush. 155]. See Moore *v.* Abbot, 2 Red. 46.

[9] Hill *v.* Warren, 2 Stark. 377. And see Stafford Canal Co. *v.* Hallen, 6 B. & C. 317.

[10] Co. Lit. 56 *a*, n. (2), Harg. & Butl. ed.; Russell *v.* The Men of Devon, 2 Tr. 671; Loring *v.* Bacon, 4 Mass. 575, 578; Payne *v.* Rogers, 2 H. Bl. 349.

to entitle him to recover; but where the damages are consequential, or affect his relative rights, some damage must be proved.[1] Where the injury consists in the destruction of a tenement, the measure of damages is the value of the old tenement, and not the cost of replacing it by a new one.[2] And the rule of damages, in all cases of nuisance, is the amount of injury actually sustained at the commencement of the suit.[3]

§ 475. **Defences.** The *defence* to this action, aside from defect of proof on the part of the plaintiff, generally consists either in a license from the plaintiff to do the act complained of, or in a denial of its injurious consequences, or, where the plaintiff claims a prescriptive right, in opposing it by another and adverse enjoyment, of sufficiently long duration. Thus, if the evidence of title to a right of way, or to the use of lights, is derived from an enjoyment of twenty years' duration, it may be rebutted by evidence that, during the whole or a part of that period, the premises were in the occupation of the defendant's tenant, for by his *laches* the defendant was not concluded;[1] or, that the enjoyment of the right by the plaintiff was under the express leave or favor of the defendant, or by mistake, and not adverse to the defendant's title.[2] So, the plaintiff's claim to the natural flow of water across or by his land, without diminution or alteration, may be rebutted by evidence of an adverse right, founded on more than twenty years' enjoyment, to divert or use it for lawful purposes.[3] If the act complained of was done by the *parol license* of the plaintiff, at the defendant's expense, this is a good defence, though if the license were executory it might have been void by the Statute of Frauds; for even a parol license, when executed, is not countermandable.[4]

§ 476. **Abandonment of Right.** As it is the enjoyment of an incorporeal hereditament that gives the prescriptive right, so the

[1] Cotterell *v.* Griffiths, 4 Esp. 69; Allen *v.* Ormand, 8 East 4; Fay *v.* Prentice, 9 Jur. 877; 1 M. G. & S. 828; Rose *v.* Groves, 5 M. & G. 613; 6 Scott N. R. 645; Newhall *v.* Ireson, 8 Cush. 595, 599.

[2] Lukin *v.* Godsall, 2 Peake's Cas. 15.

[3] Thayer *v.* Brooks, 17 Ohio, 489; Troy *v.* Ch. Railroad Co., 3 Foster (N. H.) 83; [Schlitz Brewing Co. *v.* Compton, 142 Ill. 511. If the injury is permanent in its character all damages, present and prospective, may be recovered: Beatrice Gas Co. *v.* Thomas, 41 Neb. 662.]

[1] Daniel *v.* North, 11 East 372. See also Barker *v.* Richardson, 4 B. & Ald. 578.

[2] Campbell *v.* Wilson, 3 East 294. And see Brown *v.* Gay, 3 Greenl. 126; Gates *v.* Butler, 3 Humph. 447; Cooper *v.* Barber, 3 Taunt. 99.

[3] Beal *v.* Shaw, 6 East 214, per Ld. Ellenborough. And see Balston *v.* Bensted, 1 Campb. 163.

[4] Winter *v.* Rockwell, 8 East 308. See also 1 Hayw. 28; Liggins *v.* Inge, 7 Bing. 690; Webb *v.* Paternoster, Palm. 71; Bridges *v.* Blanchard, 1 Ad. & El. 536. But no license to alter windows can be inferred from the fact that the adjoining owner witnessed the alterations as they were going on, without objection; so as to prevent him from afterwards obstructing them by building on his own land: Blanchard *v.* Bridges, 4 Ad. & El. 176.

[The sanction of the legislature is a defence: Murtha *v.* Lovewell, 166 Mass. 391. But see Koehl *v.* Schoenhausen, 47 La. Ann. 1316; Haggart *v.* Stehlin, 137 Ind. 43.]

ceasing to enjoy destroys the right, unless, at the time when the party discontinues the enjoyment, he does some act to show that he intends to resume it within a reasonable time.[1] Evidence of abandonment by the plaintiff will therefore be a good defence against his claim; and the burden of proof will be on him to show that the abandonment was but temporary, and that he intended to resume the enjoyment of the right.[2] If the plaintiff, having a right to the unobstructed access of light and air through a window, should materially alter the form of the wall in which the window is put out, as by changing it from straight to circular, this will amount to an abandonment of the right.[3]

[1] Moore *v.* Rawson, 3 B. & C. 332, 337, per Bayley, J. And see Garritt *v.* Sharp, 3 Ad. & El. 325.
[2] Ibid.
[3] Blanchard *v.* Bridges, 4 Ad. & El. 176.

PARTNERSHIP.

§ 477. **Proof of Partnership.** The question of partnership is raised in actions either between the partners themselves, or between them and third persons; but the evidence which would prove a partnership against the partners, in favor of other persons, is sufficient, *prima facie*, to prove it in actions between the partners alone, and also in actions in their favor against third persons.[1]

§ 478. **Where there are Several Plaintiffs.** It is a general rule, that where the action is *by several plaintiffs*, they must prove either an express contract by the defendant with them all, or the joint interest of all in the subject of the suit. If they are jointly interested as partners, they may sue jointly upon a contract made by the joint agent of all, though the names of all are not expressed in the instrument. But it must appear that all who sue were partners at the time of making the contract;[1] for one who has been subsequently admitted as a partner cannot join, though it were agreed that he should become equally interested with the others in all the existing property and rights of the firm, unless, upon or after the accession of the incoming partner, there has been a new and binding promise to pay to the firm as newly constituted,[2] or unless the security, being negotiable, has been transferred by indorsement.[3] Where several plaintiffs sue as indorsees of a bill indorsed in blank, they are not bound to prove any partnership, nor any transfer expressly to themselves, unless it should appear that it had once been specially transferred to some of them, and not to all.[4] And where a negotiable security due by one firm is indorsed to another firm, or a debt is due in any other form by one firm to another, and

[1] Peacock *v.* Peacock, 2 Camph. 46, per Ld. Ellenborough; Stearns *v.* Haven, 14 Vt. 540. In the latter case, a stranger cannot object that the contract does not constitute a partnership in legal strictness, if the parties themselves have treated it as such a contract: ibid. See also Bond *v.* Pittard, 3 M. & W. 357.

[1] Ord *v.* Portal, 3 Campb. 239, 240, n.; Ege *v.* Kyle, 2 Watts 222; McGregor *v.* Cleveland, 5 Wend. 475. {So where one has bought all the assets of a firm and assumes the responsibilities, he is not able to sue on a contract made by the firm: Ayres *v.* Gallup, 44 Mich. 13.}

[2] Wilsford *v.* Wood, 1 Esp. 182. And see Wright *v.* Russell, 3 Wils. 520; 2 W. Bl. 934; *Ex parte* Marsh, 2 Rose 239. The mere transfer of a balance due to the old firm into the books of the new firm, does not vest in the latter a right of action for such balance, unless the assent of the debtor is proved: Armsby *v.* Farnham, 16 Pick. 318.

[3] Peas *v.* Hirst, 10 B. & C. 122; Ord *v.* Portal, 3 Campb. 239; Ege *v.* Kyle, 2 Watts 222; McGregor *v.* Cleveland, 5 Wend. 475.

[4] Rordasnz *v.* Leach, 1 Stark. 446; Machel *v.* Kinnear, ib. 499.

one of the individuals is a partner in both firms, no action can be maintained for the debt, for no one can be interested as a party on both sides of the record.[5] If business is carried on in the names of several persons, who in fact are not partners, the entire interest being in one only, he may sue alone, but he must distinctly prove that the others were not his partners;[6] to prove which they are competent witnesses.[7] On the other hand, if an express contract is made with one alone, he may maintain an action upon it in his own name only, though others, whose names are not mentioned in the contract, are interested in it jointly with himself,[8] and might well have joined in the action.[9] If the name of the firm has remained a long time the same, but the partners have been changed, parol evidence is admissible, in an action upon a contract made in the name of the firm, to show that the plaintiffs were in fact the real members of the firm at the time of making the contract.[10]

§ 479. **Proof of Partnership.** The usual proof of partnership is by the evidence of clerks, or other persons, who know that the parties have actually carried on business as partners. Though the partnership was constituted by indentures, or other writings, it is ordinarily not necessary, in an action between the partners and third persons, to produce them.[1] And if the witness called to prove

[5] Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 B. & P. 120; Moffatt *v.* Van Millingen, ib. 124, n. The purchase of such a bill or note would be regarded as payment of it, for account of the partner in question: ibid. And the giving of such a security would seem, on the same principle, to amount only to evidence of a similar payment. {The joint and several note of a partnership is not extinguished by its transfer to another firm composed in part of the same persons; the latter firm may negotiate the note to third persons: Fulton *v.* Williams, 11 Cush. 108, 110. If a note is given by a firm to one of its members, he cannot sue on it in his own name, but he may indorse it, and his indorsee may sue; and if one partner gives his note to the firm, they cannot sue on it, but their indorsee may bring an action thereon: ibid.; Little *v.* Rogers, 1 Met. (Mass.) 108; Thayer *v.* Buffum, 11 id. 398; Davis *v.* Briggs, 39 Me. 304; Smith *v.* Lusher, 5 Cow. (N. Y.) 688. And one partner, even after the dissolution of the firm, may indorse the note of the firm, payable to himself, given before the dissolution: Temple *v.* Seaver, 11 Cush. (Mass.) 314; Quinn *v.* Fuller, 7 id. 224; Decreet *v.* Burt, ib. 551.}

[6] Teed *v.* Elworthy, 14 East 210; Atkinson *v.* Laing, 1 D. & Ry. Cas. 16; Davenport *v.* Rackstrow, 1 C. & P. 89.

[7] Parsons *v.* Crosby, 5 Esp. 199; Glossop *v.* Colman, 1 Stark. 25.

[8] Lloyd *v.* Archbowle, 2 Taunt. 324; Mawman *v.* Gillett, ib. 325, n.; Bank of St. Mary *v.* St. John, 25 Ala. 366.

[9] Leveck *v.* Shaftoe, 2 Esp. 468; Skinner *v.* Stocks, 4 B. & Ald. 437; Lord *v.* Baldwin, 6 Pick. 348. But proof that the contract was expressly made with one alone, upon his assertion, that the subject-matter was his sole property, will be conclusive to defeat an action on that contract by all the partners: Lucas *v.* De la Cour, 1 M. & S. 249.

[10] Moller *v.* Lambert, 2 Campb. 548. {If the note of the firm is given by one copartner for his individual debt, during the continuance of the partnership, and the other copartner, with a full knowledge of the fact, recognizes and ratifies the note so given as a partnership note, it thereby binds the firm: Wheeler *v.* Rice, 8 Cush. (Mass.) 205, 208; Sweetzer *v.* French, 2 id. 309; Gansevoort *v.* Williams, 14 Wend. (N. Y.) 139, 140; Bank of Kentucky *v.* Brooking, 2 Littell (N. C.) 41. Mere knowledge on their part is no proof of assent: Elliott *v.* Dudley, 19 Barb. (N. Y.) 326.}

[1] Alderson *v.* Clay, 1 Stark. 405; Collyer on Partn. 406; Dutton *v.* Woodman, 9 Cush. 255.

a partnership in fact is unable to recollect the names of all who are members of the firm, his memory may be assisted by suggesting them.[2]

§ 480. **Defence as against Partners.** In *defence* of an action of *assumpsit* brought by partners, the defendant may show any separate agreement between him and one of the plaintiffs, which would have been available if made by all; such as an agreement by one to provide for the payment of a bill, accepted by the defendant for the accommodation of the firm;[1] or an agreement with the drawer of a bill, by A, a partner in the house of A & B, to provide for the payment of the bill, which was negotiated by them to the firm of A & C, in which also he was a partner.[2] So where the defendant has allowed to one partner the amount of the partnership debt, on settlement of his private account against the partner, if done in good faith, it is a valid defence against the firm.[3] So if, in the particular transaction, the conduct of one partner has been fraudulent, as, if he sell and deceitfully pack goods in a foreign country, to be imported in fraud of the revenue laws, it is a good defence to an action by the firm for the price, though his partners were ignorant of the fraud.[4]

§ 481. **Partners inter sese.** As *between the parties* themselves, a partnership is constituted by a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.[1] The proof of the partnership, therefore,

[2] *Ante*, Vol. I. § 435; Acerro *v.* Petroni, 1 Stark. 400.

[1] Richmond *v.* Heapy, 1 Stark. 202; Sparrow *v.* Chisman, 9 B. & C. 241; Jones *v.* Yates, 9 B. & C. 532.

[2] Jacaud *v.* French, 12 East 317.

[3] Henderson *v.* Wild, 2 Campb. 561. {It is also a valid defence against the firm, though the partner act fraudulently, if the creditor act in good faith: Homer *v.* Wood, 11 Cush. (Mass.) 62, where the authorities are reviewed; Greely *v.* Wyeth, 10 N. H. 15; Richmond *v.* Heapy, 1 Stark. 202; Jones *v.* Yates, 9 B. & C. 532; Wallace *v.* Kelsall, 7 Mees. & Welsb. 264, 273; Story on Partn. § 238; Collyer on Partn. § 643. But see Purdy *v.* Powers, 6 Pa. St. 392.}

[4] Biggs *v.* Lawrence, 3 T. R. 454. {One partner cannot maintain an action at law on the covenants in the articles of copartnership to recover damages of his copartner for neglect of the partnership business, while there is a considerable amount due from him to his copartner, and the debts due by and to the firm, the burden of which is to be borne, and the benefit enjoyed, by the partners in certain proportions, are not all settled: Capen *v.* Barrows, 1 Gray (Mass.) 376, 382. In such an action, if there are several partners, all must join against the delinquent member of the firm: ibid. No action at law can be maintained on a joint agreement by the plaintiffs and defendants, who were all members of the same joint-stock company, formed to purchase a vessel of the plaintiffs: Myrick *v.* Dame, 9 Cush. (Mass.) 248; Green *v.* Chapman, 27 Vt. 236; Collamer *v.* Foster, 26 id. 754. Where two persons do business under the name of one of them, a bill drawn on that person, and by him accepted, is presumed in law to bind him only, and not the firm: Mercantile Bank *v.* Cox, 38 Me. 500.}

[1] Story on Partn. § 2; 3 Kent Comm. pp. 23, 24; Collyer on Partn. p. 2. A surgeon selling out his business, but retaining a moiety of the first year's net profits, for introducing his patients to his successor, and other like services, held not a partner: Rawlinson *v.* Clark, 15 M. & W. 292. A proprietor of a newspaper selling out, but retaining a share in the profits, held a partner, under the circumstances of the case: Barry *v.* Nesham, 10 Jur. 1010. And see Pott *v.* Eyton, 15 Law Journ. N. S. 257. {A

will be made by any competent evidence of such an agreement. If it is contained in written articles, these, in an action between the partners, must be produced or proved; and the parties themselves will be governed by their particular terms, but their precise limitations will not affect strangers, to whom they are unknown.[2]

§ 482. **As against Third Persons.** In favor of third persons, and *against the partners* themselves, the same agreement ought generally to be established by such competent evidence as is accessible to strangers. Where there is a community of interest in the property, and also a community of interest in the profits, there is a partnership. If there is neither of these, there is no partnership. If one of these ingredients exists, without the presence of the other, the general rule is, that no partnership will be created between the parties themselves, if it would be contrary to their real intentions and objects. And none will be created between themselves and third persons, if the whole transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of partnership.[1] The cases in which a liability as partners as to third

made with B the following agreement in writing: "Sold B, on joint account with A, two thousand boxes of candles at twenty-six cents, six months from delivery; B to be allowed two and a half per cent on sales; on all sales not approved by A, B is to guarantee the same, receiving a commission of two and a half per cent; for one-half of the sales made by B, he is to pass over the paper to A; there are to be no charges for storage; property in store to be covered by insurance by B for joint account and expense;" and the parties acted under and in pursuance of this agreement. Held, that this constituted a sale of an undivided half of the candles by A to B, and did not make A and B partners in regard thereto: Hawes *v.* Tillinghast, 1 Gray (Mass.) 289.

So the parties who prosecute a lawsuit jointly are not, as between themselves, partners, in reference to the property: Wilson *v.* Cobb, 28 N. J. Eq. 177. An agreement by which one receives a certain per cent of the profits as compensation for his services has been held not to make him a partner, as between him and others interested in the profits: Smith *v.* Bodine, 74 N. Y. 30.

For other cases in which the facts were held either sufficient or insufficient to establish a partnership, see Judson *v.* Adams, 8 Cush. (Mass.) 556; Fay *v.* Noble, 7 id. 188; Trowbridge *v.* Scudder, 11 id. 83; Denny *v.* Cabot, 6 Met. (Mass.) 82; Bradley *v.* White, 10 id. 303; Holmes *v.* Porter, 39 Me. 157; Knowlton *v.* Reed, 38 id. 246; Banchor *v.* Cilley, ib. 553; Ripley *v.* Colby, 23 N. H. 438; Newman *v.* Bean, 1 id. 93; Belknap *v.* Wendell, ib. 175; Hatch *v.* Foster, 27 Vt. 515; Penniman *v.* Munson, 26 id. 164; Mason *v.* Potter, ib. 722; Noyes *v.* Cushman, 25 id. 390; Brockway *v.* Burnap, 16 Barb. (N. Y.) 309; Catskill Bank *v.* Gray, 14 id. 471; Vassor *v.* Camp, ib. 341; Hodgman *v.* Smith, 13 id. 302; Smith *v.* Wright, 5 Sandf. (N. Y.) 113; Wadsworth *v.* Manning, 4 Md. 59; Peirson *v.* Steinmyer, 4 Rich. (S. C.) 309; Blue *v.* Leathers, 15 Ill. 31; Stoallings *v.* Baker, 15 Mo. 481; Tibbatts *v.* Tibbatts, 6 McLean C. C. 80; Stocker *v.* Brockelbank, 5 Eng. Law & Eq. 67; Peel *v.* Thomas, 29 id. 276.}

[2] Winship *v.* United States Bank, 5 Peters 529; Gill *v.* Kuhn, 6 S. & R. 333; Churchman *v.* Smith, 6 Whart. 146; Tillier *v.* Whitehead, 1 Dall. 269; United States Bank *v.* Binney, 5 Mason 176. {As between the partners, the books of the firm are evidence: Cheever *v.* Lamar, 19 Hun (N. Y.) 130; Boire *v.* McGinn, 8 Or. 466. If the books are kept by one of the partners, and they are found at the trial to be kept in such a way that the relative liabilities of the partners cannot be ascertained, this furnishes a strong presumption against him: Dimond *v.* Henderson, 47 Wis. 172.}

[1] Story on Partn. § 30. This learned author proceeds to discuss the distinction between an agreement for a compensation proportioned to the profits, and an agreement for an interest in such profits, so as to entitle him to an account as a partner, and then observes as follows: "Admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third

persons exists have been distributed into five classes. First, where, although there is no community of interest in the capital stock, yet

persons, in the absence of all other opposing circumstances, it remains to consider whether the rule ought to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled, and overcome by other circumstances, and not as of itself overcoming or controlling them. In other words, the question is, whether the circumstances under which the participation in the profits exists may not qualify the presumption, and satisfactorily prove that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere compensation for labor and services. If the latter be the true predicament of the party, and the whole transaction admits, nay, requires, that very interpretation, where is the rule of law which forces upon the transaction the opposite interpretation, and requires the court to pronounce an agency to be a partnership, contrary to the truth of the facts and the intention of the parties? Now, it is precisely upon this very ground that no such absolute rule exists, and that it is a mere presumption of law, which prevails in the absence of controlling circumstances, but is controlled by them, that the doctrine in the authorities alluded to is founded. If the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled. In this way the law carries into effect the actual intention of the parties, and violates none of its own established rules. It simply refuses to make a person a partner, who is but an agent for a compensation, payable out of the profits; and there is no hardship upon third persons, since the party does not hold himself out as more than an agent. This qualification of the rule (the rule itself being built upon an artificial foundation) is, in truth, but carrying into effect the real intention of the parties, and would seem far more consonant to justice and equity, than to enforce an opposite doctrine, which must always carry in its train serious mischiefs, or ruinous results, never contemplated by the parties:" ib. § 38. And after citing and commenting on the principal cases upon this subject, he concludes thus: "These may suffice as illustrations of the distinction above alluded to. The whole foundation on which it rests is, that no partnership is intended to be created by the parties *inter sese;* that the agent is not clothed with the general powers, rights, or duties of a partner; that the share in the profits given to him is not designed to make him a partner, either in the capital stock or in the profits, but to excite his diligence, and secure his personal skill and exertions, as an agent of the concern, and is contemplated merely as a compensation therefor. It is, therefore, not only susceptible of being treated purely as a case of agency, but in reality it is positively and absolutely so, as far as the intention of the parties can accomplish the object. Under such circumstances, what ground is there in reason, or in equity, or in natural justice, why in favor of third persons this intention should be overthrown, and another rule substituted, which must work a manifest injustice to the agent, and has not operated either as a fraud, or a deceit, or an intentional wrong upon third persons? Why should the agent, who is by this very agreement deprived of all power over the capital stock, and the disposal of the funds, and even of the ordinary rights of a partner to levy thereon, and an account thereof, be thus subjected to an unlimited responsibility to third persons, from whom he has taken no more of the funds or profits (and, indeed, ordinarily less so) than he would have taken, if the compensation had been fixed and absolute, instead of being contingent? If there be any stubborn rule of law which establishes such a doctrine, it must be obeyed; but if none such exist, then it is assuming the very ground in controversy to assert that it flows from general analogies or principles. On the contrary, it may be far more correctly said, that even admitting (what, as a matter unaffected by decisions, and to be reasoned out upon original principles, might well be doubted) that where each party is to take a share of the profits indefinitely, and is to bear a proportion of the losses, each having an equal right to act as a principal, as to the profits, although the capital stock might belong to one only, it shall constitute, as to third persons, a case of partnership; yet that rule ought not to apply to cases where one party is to act manifestly as the mere agent for another, and is to receive a compensation for his skill and services only, and not to share as a partner, or to possess the rights and powers of a partner. In short, the true rule, *ex æquo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in a capital stock, or in the profits, or in both, then, that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves

the parties agree to have a community of interest or participation in the profit and loss of the business or adventure, as principals, either indefinitely or in fixed proportions. Secondly, where there is, strictly speaking, no capital stock, but labor, skill, and industry are to be contributed by each in the business, as principals, and the profit and loss thereof are to be shared in like manner. Thirdly, where the profit is to be shared between the parties, as principals, in like manner, but the loss, if any occurs beyond the profit, is to be borne exclusively by one party only. Fourthly, where the parties are not in reality partners, but hold themselves out, or at least are held out by the party sought to be charged, as partners to third persons, who give credit to them accordingly. Fifthly, where one of the parties is to receive an annuity out of the profits, or as a part thereof.[2] Wherever, therefore, the evidence brings the case

out as partners to the public, or their conduct operated as a fraud or deceit upon third persons. It is upon this foundation that the decisions rest, which affirm the truth and correctness of the distinction already considered as a qualification of the more general doctrine contended for. And in this view it is difficult to perceive why it has not a just support in reason, and equity, and public policy. Wherever the profits and losses are to be shared by the parties in fixed proportions and shares, and each is intended to be clothed with the powers, and rights, and duties, and responsibilities of a principal, either as to the capital stock, or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they intend a partnership. But where one party is stripped of the powers and rights of a partner, and clothed only with the more limited powers and rights of an agent, it seems harsh, if not unreasonable, to crowd upon him the duties and responsibilities of a partner, which he has never assumed, and for which he has no reciprocity of reward or interest. It has, therefore, been well said by Mr. Chancellor Kent in his learned Commentaries, that 'to be a partner, one must have such an interest in the profits as will entitle him to an account, and give him a specific lien or preference in payment over other creditors. There is a distinction between a stipulation for a compensation for labor proportioned to the profits, which does not make a person a partner; and a stipulation for an interest in such profits, which entitles the party to an account as a partner.' And Mr. Collyer has given the same doctrine in equally expressive terms, when he says, that in order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profit must be mutual; that is, each person must have a specific interest in the profits, as a principal trader:" ib. §§ 48, 49. {See, on this question of partnership from a participation in the profits, Berthold *v.* Goldsmith, 24 How. (U. S.) 536; Denny *v.* Cabot, 6 Met. (Mass.) 85; Holmes *v.* Old Colony R. R., 5 Gray (Mass.) 58; Fitch *v.* Harrington, 13 id. 468; Brigham *v.* Dana, 29 Vt. 1; Legett *v.* Hyde, 58 N. Y. 272; Parsons on Partnership, 71 and n. (*l*); where the true test is said to be, "Did the supposed partner acquire by his bargain any property in, or any control over, the profits, while they remained undivided? If so, he is liable to third persons, and otherwise not." Also Braley *v.* Goddard, 49 Me. 145; Atherton *v.* Tilton, 44 N. H. 452. In Cox *v.* Hickman, 8 H. L. Cases 268, 306, and s. c. 9 C. B. N. S. 47, it is held that the test whether a person who is not an ostensible partner in a trade is nevertheless, in contemplation of law, a partner, is not whether he is entitled to participation in the profits, — although this affords cogent, often conclusive, evidence of it, — but whether the trade has been carried on by persons acting on his behalf. This rule is followed in Kilshaw *v.* Jukes, 3 B. & S. 847, and English and Irish Church University, *in re*, 1 H. & M. 85. See also, upon this and other kindred points, a valuable paper in 17 Am. L. Reg. 209, on the "Criteria of Partnership."} [It is now settled law, except in Pennsylvania, that a person can be charged as a partner only when he is actually a partner, or when he is estopped to deny the existence of the partnership, by having induced the plaintiff to act on the belief that a partnership existed: Cox *v.* Hickman, 8 H. L. C. 268; Thompson *v.* Bank, 111 U. S. 529; Meehan *v.* Valentine, 145 id. 611.]

[2] Story on Partn. § 54; ib. §§ 55–70; Collyer on Partn. c. 1, § 2, pp. 43–56.

within either of these classes, a partnership, as against the parties, will be sufficiently proved.[3]

§ 483. **In Contract against Partners.** It is essential, in an *action ex contractu against partners*, that the evidence of partnership should extend to all the defendants;[1] otherwise the plaintiff will be nonsuited. But the utmost strictness of proof is not required; for though, where they sue as plaintiffs, they may well be held to some strictness of proof, because they are conusant of all the means whereby the fact of partnership may be proved; yet where they are defendants, the facts being less known to the plaintiff, it is sufficient for him to prove that they have acted as partners, and that by their habit and course of dealing, conduct, and declaration, they have induced those with whom they have dealt to consider them as partners.[2] Hence, if two persons have in many instances traded jointly, this will be admissible evidence towards the proof of a general partnership, and sufficient, if the instances of joint dealing outweigh the instances of separate dealing, to throw upon the defendants the bur-

[3] {Where one lends money to a firm, which money is to be paid back absolutely without regard to the profits of the firm, the fact that he is to receive a part of the profits does not make him a partner, as he does not share the risk of loss: Eager *v.* Crawford, 76 N. Y. 97. Nor is he if he takes part of the profits as interest: Hart *v.* Kelley, 83 Pa. St. 286. If, however, he receives the share of the profits *qua* profits, he is liable as partner to third parties: Leggett *v.* Hyde, 58 N. Y. 272.

Where persons agree to share the profits of a business, an agreement between themselves that they shall not be partners will not affect third parties: Haas *v.* Roat, 16 Hun (N. Y.) 526.

Societies and clubs formed for political or social purposes — *e. g.* the so-called "Granges" — are not partnerships: Richmond *v.* Judy, 6 Mo. App. 465; Edgerly *v.* Gardner, 9 Neb. 130.

Where a number of people act as a corporation, under a corporate name, without any legal organization, their liability to third parties is that of copartners: Marseilles, etc. Co. *v.* Aldrich, 86 Ill. 504.} [*Contra*, the weight of authority. See Cook on Corporations, chapter xiii.]

[1] Young *v.* Hunter, 4 Taunt. 582. In *assumpsit*, the fact of partnership is put in issue by the plea of *non assumpsit:* Tomlinson *v.* Collett, 3 Blackf. 436.

[2] 2 Stark. Evid. 585, 586; Evans *v.* Curtis, 2 C. & P. 296. If it be clear that the party, at the time of the acts and admissions, was not a partner, they will not render him liable for a prior debt of the firm: Saville *v.* Robertson, 4 T. R. 720. Nor will an admission of a partnership in one transaction bind the party as a partner in another matter not connected with it: De Berkom *v.* Smith, 1 Esp. 29. If the articles of copartnership are produced in evidence against the firm, it will be sufficient to prove the signatures of those who are parties to the suit: Beach *v.* Vanderwater, 1 Sandf. S. C. 265. {Where one represents himself or causes others to represent him as being a member of their firm, he is liable to those who trade with the firm, believing him to be a partner: Rice *v.* Barrett, 116 Mass. 312; Rowland *v.* Long, 45 Md. 439; Brugman *v.* McGuire, 32 Ark. 733. To establish this liability he must know or have reason to know that he is regarded as a partner: *Re* Jewett, 15 Bankr. Reg. 126.

Where the plaintiff seeks to fix a liability on the defendants as partners by reason of their carrying on business in such a way as to hold themselves out to the world as partners, evidence may be given of the whole manner of carrying on the business, and those who have had dealings with them are admissible as witnesses to testify to these facts: Parshall *v.* Fisher, 43 Mich. 529.

In settling the affairs of a firm, where it was found that the same partners carried on business in two places, under different names, it was held that all the assets of the two nominal firms should be applied to paying all the creditors of both: *Re* Williams, 3 Wood C. C. 493.}

den of proving that it was not such a partnership.[3] And though the partnership was established by deed, yet, against the parties, it may be proved by oral evidence of partnership transactions,[4] or by the books of the firm.[5] But evidence of general reputation, or common report of the existence of the partnership, is not admissible, except in corroboration of previous testimony; unless it be to prove the fact, that the partnership, otherwise shown to exist, was known to the plaintiff.[6]

§ 484. **Proof by Declarations and Admissions.** A partnership may also be proved against the parties, by their respective *declarations and admissions*, whether verbal, or in letters or other writings. Thus where, upon the trial of the question of partnership, the defendants, in order to render a witness competent, executed a release to him, the release was permitted to be read by the plaintiff, as competent evidence in chief to establish the partnership.[1] So, also, an entry at the custom-house, by one partner in the name of the firm, is admissible, though not conclusive evidence for the same purpose.[2] In other cases, the act, declaration, or admission of one person is not admissible in evidence to establish the fact that others are his partners, though it is ordinarily sufficient to prove it as against himself.[3] But if, in an action against three as partners, two

[3] Newnham *v.* Tethrington, cited in Collyer on Partn. p. 450; Etheridge *v.* Binney, 9 Pick. 272. The signature of a joint note by two persons is no evidence of a partnership between them: Hopkins *v.* Smith, 11 Johns. 161. But the signature of the name of a firm is evidence against the person signing it, that he is one of the partners: Spencer *v.* Billing, 3 Campb. 312.

[4] Alderson *v.* Clay, 1 Stark. 405; Widdifield *v.* Widdifield, 2 Binn. 249; Allen *v.* Rostain, 11 S. & R. 362.

[5] Richter *v.* Selin, 8 S. & R. 425; Champlin *v.* Tilley, 3 Day 306; Hill *v.* Manchester Waterw. Co., 2 N. & M. 573. {Entries in the books of a firm are not evidence against any one to show that he is a member of the firm: Robins *v.* Warde, 111 Mass. 244. Nor, in a suit between partners, are entries in the plaintiff's books, charging the defendant as a partner, admissible: McNamara *v.* Draft, 40 Iowa 413.}

[6] Allen *v.* Rostain, 11 S. & R. 362; Whitney *v.* Sterling, 14 Johns. 215; Barnard *v.* Torrance, 5 Gill & Johns. 383. See also Gowan *v.* Jackson, 20 Johns. 176; Halliday *v.* McDougall, 20 Wend. 81; Brand *v.* Ferriday, 16 La. 296; {Brown *v.* Rains, 53 Iowa 81; Sager *v.* Tupper, 38 Mich. 258; Carlton *v.* Ludlow Woollen Mills, 27 Vt. 496; Brown *v.* Crandall, 11 Conn. 92; Bowen *v.* Rutherford, 60 Ill. 41. Such general reputation does not make such a *prima facie* case as calls on the defendant to introduce any evidence to rebut it: Taylor *v.* Webster, 39 N. J. L. 102. And see *post*, § 485. The partnership cannot be proved by the report of a mercantile agency, for this is hearsay: Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135; Campbell *v.* Hastings, 29 Ark. 512. But evidence of general reputation is admissible on the question of whether one is a dormant partner: Metcalf *v.* Officer, 1 McCrary C. C. 325. In any case, if it is shown that the defendant knew he was being held out and regarded as a partner, and does not contradict the general report or the reputation, he is, as to third parties, a partner: Campbell *v.* Hastings, *supra*.}

[1] Gibbons *v.* Wilcox, 2 Stark. 43. And see Parker *v.* Barker, 1 B. & B. 9. Declarations made to a third person are admissible, though not made in the presence of the other parties: Shott *v.* Strealfield, 1 M. & Rob. 8. {Where three parties are sued as partners, and no service is made on one, his declarations are inadmissible as proof of the partnership: Smith *v.* Hulett, 65 Ill. 495.} [See also Vol. I. § 184 *b*.]

[2] Ellis *v.* Watson, 2 Stark. 453.

[3] Burgue *v.* De Tastat, 3 Stark. 53; Flower *v.* Young, 3 Campb. 240; Tinkler *v.* Walpole, 14 East 226; Cooper *v.* South, 4 Taunt. 802; Whitney *v.* Ferris, 10 Johns.

have acknowledged the existence of articles of copartnership, which the third, on due notice, refuses to produce at the trial, the jury will be warranted in finding the fact of partnership upon this evidence alone.[4] In one case, where the issue of partnership was raised by a plea in abatement, for the non-joinder of parties as defendants, the admission of liability as a partner, by one not joined in the suit, being good in an action against him, was held to be also receivable on this issue, to prove him a partner.[5]

§ 485. **Defences.** The *proof of partnership* may be *answered* by the defendant, by evidence of an arrangement between the parties, by which 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; provided the plaintiff had previous and express notice.[1] The defendant may also 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] or, that the partnership was previously dissolved; or, that he had notified the plaintiff not to deal with his partner, without his own concurrence.[3]

§ 486. **Surviving Partner; Witness.** In an action against the administrators of a deceased partner, the *surviving partner* is a competent witness to prove the partnership; for he has no interest in the matter, such an action not being maintainable at law.[1] But in an action brought by the surviving partner as such, the *widow of his deceased partner* is not a competent witness for him, her testimony going to increase the fund, of which she is entitled to a distributive share.[2] A *dormant partner* is a competent witness for his partner in an action by the latter, if he releases his interest in the subject of the suit.[3]

66; Tuttle *v.* Cooper, 5 Pick. 414; Robbins *v.* Willard, 6 id. 464; McPherson *v.* Rathbone, 7 Wend. 216. See *ante*, Vol. I. § 177; McCutchin *v.* Bankstone, 2 Kelly 244; Grafton Bank *v.* Moore, 13 N. H. 99; {Allcott *v.* Strong, 9 Cush. (Mass.) 523; Dutton *v.* Woodman, ib. 255; Chase *v.* Stevens, 19 N. H. 465. And such admissions need not be made at the exact time at which the cause of action arose, if they are sufficiently near it to allow a reasonable inference that the partnership existed at the time when the cause of action arose: Sager *v.* Tupper, 38 Mich. 258. But cf. Ruhe *v.* Burnell, 121 Mass. 450.}

[4] Whitney *v.* Sterling, 14 Johns. 215.

[5] Clay *v.* Langslow, 1 M. & Malk. 45. *Sed quære*, and see *ante*, Vol. I. § 395; Miller *v.* M'Clenachan, 1 Yeates 144. {The admissions of one partner, made after the dissolution of the firm, are not admissible against the other parties: Hogg *v.* Orgill, 34 Pa. 344.}

[1] Minnett *v.* Whitney, 5 Bro. P. C. 489; Collyer on Partn. 214, 456; *Ex parte* Harris, 1 Madd. 583; Alderson *v.* Clay, 1 Campb. 404.

[2] Jones *v.* Hunter, Dan. & Lloyd 215; Collyer on Partn. 456.

[3] Willis *v.* Dyson, 1 Stark. 164; Lord Galway *v.* Matthew, 10 East 264. {But proof of the dissolution must be by notice published in a newspaper at least, and actual notice to all correspondents. Notoriety is not proof of the dissolution, it being a private and not a public matter: Pitcher *v.* Barrows, 17 Pick. (Mass.) 361; *ante*, Vol. I. §§ 14*p*, 137, 138; Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321.}

[1] Grant *v.* Shutter, 1 Wend. 148.

[2] Allen *v.* Blanchard, 9 Cowen 631.

[3] Clarkson *v.* Carter, 3 Cowen 84.

PATENTS.[1]

§ 487. **Remedy for Infringement.** The remedy for the infringement of a patent-right, both by statute and common law, is by an action on the case.[2] From the nature of the action and the tenor of

[1] [For the present statutory law governing patents see U. S. Rev. St., Title LX. and amendments.]

[2] Stat. U. S. 1836, c. 357, § 14; 1 Chitty on Plead. 131. The declaration for the infringement of this right is given by Mr. Phillips in his excellent Treatise on the Law of Patents, p. 520, as follows: "To answer to A of B, in the county of S, in the district of ——, manufacturer, in a plea of trespass on the case, for that the plaintiff was the original and first inventor [or discoverer] of a certain new and useful art [machine, manufacture, composition of matter, or improvement on any art, machine, etc., taking the words of the statute most applicable to the subject of the invention] in the letters-patent hereinafter mentioned and fully described, the same being a new and useful [here insert the title or description given in the letters-patent], which was not known or used before his said invention [or discovery], and which was not, at the time of his application for a patent as hereinafter mentioned, in public use or on sale with his consent or allowance; and the plaintiff, being so as aforesaid the inventor [or discoverer] thereof, and being also a citizen of the United States [if the fact is so], (*a*) on the —— day of —— [here insert the date of the patent], upon due application therefor, did obtain certain letters-patent therefor in due form of law under the seal of the Patent Office of the United States, signed by the Secretary of State, and countersigned by the Commissioner of Patents of the United States, bearing date the day and year aforesaid, whereby there was secured to him, his heirs, administrators, executors, or assigns, (*b*) for the term of fourteen years from and after the date of the patent, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention [machine, improvement, or discovery], as by the said letters-patent, in court to be produced, (*c*) will fully appear. (*d*) And the plaintiff further says, that from

(*a*) "It has been suggested, in a preceding part of this work, p. 408" (says Mr. Phillips in his note in this place), "that the citizenship of the patentee need not be proved by the plaintiff, and, if so, it need not be averred. This will, however, depend upon the construction that shall be given to the 15th section of the act of 1836, c. 357, by which, if the patentee be an alien, the defendant is permitted to give matter in evidence, tending to show that the patentee 'has failed and neglected for the space of eighteen months from the date of the patent to put and continue on sale to the public, on reasonable terms, the invention or discovery.' The position referred to in p. 408 assumes that the burden on this point is, in conformity to the language of the statute in the first instance, on the defendant. But to go on the safer side, the above form of declaring assumes the burden to be on the plaintiff to aver and prove, in the first instance, that the patentee is a citizen of the United States, or, if an alien, and the eighteen months have expired before the date of the writ, that he has put and continued the invention on sale in the United States on reasonable terms."

(*b*) "Act of 4th of July, 1836, c. 357, § 5."

(*c*) "Which the plaintiff brings here into court:" Chit. Pl. vol. ii. p. 795 (5th ed.).

(*d*) "The English precedents here state the making and filing of the specification, the assignment of the patent, and the recording of the assignment, if the action be in the name of an assignee, or if an assignee of part of the right is joined.

"If the patentee is an alien, and the counsel chooses to declare very cautiously, if eighteen months have expired from the date of the patent, he may here introduce the averment, that within eighteen months from the date of the patent, namely, on, etc.,

the declaration, as stated below, it is apparent that the plaintiff, under the general issue, may be required, and therefore should be prepared, to prove, (1) the grant and issuing of the letters-patent, together with the specification and the assignment to him, if he claims as assignee; (2) that the invention was that of the patentee, and was prior to that of any other person; (3) that it is new and useful, and has been reduced to practice; (4) that it has subsequently been infringed by the defendant; and the damages, if any, beyond a nominal sum are claimed.[3]

the time of the granting to him of the said letters-patent, hitherto, he has made, used, and vended to others to be used [or he has made, *or* has used, *or* has vended to others to be used, as the case may be], the said invention [machine, improvement, or discovery], to his great advantage and profit [or if he has not made, used, or vended, then, instead of the above averments, may be substituted after the word 'hitherto,' 'the said exclusive right has been and now is of great value to him, to wit, of the value of $ '](*e*) Yet the said D, well knowing the premises, but contriving to injure the plaintiff, (*f*) did on the [some day after the date of the patent], and at divers times before and afterwards, during the said term of fourteen years mentioned in said letters-patent, and before the purchase of this writ, at C, in the county of M, in the said district of ——, unlawfully and wrongfully, and without the consent or allowance, and against the will of the plaintiff, make [use, and vend to others to be used, or did make, or did use, or did vend to others to be used, as the case may be] the said invention [machine, improvement, or discovery], in violation and infringement of the exclusive right so secured to the plaintiff by said letters-patent as aforesaid, and contrary to the form of the statutes of the United States in such case made and provided, whereby the plaintiff has been greatly injured, and deprived of great profits and advantages, which he might and otherwise would have derived from said invention; and has sustained actual damage to the amount of —— ; and, by force of the statute aforesaid, an action has accrued to him, to recover the said actual damage, and such additional amount, not exceeding in the whole three times the amount of such actual damages, (*g*) as the court may see fit to order and adjudge. Yet the said D, though requested, has never paid the same, or any part thereof, to the plaintiff, but hath refused, and yet refuses, so to do."

[3]]The burden of proof on all these points is on the plaintiff: Bates *v.* Coe, 98 U. S. 31; Mellen *v.* Delaware, etc. Ry. Co., 12 Fed. Rep. 640, note. But the letters are *prima facie* evidence on all these points: [Harper *v.* Wilgus, 56 F. 587, U. S. App.; St. Louis Car-Coupler Co. *v.* National, etc. Co., 87 F. 885, U. S. App.]; and shift the burden of evidence of any defence, *e. g.* anticipation, on the defendant: Grear *v.* French,

at, etc., he (or his assignees) put the invention on sale in the United States, on reasonable terms, and from that time always afterwards to the time of purchasing the writ, he (or they, or he and they) had continued the same on public sale, in the United States, on reasonable terms."

(*e*) "The principle upon which these averments are made is the same as that upon which, in an action for trespass upon personal property, the value of the property is alleged, by way of showing that it was a thing in respect to which the plaintiff might sustain damage. Mr. Gould says of this averment: 'As he (the plaintiff) is not obliged to state the true value, the rule requiring it to be stated would seem to be of no great practical use.' Gould's Pl. c. 4, § 37, p. 187. Mr. Chitty says, the above averments as to profit by making, using, and vending are sometimes omitted. The propriety of making the averment of the value seems to depend upon the question whether the allegation of ownership of an article or species of personal property, or interest in it, and possession of it, imports a value to the plaintiff, without specifically alleging its value; for if it does, then a ground of action distinctly appears, without any such specific allegation."

(*f*) "'Contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and within the said term of fourteen years in said letters patent mentioned:'" Chit. Pl. (5th ed.) vol. ii. p. 766.

(*g*) "Act of 4th of July, 1836, c. 357, § 14."

§ 488. **Proof of Letters-patent.** (1) The *letters-patent*, to which, in the United States, a copy of the *specification* is annexed as a part thereof, are proved either by the production of the originals, or by copies of the record of the same, under the seal of the patent office, and certified by the Commissioner of Patents, or, if his office be vacant, by the chief clerk.[1] If the patent is for an improvement, and the specification refers to the former patent, without which it is not sufficiently clear and intelligible, the former patent with its specification must also be produced.[2] Where the proof is by an exemplification, it must be of the whole record, and not of a part only. The drawings, if any, must be produced, whenever they form part of the specification.

§ 489. **Construction of Letters-patent.** As letters-patent are not granted as restrictions upon the rights of the community, but to promote science and the useful arts,[1] the courts will give a *liberal construction* to the language of patents and specifications, adopting that interpretation which gives the fullest effect to the nature and

11 F. 591; Brodie *v.* Ophir, etc. Co., 5 Sawyer C. C. 608; Cornvallis Fruit Co. *v.* Curran, 8 F. 150 ; Miller *v.* Smith, 5 id. 359; Rogers *v.* Beecher, 4 id. 639. [The weight of a patent as evidence, however, is affected by the circumstances of its issue: Earle *v.* Wanamaker, 87 id. 740.]

So a decision of the patent office authorities on the validity of a patent, in a case when there is a conflict, throws the burden of introducing evidence on the party against whom the decision is rendered (Wire Book S. M. Co. *v.* Stevenson, 11 id. 155); but on an affirmative defence — *e. g.* license — the burden of proof is on the defendant (Watson *v.* Smith, 7 id. 350).

It has been said that the defence of a prior invention is an affirmative defence: Schillinger *v.* Gunther, 17 Blatch. C. C. 66; Putnam *v.* Hollender, 6 F. 382; Howes *v.* Nute, 4 Cliff. C. C. 173. But cf. Miller *v.* Smith, *supra*; [Sessions *v.* Gould, 60 F. 753; Anderson *v.* Monroe, 17 U. S. App. 195; Singer Mfg. Co. *v.* Brill, 9 id. 601. That anticipation must be established beyond a reasonable doubt, see Pacific Cable R. *v.* Butte City R., 55 F. 760.]

[1] Stat. U. S. 1836, c. 357, §§ 4, 5. By this act, no letters-patent are to be issued until the specification is filed; which it is the duty of the clerk to enroll; and therefore no particular evidence of the enrolment is required on the part of the plaintiff. But in England, where the letters-patent are issued before the specification is filed, the party is bound to see to the enrolment of his specification within a limited time, and therefore is bound to show that this requirement has been complied with. *Ex parte* Beck, 1 Bro. Ch. 578; *Ex parte* Koops, 6 Ves. 599; Watson *v.* Pears, 2 Campb. 294. [By act of 1861, c. 88, § 15, it is enacted, "that printed copies of the letters-patent of the United States, with the seal of the office affixed thereto, and certified and signed by the Commissioner of Patents, shall be legal evidence of the contents of said letters-patent in all cases."]

[2] Lewis *v.* Davis, 3 C. & P. 502; Phillips on Patents, pp. 401, 402; [Kittle *v.* Merriam, 2 Curtis C. C. 475; Parker *v.* Stiles, 5 McLean C. C. 44.]

[1] Blanchard *v.* Sprague, 3 Sumn. 535; [Parker *v.* Stiles, 5 McLean C. C. 44; Winans *v.* Denmead, 15 How. (U. S.) 330. But this rule of construction is applicable only to those cases where the state of the art is such that there is no conflict between the claims of various inventors, and the patent which is the subject of judicial construction is the first in the field. When, however, there are numerous patents covering nearly similar inventions, the enlargement of any one claim beyond the construction which might fairly be implied from its language would work injustice to other inventors who have equal claims upon the public for support, and whose patents would be narrowed by such enlarged construction, and the strict construction of all the claims will be adopted by the courts: Delong *v.* Bickford, 13 F. 32; Neacy *v.* Allis, ib. 874.

extent of the claim made by the inventor.[2] The meaning is a question for the court, the words of art having been interpreted by the jury.[3] If there is any obscurity in them, reference may be had to the affidavit of the patentee, made and filed prior to the issuing of the patent.[4] No precise form of words is necessary provided their import can be clearly ascertained by fair interpretation, even though the expressions may be inaccurate.[5] But if the claim is of an abstract principle or function only, detached from machinery, it is void.[6]

§ 490. **Sufficiency of Specification.** The plaintiff must give some evidence of the *sufficiency* of the specification, if denied; such as, the evidence of persons of science, and workmen, that they have read the specification, and can understand it, and have practised the invention according to it; and such evidence will be sufficient, unless the defendant can show that persons have been misled by the specification, or have incurred expense in attempting to follow it, and were unable to ascertain what was meant.[1] The sufficiency of the specification, in matters of description, is a question for the jury.[2] If a whole class of substances be mentioned as suitable, the plaintiff must show that each and every of them will succeed; for otherwise the difficulty of making the instrument will be increased, and the public will be misled.[3] But if the title describes the patent to have been granted for improvements, in the plural, whereas the

[2] Ryan *v.* Goodwin, 3 Sumn. 514. Where a patent is granted for a term of years, the day of the date of the patent is reckoned inclusive: Russell *v.* Ledsman, 9 Jur. 557, 558.

[3] Neilson *v.* Harford, 8 M. & W. 806. {On the question of the identity of the inventions described in a patent and in a re-issue, the following rule of construction was given in Heald *v.* Rice, in the Supreme Court of the United States, 12 F. 222: —

Where the question of identity of the invention in the original and re-issued patents is to be determined by their face from mere comparison, and if it appears from the face of the instruments that extrinsic evidence is not needed to explain the terms of art, or to apply the descriptions to the subject-matter, so that the court is able to say from mere comparison what are the inventions described in each, and to affirm from such comparison that they are not the same, then the question of identity is one of pure construction, and not of evidence, and consequently is matter of law for the court without any auxiliary matter of fact to be passed on by the jury when the action is at law. Cf. Jennings *v.* Kibbe, 10 id. 669.}

[4] Pettibone *v.* Derriger, 4 Wash. 215.

[5] Wyeth *v.* Stone, 1 Story 273; Minter *v.* Mower, Webst. Pat. Cas. 138, 141; s. c. 6 Ad. & El. 735; Derosne *v.* Fairie, ib. 154, 157; 5 Tyrw. 393; s. c. 1 M. & Rob. 457. {And the specification is to be construed according to the true import of the words used, rather than by their grammatical arrangement: Allen *v.* Hunt, 6 McLean C. C. 303.}

[6] Blanchard *v.* Sprague, 3 Sumn. 535; Wyeth *v.* Stone, 1 Story 273; Lowell *v.* Lewis, 1 Mason 187; Earle *v.* Sawyer, 4 Mason 1; Phillips on Patents, pp. 95–100, 109–113; Godson on Patents, c. 3, § 5; {Smith *v.* Ely, 5 McLean C. C. 76.}

[1] Turner *v.* Winter, 1 T. R. 602; Cornish *v.* Keene, 3 Bing. N. C. 570; s. c. 4 Scott 337. See on the requisites of a sufficient specification, Phillips on Patents, c. 11; Godson on Patents, c. 4. See also Bickford *v.* Skewes, Webst. Pat. Cas. 219; Household Co. *v.* Neilson, ib. 692; {Curtis on Patents, 3d ed. § 478.}

[2] Walton *v.* Potter, Webst. Pat. Cas. 595; {Battin *v.* Taggart, 17 How. (U. S.) 74; Hogg *v.* Emerson, 11 id. 587.}

[3] Bickford *v.* Skewes, 6 Jur. 167; s. c. 1 Gale & D. 736.

specification discloses only one improvement, it is no variance.[4] The object of the specification is, that after the expiration of the term the public shall have the benefit of the discovery.[5] It must be understood according to the acceptation of practical men at the time of its enrolment; and be such as, taken in connection with the drawings, if any, to which it refers, will enable a skilful mechanic to perform the work.[6] If it contain an untrue statement in fact, which, if literally acted upon by a competent workman, would mislead him, and cause the experiment to fail, it is bad, even though a competent workman, acquainted with the subject, would perceive, and in practice correct, the error.[7]

§ 491. **Assignment.** Besides the formal proof of the *assignment*, where the plaintiff claims as assignee, he must show that the assignment has been recorded in the patent-office, before he can maintain any suit, either at law or in equity, either as sole or joint plaintiff, at least as against third persons.[1]

§ 492. **Originality of Invention.** (2) The next step in the plaintiff's proof is to show, that the *invention* is original, and his *own* and *prior* to any other. Of this point, as the applicant for a patent is required to make affidavit of the fact before the patent is issued, the possession of the patent has been held *prima facie* evidence, in a *scire facias* for its repeal;[1] and it is now held that the oath of the

[4] Nickels *v.* Haslam, 7 M. & G. 378.

[5] Liardet *v.* Johnson, Bull. N. P. 76; Newberry *v.* James, 2 Meriv. 446.

[6] Crossly *v.* Beverly, 9 B. & C. 63; s. c. 3 C. & P. 513; Bloxam *v.* Elsee, 1 C. & P. 558; 6 B. & C. 169; Morgan *v.* Seaward, 2 M. & W. 544. [A specification is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates: Seabury *v.* Am Ende, 152 U. S. 561.] {The words "or the equivalent therefor," in a claim, cannot apply to another invention differing in arrangement and principle, but equivalent in result. The words embrace only colorable imitations: McCormick *v.* Manny, 6 McLean C. C. 539.}

[7] Neilson *v.* Harford, 8 M. & W. 806. {In construing the specification of claim in letters-patent, the entire specification and drawings are to be examined; and though there is an error in showing how a particular element enters into the combination claimed, if the residue of the specification and the drawing afford means to correct this mistake, it does not avoid the letters-patent: Kittle *v.* Merriam, 2 Curtis C. C. 475.}

[1] Wyeth *v.* Stone, 1 Story 273. {An invention may be assigned as well before as after the application for a patent; but the patents must be applied for and issued in the name of the inventor, and when obtained it will inure to the benefit of the assignee: Rathbone *v.* Orr, 5 McLean C. C. 134. It seems that a license to run a patented machine, not being considered a personal privilege, is assignable: Wilson *v.* Stolly, 5 McLean C. C. 1. Parol evidence is admissible in an action by an inventor to recover an agreed consideration for permitting the defendant to take out the patent in his own name: Lockwood *v.* Lockwood, 33 Iowa 509.} [A certified copy of the record of assignment is not admissible to prove the assignment: New York *v.* American Cable Co., 26 U. S. App. 7. A patent right is an entirety, and cannot be assigned in part, though an undivided interest in the whole may be assigned: Pope Mfg. Co. *v.* Gormully Mfg. Co., 144 U. S. 248.]

[1] Stearns *v.* Barrett, 1 Mason 153. And see Minter *v.* Wells, Webst. Pat. Cas. 129; 5 Tyrw. 163. On the same principle, it has been held in England, irrespective of any oath of the party, that the introducer is *prima facie* the inventor: Minter *v.* Hart, Webst. Pat. Cas. 131. {The issue of letters-patent raises the presumption of originality, and this presumption is strengthened by the extension of the patent: McComb *v.* Ernest, 1 Woods C. C. 195;} [Harper *v.* Wilgus, 56 F. 587, U. S. App. The pre-

patentee, made *diverso intuitu*, that he was the true and first inventor, may be opposed to the oath of a witness whose testimony is offered to the contrary, in an action for infringement of the right.[2] The person who first suggests the principle is the true and first inventor,[3] provided he has also first perfected and adapted the invention to use; for until it is so perfected and adapted to use, it is not patentable.[4] In a race of diligence between two independent and contemporaneous inventors, he who first reduces his invention to a fixed and positive form has the priority of title to a patent therefor.[5] But if the first inventor is using reasonable diligence in adapting and perfecting his invention, he will have the prior right, notwithstanding a second inventor has in fact first perfected the same, and first reduced it to practice in a positive form.[6] The language of the statute,[7] "not known or used by others before his or their discovery thereof," does not require that the invention should be known or used by more than one person, but merely indicates that the use should be by some other person or persons than the patentee.[8]

§ 493. **Practicability.** (3) It must also be shown by the plaintiff, that the invention is *new and useful*, and that it has been *reduced to practice*.[1] The fact of novelty does not necessarily follow from the fact of its invention by the patentee; for there may have been several inventors of the same thing, independent of each other. But the question of novelty, in our practice, can hardly arise upon opening the plaintiff's case, inasmuch as the patent itself, issued as it is upon the oath of the applicant, that the invention is new,

sumption cannot control the power of the court to declare what constitutes novelty: Warren Co. *v.* Rosenblatt, 53 U. S. App. 234.]

[2] Alden *v.* Dewey, 1 Story 336; *ante*, Vol. I. § 352; Woodworth *v.* Sherman, 1 Story 171.

[3] Minter *v.* Hart, Webst. Pat. Cas. 131.

[4] Reed *v.* Cutter, 1 Story 590; Bedford *v.* Hunt, 1 Mason 302; Woodcock *v.* Parker, 1 Gallis. 438; {Thomas *v.* Weeks, 2 Paine C. C. 92; Allen *v.* Hunter, 6 McLean C. C. 303; *In re* Lowe's Patent, 35 Eng. Law & Eq. 325.}

[5] {On this principle it has been held that it is not sufficient for the defendant, in order to make out a defence of lack of priority in the plaintiff's invention, to give evidence that similar devices had been in use prior to the invention of the plaintiff, if it appears that such use was merely by way of experiment, with a view to a final perfecting of the machine, and that this perfecting was not in fact ever accomplished; although it may be that these experiments suggested to the plaintiff the device which he subsequently patented: Whittlesey *v.* Ames, 15 F. 893; Jennings *v.* Pierce, 13 Blatchf. C. C. 42.}

[6] Reed *v.* Cutter, 1 Story 590. See, as to the novelty and originality of invention, Phillips on Patents, pp. 65, 66, 150–168; Godson on Patents, pp. 36–50.

[7] Stat. U. S. 1836, c. 357, § 6.

[8] Reed *v.* Cutter, 1 Story 590; {Parker *v.* Stiles, 5 McLean C. C. 61; Evans *v.* Eaton, 3 Wheat. (U. S.) 454; and case in Circuit Court in Connecticut, cited by Mr. Justice Nelson in Hotchkiss *v.* Greenwood, 11 How. (U. S.) 248, 266. See also Gayler *v.* Wilder, 10 id. 477, where it is held by a majority of the court, that a prior construction and use of the thing patented, in one instance only, which had been finally forgotten or abandoned, and never made public, so that, at the time of the invention by the patentee, the invention did not exist, will not render a patent invalid:} [Harrison *v.* Kennedy, 149 Pa. 3.]

[1] The facts being undisputed, the question whether the invention is new is for the court: Morgan *v.* Seaward, 2 M. & W. 544; Webst. Pat. Cas. 172.

seems to be *prima facie* evidence of that fact.[2] It is sufficient under the statute of the United States, though it is otherwise in England and France, if it appears that the thing in question was not known or used before the invention thereof by the patentee, though it may have been used prior to the date of the patent.[3] Nor is it necessary to the validity of the patent, that any of the ingredients should be new or unused before for the purpose; the true question being, whether the combination of them by the patentee is substantially new.[4]

§ 494. **Utility.** The question of *utility* is a question for the jury; who have frequently found, that all that was new in a patent was immaterial or useless.[1] It will be sufficient, however, if the amount of invention and of utility, taken together, be considerable. Novelty may frequently exist without utility; but great utility cannot be conceived to exist without novelty. Hence great utility does of itself, for all practical purposes, constitute novelty; and the latter may be assumed wherever the former is proved to exist in any degree. Ordinarily, both may be proved by the testimony of persons well conversant with the subject, to the effect that they had never seen or heard of the invention before, and that the public had given large orders for the article, or that licenses had been taken for the exercise of the right.[2] If the invention has never gone into general use, or has never been pursued, it is a presumption against its utility.[3]

[2] Phillips on Patents, pp. 406, 407.

[3] Ib. 150–164, 407.

[4] Ryan *v.* Goodwin, 3 Sumn. 514; {Newton *v.* Vancher, 11 Eng. Law & Eq. 589; Electric Telegraph Co. *v.* Brett, 4 id. 347; Bush *v.* Fox, 26 id. 464.}

[1] By "useful" is meant, not as superior to all other modes now in practice, but as opposite to frivolous or mischievous invention, or inventions injurious to the moral health or good order of society: Lowell *v.* Lewis, 1 Mason 182; Bedford *v.* Hunt, ib. 302. [A patent not useful for the purpose for which it is claimed is void; Fox *v.* Kensington, etc. Co., 1892, 3 Ch. 424. There is no utility in a coin-controlled gambling machine: Schultze *v.* Holtz, 82 F. 448.] {Upon the question of the utility of an invention, courts are not rigid; the patent raises the presumption of utility, and, unless the invention be shown to be absolutely frivolous and worthless, the patent is valid: Parker *v.* Stiles, 5 McLean C. C. 44; Manny *v.* Jagger, 1 Blatchf. C. C. 372. In an action to recover royalties, a decree of a competent court, that the patent was invalid, is evidence of want of consideration and worthlessness of the patent: Hawks *v.* Swett, 6 T. & C. (N. Y.) 329. If the defendant has admitted the usefulness of parts of the plaintiff's machine, which appear also in his machine, this admission is sufficient proof of the usefulness of those parts: Foye *v.* Nichols, 13 F. 125. The letters-patent are *prima facie* evidence, as against one who has infringed them, of the novelty and utility of the patent: Lehnbeuter *v* Holthaus (U. S. Sup. Ct.), 105 U. S. 94, 13 F. 144; Sawyer *v.* Miller, 12 F. 725;} [DuBois *v.* Kirk, 158 U. S. 58; Gandy *v.* Main Belting Co., 143 id. 587.]

[2] Webster on Patents, pp. 10, 11, 30; Cornish *v.* Keene, 3 Bing. N. C. 570; s. c. 4 Scott 337; Galloway *v.* Bleaden, Webst. Pat. Cas. 526; 1 M. & G. 247. And see Hill *v.* Thompson, 8 Taunt. 375; Holt Cas. 636; Earle *v.* Sawyer, 4 Mason 6; {Lindsay *v.* Stein, 10 F. 907; Wilson Packing Co. *v.* Chicago Packing, etc. Co., 9 id. 547; Shedd *v.* Washburn, ib. 904; Washburn & Moen Manufactnring Co. *v.* Haish, 4 id. 900.} [The fact that a patented article has gone into general use is not conclusive as to its utility: Lovell Mfg. Co. *v.* Cary, 147 U. S. 623; Grant *v.* Walter, 148 id. 547; McClain *v.* Ortmayer, 141 id. 419.]

[3] Morgan *v.* Seaward, 2 M. & W. 544; 1 Jur. 527; Minter *v.* Mower, 6 Ad. & El. 735; Simister's Patent, Webst. Pat. Cas. 723.

§ 495. **Practicability.** The plaintiff must also show that the invention has been *reduced to practice*, and that it effects what the specification professes, and in the mode there described. For the thing to be patented is not a mere elementary principle, or intellectual discovery, but a principle put in practice, and applied to some art, machine, manufacture, or composition of matter.[1]

§ 496. **Infringement.** (4) The plaintiff, lastly, must prove the *infringement* of his right, by the defendant, before the commencement of the action, together with his *damages*,[1] if he claims any, beyond a nominal sum. On the point of infringement, the presumption is in favor of the defendant. The statute secures to the patentee "the exclusive right of making, using, and vending to others to be used, the invention or discovery."[2] It will be sufficient, therefore, to prove the *making* of the thing patented, for use or sale, though the defendant has never either used or sold it.[3] In the proof of *using*, which is a matter of great delicacy, a distinction is to be observed between the use of an article about or upon which a patented material or machine has been employed, and the act of applying such material or machine. It is the latter only which is a violation of the right. Thus, if a carriage has been finished with patented paint, it is the builder, and not the purchaser, who violates the right of the patentee.[4] So, where a quantity of wire

[1] Earle *v.* Sawyer, 4 Mason 1, 6, per Story, J.; Phillips on Patents, c. 7, § 8, pp. 109–112, 409; [Standard Cartridge Co. *v.* Peters Cartridge Co., 47 U. S. App. 205; Front Rank Furnace Co. *v.* Wrought Iron Range Co., 63 F. 995. A copy of a foreign patent is not legal evidence that the process patented is practicable: New Jersey Zinc Co. *v.* Lehigh Zinc Co., 59 N. J. L. 189.]

[1] {In cases where there is no established patent or license fee, general evidence may be resorted to in order to get at the measure of damages; and evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate: Suffolk Company *v.* Hayden, 3 Wall. (U. S.) 315; Seymour *v.* McCormick, 16 How. (U. S.) 485. Counsel fees are not a proper element for the consideration of the jury in estimation of damages: Teese *v.* Huntingdon, 23 id. 2. The plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more: New York *v.* Ransom, ib. 487. The rule of damages is the amount which the infringer actually realized in profits, not what he might have made by reasonable diligence: Dean *v.* Mason, 20 id. 198; Livingston *v.* Woodworth, 15 id. 546.}

[2] Stat. 1836, c. 357, § 5. Merely exhibiting for sale is no infringement: Minter *v.* Williams, 4 Ad. & El. 251; s. c. 5 Nev. & M. 647.

[3] Whittemore *v.* Cutter, 1 Gall. 429. In Boyce *v.* Dorr, 3 McLean 528, it was held, that, if the maker was ignorant that it had been patented, none but nominal damages should be given. And it has been held in the Court of Exchequer, that if a patent has been infringed unintentionally, the patentee is not entitled to any redress. But this doctrine has been disapproved. See Heath *v.* Unwin, 15 Sim. 552; 11 Jur. 420; 16 Law J. 383, Chan. {A sale of the thing patented to an agent of the patentee employed by him to make the purchase, on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of an infringement: Byam *v.* Bullard, 1 Curtis C. C. 100.}

[There is no infringement of an English patent where a foreign manufacturer makes goods according to the patent and mails them at a foreign post-office to an English customer: Badische Fabrik *v.* Basle Works, 1898, 1 A. C. 200.]

[4] Phillips on Patents, pp. 361–363.

watch-chains were made to order, in the manufacture of which a patented instrument was unlawfully used, it was held that the manufacturer alone was liable to the patentee, though the purchaser knew that the instrument in question was used, and approved of its use.[5] But where the defendant *ordered* the goods to be manufactured by the plaintiff's process, which goods he afterwards received and sold, he was held liable.[6] The use of the article merely for philosophical experiment, or for the purpose of ascertaining the verity and exactness of the specification, is not an infringement of the right.[7] As to the fact of using, it may here be observed, that, though this ordinarily is proved only by direct evidence, yet the conduct of the defendant, in refusing to permit the manner of his manufacture and course of his operations to be inspected, is admissible in evidence, as furnishing a presumption that he has infringed the plaintiff's right. If the article made by the defendant agrees in all its qualities with one made upon the plaintiff's plan, it is *prima facie* evidence that it was so made.[8]

§ 497. **Same Subject.** If the use of the machine or other subject of the patent is shown to have been *prior to the grant* of the patent, it is no infringement;[1] but it cannot be afterwards continued. So, if a patent proves to be void, on account of a formal defect in the specification, for which reason it is surrendered, and a new patent is taken out, but in the interim, another person, without license, erects and uses the thing invented, his continued use of it, after the second patent is issued, will be an infringement of the right; but he will not be liable for the intermediate use, before the issuing of the second patent.[2] And the law is the same, where a patent, originally void, is amended by filing a disclaimer, under the statute.[3]

§ 498. **Identity.** It must also appear that the machine used by the defendant is *identical* with the subject of the patent. Machines are the same if they operate in the same manner, and produce the same results, upon the same principles.[1] If the differences between

[5] Keplinger *v.* De Young, 10 Wheat. 358; Boyd *v.* McAlpen, 3 McLean 427.

[6] Ibid.; Gibson *v.* Brand, 4 M. & G. 179.

[7] Whittemore *v.* Cutter, 1 Gall. 429; Phillips on Patents, p. 366.

[8] Huddart *v.* Grimshaw, Webst. Pat. Cas. 91; Hall *v.* Jarvis, ib. 102; Godson on Patents, p. 242; Gibson *v.* Brand, Webst. Pat. Cas. 627, 630. {A French vessel was rigged in France with gaffs which had been patented in the United States, and so rigged came into one of our ports; but as the gaffs were placed on the vessel when she was built, as part of her original equipment in a foreign country, by persons not within the jurisdiction of our patent laws, it was held that such use of the gaffs was not an infringement of the patent: Brown *v.* Duchesne, 2 Curtis C. C. 371.}

[1] [Brill *v.* St. Louis Car Co., 80 F. 909.]

[2] Ames *v.* Howard, 1 Sumn. 482; Phillips on Patents, pp. 368, 370; Dixon *v.* Moyer, 4 Wash. 68.

[3] Perry *v.* Skinner, 2 M. & W. 471; s. c. 1 Jur. 433; Stat. U. S. 1837, c. 45, §§ 7, 9, which is essentially similar to Stat. 5 & 6 W. IV. c. 83, § 1.

[1] Gray *v.* Osgood, 1 Pet. C. C. 394; Odiorne *v.* Winkley, 2 Gall. 51. A witness, who has previously constructed a machine like the plaintiff's, may look at a drawing

the two machines are substantial they are not alike; but if formal only, then they are alike. To this point the opinion of *experts* is admissible in evidence;[2] but it is still only matter of opinion, to be weighed and judged of by all the other circumstances of the case. The question whether the principles are the same in both machines, when all the facts are given, is rather a matter of law, than of the opinion of mechanics;[3] but the general question of identity, as well as the general question of infringement, being a mixed question of law and fact, is submitted to the jury, under proper instructions from the court.[4]

§ 499. **Competency of Witness.** The purchaser of a license to use an invention is a *competent witness* for the plaintiff in an action for infringement of the patent-right; for he has no direct pecuniary interest in supporting the patent, but on the contrary, it may be for his advantage that it should not be supported.[1]

§ 500. **Defence.** The *defence* in an action for infringement of a patent-right, is usually directed either to the patent itself, in order to invalidate the plaintiff's title, or to the fact of its violation by the defendant; and it is ordinarily made under the general issue, with notice of special matter to be given in evidence, which the statute permits.[1] The notice of special matter must have been

not made by himself, and say whether he has such a recollection of the machine as to be able to say that it is a correct drawing of it: R. *v.* Hadden, 2 C. & P. 184.

[2] {"Experts may be examined to explain terms of art, and the state of the art, at any given time. They may explain to the court and jury the machines, models, or drawings exhibited. They may point out the difference or identity of the mechanical devices involved in their construction. The maxim of *cuique in sua arte credendum* permits them to be examined as to questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence." Grier, J., Winans *v.* New York & Erie Railroad Company, 21 How. (U. S.) 100.}

[3] Barrett *v.* Hall, 1 Mason 470, 471. And see Morgan *v.* Seaward, Webst. Pat. Cas. 171.

[4] Barrett *v.* Hall, 1 Mason 470, 471; Morgan *v.* Seaward, Webst. Pat. Cas. 168; Jupe *v.* Pratt, ib. 146; Macnamara *v.* Hulse, 1 Car. & Marshm. 471; Boulton *v.* Bull, 2 H. Bl. 480. {A patent is *prima facie* evidence that the several grants of right contained in it are valid; that the several things, methods, and devices contained in it are new, useful, required invention, and were invented by the patentee. If one instrument performs a certain office better than another which is patented, and has driven the latter out of the market, this is *prima facie* evidence of difference from it, and of newness of invention: Smith *v.* Woodruff, 6 Fish. Pat. Cas. 476.}

[1] Derosne *v.* Fairie, Webst. Pat. Cas. 154; s. c. 1 M. & Rob. 457. {The plaintiff is also a competent witness for himself, if allowed to testify by the laws of the State within whose limits the court is sitting: Vance *v.* Campbell, 1 Black (U. S.) 427; Haussknecht *v.* Claypool, ib. 431.}

[1] Where the defendant pleaded, 1, not guilty; 2, that the plaintiff was not the true and first inventor; 3, that the invention had previously been wholly, or in part, publicly and generally known, used, practised, and published, — it was held, that the issue on the first plea must be determined by the acts done by the defendant, without reference to the intention with which they were done; that the second plea would be proved by showing a publication before the date of the letters-patent; and that the third plea only raised a question of user before the grant of the letters-patent: Stead *v.* Anderson, 4 M. G. & S. 306.

given to the plaintiff or his attorney thirty days before the trial.[2] Any special matter is admissible, "tending," as the statute expresses it, "to prove, (1) that the description and specification filed by plaintiff does not contain the whole truth, relative to his invention or discovery; or (2) that it contains more than is necessary to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public; or (3) that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new; or (4) that it had been described in some public work anterior to the supposed discovery thereof by the patentee; or (5) had been in public use or on sale with the consent and allowance of the patentee before his application for a patent; or (6) that he had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same; or (7) that the patentee, if an alien at the time the patent was granted, had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public on reasonable terms, the invention or discovery for which the patent issued;[3] (8) and whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used; in either of which cases judgment shall be rendered for the defendant with costs;[4] (9) *Provided, however*, That whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country; it not appearing that the same, or any substantial part thereof, had before been patented or described in any printed publication."[5]

[2] {If the first notice served is defective, or not sufficiently comprehensive to admit his defence, the defendant may give another to remedy the defect or supply the deficiency, subject to the same condition that it must be in writing, and be served more than thirty days before the trial: Teese *v.* Huntingdon, 23 How. (U. S.) 10.}

[3] {And in this case the burden of proof rests on the defendant: Tatham *v.* Lowber, 2 Blatchf. C. C. 49.}

[4] {"Notice of the time when the person possessed the knowledge or use of the invention is not required by the act; the name of the person, and of his place of residence, and the place where it has been used, are sufficient:" Phillips *v.* Page, 24 How. (U. S.) 168.}

[5] Stat. U. S. 1836, c. 357, § 15. {In an action at law for infringement, the defendant cannot show use in a foreign country: Judson *v.* Cope, 1 Bond 327. And if the party charged fails to produce the article he uses, if it be in his power, it is an admission of infringement: Ely *v.* Monson Mfg. Co., 4 Fish. Pat. Cas. 64. See also Wood *v.* Cleveland Rolling Mill, 4 id. 550. In Roberts *v.* Buck, 6 id. 325, it was held that when evidence of anticipations not set up in the answer had been

§ 501. **Want of Novelty.** As the proof of *novelty* of invention, on the side of the plaintiff, must of necessity be negative in its character, it may be successfully opposed, on the part of the defendant, by a single witness, testifying that he had seen the invention in actual use, at a time anterior to the plaintiff's invention. The facility with which this defence may be made affords a strong temptation to the crime of subornation of perjury; to prevent which the defendant is required to state, in his notice, the names and residence of the witnesses by whom the alleged previous invention is to be proved.[1] But notwithstanding its liability to abuse, the evidence is admissible, to be weighed by the jury, who are to consider, whether, upon the whole evidence, they are satisfied of the want of novelty.[2] If the action is brought by an assignee against the patentee himself, he is estopped by his own deed of assignment from showing that it was not a new invention.[3]

§ 501 *a*. **Invention not original.** The question whether the plaintiff is the true and *original inventor* or not depends on the question whether he borrowed the invention from a source open to the public, or not.[1] It seems that his title is not destroyed by the fact that the same invention has been previously made, if it had altogether been lost sight of.[2] If the invention has been distinctly

taken, and a motion was afterwards made to amend the answer, an amendment would not make that evidence admissible, which was taken under objection before that amendment. In Allis *v.* Buckstaff, 13 F. 879, the court says, in commenting on the case of Roberts *v.* Buck, that it is discretionary with the court in such a case, especially after the objecting party has fully cross-examined the witnesses, and taken rebutting proofs, either to let the testimony stand in the case, or to strike it out, and permit the defence to take the testimony anew under the amended answer, and that so far as the state of the case in Roberts *v.* Buck is disclosed, in the opinion of the court, there is ground for inferring that the objecting party stood on his objection and elected not to cross-examine the witnesses or offer rebutting proofs, and the court then holds that if there has been full cross-examination, and proofs in rebuttal of that particular evidence have been taken, the proper course is to let the testimony stand.

In Searls *v.* Bouton, 12 id. 140, it was held that if a defence of prior knowledge is set up, but no mention made of prior use, evidence of such use will not be admitted if it is objected to. Cf. Roemer *v.* Simon, 95 U. S. 214.}

[1] {It is said in Allis *v.* Buckstaff, 13 F. 879, that the case of Richardson *v.* Lockwood, 6 Fisher 454, in which it was ruled that the names of the witnesses by which an alleged prior use is to be proved, should be stated in the answer, has been overruled by Roemer *v.* Simon, 95 U. S. 214, and Planing Machine Company *v.* Keith, 101 id. 479, wherein it is held that only the names of those who had invented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth.}

[2] Manton *v.* Manton, Dav. Pat. Cas. 250; Phillips on Patents, pp. 415–417; Lewis *v.* Marling, 10 B. & C. 22; Cornish *v.* Keene, 3 Bing. N. C. 570. It is sufficient if the invention is new as to general use and public exercise: Lewis *v.* Marling, Webst. Pat. Cas. 492. [Evidence that a device has gone into general use and displaced other devices previously used is admissible to controvert a doubt as to the novelty of an invention: Potts *v.* Creager, 155 U. S. 597; Keystone Mfg. Co. *v.* Adams, 151 id. 139; but is by no means conclusive: Lovell Mfg. Co. *v.* Cary, 147 id. 623; Grant *v.* Walter, 148 id. 547; McClain *v.* Ortmayer, 141 id. 419.]

[3] Oldham *v.* Langmead, cited 3 T. R. 441.

[1] Walton *v.* Potter, Webst. Pat. Cas. 592.

[2] Household Co. *v.* Neilson, Webst. Pat. Cas. 690. {See Gayler *v.* Wilder, 10 How. (U. S.) 477.}

described, not by way of mere speculation or suggestion, but as a complete, successful, and perfect invention, in a book, whether written or printed,[3] which has been publicly circulated, whether at home or abroad, this is a sufficient answer to the plaintiff's claim as the first inventor, whether he knew of the publication or not.[4]

§ 502. **Public Use.** The *public use*[1] *and exercise* of an invention, which prevents it from being considered as new, is a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in private, or by another by his license, and in order to test its qualities, and does not mean a use by the public generally.[2] But it is not necessary that the use should come down to the time when the patent was granted; proof of public use, though it has been discontinued, is sufficient to invalidate the patent.[3] And the place of the use, whether at home or abroad, makes no difference;[4] provided, in the case of foreign use, the invention has also been described in a printed publication.[5] It is sufficient to prove that it was not first reduced to practice by the patentee;[6] but it is not sufficient to prove that another was the first inventor, if he neither reduced the invention to practice, nor used due diligence in adapting and perfecting it.[7] The proof of use may be rebutted by the plaintiff, by showing that it was by his license.[8]

§ 503. **Subsequent Patent.** The defendant may also prove, in defence, a *subsequent patent*, granted to the same patentee, either alone or jointly with another person, and either for the whole or a part of the same invention.[1] So, he may show that *different and distinct inventions* are joined in the same patent, or that the invention is *not lawful*, or is *pernicious*.[2]

[3] [Or in a trade magazine: Truman *v.* Carvill Mfg. Co., 87 F. 470.]

[4] Household Co. *v.* Neilson, Webst. Pat. Cas. 690; Stead *v.* Williams, 8 Jur. 930; 7 M. & G. 818; Brooks *v.* Jenkins, 3 McLean 250.

[1] [Evidence of prior use should be sufficient beyond a reasonable doubt: Mast *v.* Dempster Mfg. Co., 82 F. 327, U. S. App.]

[2] Carpenter *v.* Smith, 9 M. & W. 300; Webst. Pat. Cas. 535. And see Pennock *v.* Dialogue, 4 Wash. 544; s. c. 2 Pet. 1; Bedford *v.* Hunt, 1 Mason 302; Bently *v.* Fleming, 1 C. & K. 587.

[3] Household Coal & Iron Co. *v.* Neilson, 9 Cl. & Fin. 788. The question of public use, as, whether it were a use for manufacture, or only for experiment which had been abandoned, is a question for the jury: Elliott *v.* Aston, Webst. Pat. Cas. 224; Cornish *v.* Keene, 3 Bing. N. C. 570.

[4] Brown *v.* Annandale, Webst. Pat. Cas. 433; Phillips on Patents, c. 7, § 16; Anon., 1 Chitty 24, n.

[5] Stat. U. S. 1836, c. 357, § 15; {O'Reilly *v.* Morse, 15 How. (U. S.) 62.}

[6] Woodcock *v.* Parker, 1 Gall. 436; Tennant's Case, Webst. Pat. Cas. 125, n.; s. c. Dav. Pat. Cas. 429.

[7] Pennock *v.* Dialogue, 4 Wash. 538; Stat. U. S. 1836, c. 357, § 15.

[8] Phillips on Patents, p. 422.

[1] Treadwell *v.* Bladen, 4 Wash. 709; Phillips on Patents, p. 420; Odiorne *v.* Amesbury Nail Factory, 2 Mason 28; Barrett *v.* Hall, 1 id. 447; [Barnes, etc. Co. *v.* Walworth Mfg. Co., 18 U. S. App. 538.] {So on a bill for an injunction by one tenant in common of letters-patent, the respondent may show a license under another tenant in common of the same patent; such tenant in common having an equal right to make, use, and sell the thing patented: Clum *v.* Brewer, 2 Curtis C. C. 506.}

[2] Phillips on Patents, pp. 128, 421.

§ 504. **Abandonment.** The defendant may also show an *abandonment* of the invention by the plaintiff, and a *dedication* or *surrender* of it to public use, prior to the issuing of the patent.[1] And if such dedication was made, or the public use of the invention was acquiesced in for a long period subsequent to the issuing of the patent, this is a good defence in equity, if the fact is explicitly relied on and put in issue by the answer.[2] But the public use or sale of an invention, in order to deprive the inventor of his right to a patent, must be a public use or sale by others,[3] with his knowledge and consent, and before his application for the patent. A sale or use of it with such knowledge or consent, in the interval of time between the application for a patent and the grant thereof, has no such effect.[4] Nor is it material whether the public use was originally by express permission of the inventor or by piracy; for in either case it is his acquiescence in the public use that renders the subsequent patent void. And he is presumed to acquiesce, when he knows, or might know, of the public use.[5]

§ 505. **Deficient Specification.** A *material defect in the specification*, whether accidental or designed and fraudulent, may also be shown in defence of this action, both by common law and by statute.[1] So, if the specification is designedly ambiguous and obscure, or, if it seeks to cover more than is actually new and useful, this also is good defence.[2] Whether the want of *utility* can be given in evidence under the general issue has been questioned; but the better opinion is that it may, as it cannot justly be said to be a surprise on the plaintiff.[3]

§ 506. **Infringement.** In regard to the *fact of infringement*, the general doctrine is, that the use of any substantial part of the invention, though with some modifications of form or apparatus, is a

[1] Phillips on Patents, c. 7, § 19, pp. 181–205, 422; Pennock *v.* Dialogue, 4 Wash. 538; s. c. 2 Pet. 1; Treadwell *v.* Bladen, 4 Wash. 709; Whittemore *v.* Cutter, 1 Gall. 478; [Craig *v.* Michigan Lubricator Co., 72 F. 173. The use may be "public," though knowledge of it is confined to one person: Root *v.* Third Ave. R., 146 U. S. 210.] A disuse of the invention *after* the grant of letters-patent is no defence at law: Gray *v.* James, 1 Pet. C. C. 394.

[2] Wyeth *v.* Stone, 1 Story 273, 282. But it is no defence at law: Shaw *v.* Cooper, 7 Pet. 292.

[3] [Mast *v.* Dempster Mfg. Co., 82 F. 327, U. S. App.]

[4] Ryan *v.* Goodwin, 3 Sumn. 514. [Want of diligence in prosecuting an application for a patent does not constitute an abandonment of the invention: Western Electric Co. *v.* Sperry Electric Co., 18 U. S. App. 177.]

[5] Shaw *v.* Cooper, 7 Pet. 292; Whittemore *v.* Cutter, 1 Gall. 482; Stat. U. S. 1836, c. 357, §§ 6, 15. See also Mellus *v.* Silsbee, 4 Mason 108.

[1] R. *v.* Cutler, 1 Stark. 354; Phillips on Patents, p. 424; Stat. U. S. 1836, c. 357, § 15. {If the specifications do not describe the invention with reasonable certainty and precision, the patentee can claim nothing under his patent: Parker *v.* Stiles, 5 McLean C. C. 44.}

[2] Galloway *v.* Bleaden, Webst. Pat. Cas. 524; Hill *v.* Thompson, 8 Taunt. 375; Lowell *v.* Lewis, 1 Mason 182; Evans *v.* Eaton, 1 Pet. C. C. 322. Unless the excess is disclaimed: Stat. U. S. 1837, c. 45, §§ 7, 9.

[3] Phillips on Patents, p. 426; Langdon *v.* De Groot, 1 Paine 203; Haworth *v.* Hardcastle, 1 Bing. N. C. 182.

violation of the patent-right. It is the substance and the principle of the machine, and not the mere form, the identity of purpose and not of name, which are to be regarded. A specious variation in form, or an alteration in the mode of adaptation, however ingenious, does not render it any the less an infringement.[1] So the use of a chemical equivalent for a substance described in the patent, if known to be so at the time, and it be used for the purpose of taking the benefit of the patent by making a colorable variation therefrom, is an infringement.[2] It is a question peculiarly for the jury, who must say whether the defendant has availed himself of the invention of the plaintiff, without having so far departed therefrom as to give to his act the denomination of a new discovery.[3] If the patent is for several distinct improvements, or for several machines, the use of one only is a violation of the right;[4] but where the patent is for the entire combination of three things, and not of any two of them, it is no infringement to construct a machine containing only two of the combinations.[5] Evidence that the invention of the defendant is better than that of the plaintiff is improper, except to show a substantial difference between the two inventions.[6]

§ 507. **Disclaimer.** Where the patent was originally too broad in its specification, including more than the patentee is entitled to hold, the error may now be cured by a *disclaimer*, filed pursuant to the statute.[1] But the disclaimer, to be effectual, must be filed in the

[1] Wyeth *v.* Stone, 1 Story 273; Hill *v.* Thompson, 8 Taunt. 375; Walton *v.* Potter, 3 M. & G. 411; 4 Scott N. R. 91; Webst. Pat. Cas. 585; Morgan *v.* Seaward, Webst. Pat. Cas. 171; Cutler's Patent, ib. 427; {Sargent *v.* Larned, 2 Curtis C. C. 340; O'Reilly *v.* Morse, 15 How. (U. S.) 62;} [McDowell *v.* Kurtz, 39 U. S. App. 353; Salmon *v.* Garvin, etc. Co., 84 F. 195.]

[2] Heath *v.* Unwin, 14 Eng. Law & Eq. 202, per Erle, J.; 16 Jur. 996. {See also Unwin *v.* Heath, 32 Eng. Law & Eq. 45; Newton *v.* Grand Junction Railway Co., 6 id. 557.}

[3] Walton *v.* Potter, Webst. Pat. Cas. 586, 587; {Battin *v.* Taggart, 17 How. (U. S.) 74.}

[4] Moody *v.* Fisk, 2 Mason 112; Wyeth *v.* Stone, 1 Story 273; Gillett *v.* Wilby, 9 C. & P. 334; Cornish *v.* Keene, 3 Bing. N. C. 570.

[5] Prouty *v.* Draper, 1 Story 568; [Derby *v.* Thompson, 146 U. S. 476; Norton *v.* Jensen, 49 F. 859, U. S. App.; Kansas City Hay Press Co. *v.* Devol, 81 F. 726, U. S. App.]

[6] Alden *v.* Dewey, 1 Story 336. [Evidence that an alleged infringing article is patented is *prima facie* proof that it does not infringe: National Harrow Co. *v.* Hanby, 54 F. 493.]

[1] Stat. U. S. 1837, c. 45, §§ 7, 9; the provisions of which are these: "Sect. 7. *And be it further enacted*, That whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee, his administrators, executors, and assigns, whether of the whole or of a sectional interest therein, may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; which disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office, on payment by the person disclaiming, in manner as other patent duties are required by law to be paid, of the sum of ten dollars. And such disclaimers shall thereafter be taken and considered as part of the original specification, to the extent of the interest which shall be possessed in the patent or right secured thereby by the disclaimant, and by those claiming by or under him subsequent

Patent Office before the suit is brought; otherwise, the plaintiff will not recover the costs of suit, even though he should prove that the infringement was in a part of the invention not disclaimed. And where a disclaimer has been filed, whether before or after the suit is commenced, yet if the filing of it has been unreasonably neglected or delayed, this will constitute a good defence to the action.[2] If the patentee has assigned his patent in part, and a joint suit in equity is brought by him and the assignee for a perpetual injunction, a disclaimer by the patentee alone, without the assignee's uniting in it, will not entitle them to the benefit of the statute.[3]

§ 508. **Competency of Witnesses.** In regard to the *competency of witnesses*, it has been held, that persons who have used the machine in question, as the defendant has done, are not thereby rendered incompetent witnesses for him, notwithstanding the object of the defence is to invalidate the patent, as well as to defeat the claim of damages; for in such a case the witness stands in the same predicament as the rest of the community; and the objection to his competency would equally apply to every witness, since, if the patent were void in law, every person might use it, and therefore every person might be said to have an interest in making it public property.[1] Another patentee claiming adversely to the plaintiff, and under whose license the defendant has acted, is also a competent witness for the defendant.[2]

to the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same.

"Sect. 9. *And be it further enacted* (anything in the fifteenth section of the act to which this is additional to the contrary notwithstanding), That whenever, by mistake, accident, or inadvertence, and without any wilful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case, the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and *bona fide* his own: *Provided*, It shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid. And every such patentee, his executors, administrators, and assigns, whether of a whole or of a sectional interest therein, shall be entitled to maintain a suit at law or in equity on such patent for any infringement of such part of the invention or discovery as shall be *bona fide* his own as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim. But, in every such case in which a judgment or verdict shall be rendered for the plaintiff, he shall not be entitled to recover costs against the defendant, unless he shall have entered at the Patent Office prior to the commencement of the suit, a disclaimer of all that part of the thing patented which was so claimed without right: *Provided, however*, That no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer as aforesaid."

[2] Reed *v.* Cutter, 1 Story 590; {Guyon *v.* Serrell, 1 Blatchf. C. C. 244; Foote *v.* Silsby, ib. 445; Silsby *v.* Foote, 14 How. (U. S.) 218; Seymour *v.* McCormick, 19 id. 96.} [As to what is an excuse for delay, see Thomson-Houston Co. *v.* Union R., 84 F. 888. As to the construction of disclaimers, see Graham *v.* Earl, 82 id. 737, U. S. App.]

[3] Wyeth *v.* Stone, 1 Story 273.

[1] Evans *v.* Eaton, 7 Wheat. 356; Evans *v.* Hettich, ib. 453.

[2] Treadwell *v.* Bladen, 4 Wash. 704.

§ 509. **Copyright.** The subject of Copyright, which is usually treated in connection with that of Patents, may properly be considered in this place.[1]

§ 510. **Remedy for Infringement.** The remedy for an infringement of copyright is either at law, by an action for the statute penalties, or by an action on the case for damages, or in equity, by a bill for an injunction;[1] but in either case the evidence necessary on both sides is substantially the same, the plaintiff being obliged to prove his title to the exclusive privilege claimed, and the fact of its violation, or, in equity, at least an intended violation, by the defendant.

§ 511. **Plaintiff's Case; Title.** The plaintiff, to make out his *title*, must prove that, prior to the publication of his work,[1] he deposited a printed copy of its title in the clerk's office of the District Court of the United States for the district where he resided at the time, and that notice of the copyright[2] was given on the title-page, or the page next following, or, if it be a map, or print, or musical composition, then on its face, in the form prescribed by the statute. He is also required to deliver to the district clerk a copy of the work, within three months after its publication;[3] and it seems that a com-

[1] [As to what is the subject of copyright, see Amberg File Co. *v.* Shea, 82 F. 314, U. S. App.; Mott Iron Works *v.* Clow, 82 F. 316, U. S. App.; Border *v.* Zeno Co., 88 F. 74.]

[1] Stat. U. S. 1831, c. 16. The subject of literary property, both by common law and by statute, received a very full and elaborate discussion in the leading case of Wheaton *v.* Peters, 8 Peters 591.

[1] [Publication of the separate parts of a book in a magazine before any steps are taken to secure a copyright is a publication which will prevent the subsequent copyright of the book: Holmes *v.* Hurst, 174 U. S. 82. There may be a publication although the purchaser of each copy is bound by contract not to communicate to any one else the information contained therein: Larrowe *v.* O'Loughlin, 88 F. 896; or to return the book within a certain time: Jewelers' Mercantile Agency *v.* Jewelers' Co., 155 N. Y. 241.]

[2] [As to what is sufficient notice, see Bolles *v.* Outing Co., 45 U. S. App. 449. The notice must state the name of the author: Osgood *v.* Aloe Co., 83 F. 470.]

[3] Stat. U. S. 1831, c. 16, §§ 4, 5. These sections are as follows: "Sect. 4. *And be it further enacted*, That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book or books, map, chart, musical composition, print, cut, or engraving, in the clerk's office, of the district court of the district wherein the author or proprietor shall reside, and the clerk of such court is hereby directed and required to record the same (*qu.* name?) thereof forthwith, in a book to be kept for that purpose, in the words following (giving a copy of the title under the seal of the court, to the said author or proprietor, whenever he shall require the same): 'District of —— to wit: Be it remembered, that on the —— day of —— Anno Domini —— A. B., of the said district, hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be), the title of which is in the words following, to wit (here insert the title); the right whereof he claims as author (or proprietor, as the case may be), in conformity with an act of Congress, entitled, "An act to amend the several acts respecting copyrights." C. D., clerk of the district.' For which record the clerk shall be entitled to receive, from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy under seal actually given to such person or his assigns. And the author or proprietor of any such book, map, chart, musical composition, print, cut, or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver, or cause to be delivered, a copy of the same to the clerk of said district. And it shall be the duty of the clerk of each district court, at least once

pliance with this requirement also must be strictly shown.[4] Of these facts, the certificate of the district clerk, and the production of a copy of the work, will be sufficient *prima facie* evidence.

§ 511 *a*. **Certain Statutory Provisions directory only.** The author of any book or other composition enumerated in the statutes respecting the law of copyright is also required to deliver a copy thereof to the librarian of the Smithsonian Institution, and another copy to the librarian of the Congress Library, for the use of those libraries, within three months after the publication of the book, map, &c.[1] But this provision is understood as merely directory, and not as another condition added to those already made precedent to the exclusive right of the author.[2]

§ 512. **Authorship.** It is frequently necessary for the plaintiff to go further, and prove that he is the author of the work;[1] for which purpose the original manuscript, which it is always expedient to preserve, is admissible, and generally is sufficient evidence; it being proved to be the handwriting of himself or of his amanuensis. If it is lost or destroyed, it must be proved by secondary evidence. If the subject was an engraving, it may be proved by producing one of the prints taken from the original plate; the production of the plate itself not being required.[2]

§ 513. **Assignment.** Where the action is by an assignee, he must deduce his title by legal *assignment* from the original author or pro-

in every year, to transmit a certified list of all such records of copyright, including the titles so recorded, and the date of record, and also all the several copies of books or other works deposited in his office according to this act, to the Secretary of State, to be preserved in his office.

"Sect. 5. *And be it further enacted*, That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page, or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz.: 'Entered according to act of Congress, in the year ——, by A. B., in the clerk's office of the district court of ——' (as the case may be)." [The act of 1891 requires the deposit of two copies with the Librarian of Congress on or before the day of publication: Osgood *v.* Aloe Co., 83 F. 470.]

[4] Such was the construction of a similar provision in the act of 1790, c. 42, § 4: Ewer *v.* Coxe, 4 Wash. 487; Wheaton *v.* Peters, 8 Peters 591.

[1] Stat. U. S. 1846, c. 178, § 10. {Repealed by Statute 1859, c. 22, § 6.}

[2] Jollie *v.* Jaques, N. Y. Leg. Obs., Jan. 1851, p. 11 [1 Blatch. C. C. 618.]

[1] {Where an author is employed by the proprietor of a periodical to write for it articles on certain terms as to price, but without any mention of the copyright, it is to be inferred that the copyright was to belong to such proprietor: Sweet *v.* Benning, 30 Eng. Law & Eq. 461; Richardson *v.* Gilbert, 3 id. 268. One who permits pupils to take copies of his manuscripts, for the purpose of instructing themselves and others, does not thereby abandon them to the public, and the publication of them will be restrained by injunction: Bartlett *v.* Crittenden, 4 McLean C. C. 300.}

[One who employs another to compile a book for him, without reservation of rights by the compiler, is the proprietor entitled to the copyright: Froude *v.* Parrish, 27 Ont. R. 526. The author of a photograph is the person who controls the operation of making it, rather than the one who performs the manual labor: Melville *v.* Mirror Co., 1895, 2 Ch. 531.]

[2] Maughan on Literary Property, p. 165; Thompson *v.* Symonds, 5 T. R. 41, 46.

prietor, in addition to the proof already mentioned. The instrument of assignment must be proved or acknowledged in the same manner as deeds of land are required to be proved or acknowledged in the State or district where the original copyright is deposited and recorded; and, in order to be valid against a subsequent purchaser without notice, it must also be recorded in the clerk's office of the same district within sixty days after its execution.[1]

§ 514. **Infringement.** The plaintiff must prove the *infringement* of his right by the defendant.[1] And it is an infringement, if the defendant has published so much of the plaintiff's work as to serve as a substitute for it; or has extracted so much as to communicate the same knowledge; whether it be in the colorable form of an abridgment, or a review, or by incorporating it into some larger work, such as an encyclopedia, or in any other mode.[2] For the question of violation of copyright may depend upon the value, rather than on the quantity, of the selected materials.[3] If so much of the work be taken, in form and substance, that the value of the original work is sensibly diminished, or the labors of the author are substantially, to an injurious extent, appropriated by another, it constitutes, in law, *pro tanto*, a piracy.[4] But a fair and real abridgment, or a fair quotation, made in good faith, is no violation; and of this intent the jury are to judge.[5] If the main design be not copied, the circumstance that part of the composition of one author is found in another is not of itself piracy sufficient to support an action. Nor will it suffice, if the effect of the new publication is prejudicial in some degree to that of the plaintiff, unless it is substantially so. If it is substantially a copy, it is actionable, however innocent the intention of the defendant in publishing it; on the other hand, if it is not substantially a copy, or a colorable selection, or an abridgment, the publication is lawful, however corrupt the motive. It is the middling class of cases which involve the greatest difficulty,

[1] Stat. U. S. 1834, c. 157, § 1; Curtis on Copyright, c. 8, pp. 216–235. [The assignment must be recorded in accordance with the statute before the assignee can sue for infringement: Liverpool Brokers' Ass'n *v.* Commercial Telegram Bureaux, 1897, 2 Q. B. 1.] {A seizure and sale on execution of the engraved plate of a map, for which the debtor has obtained a copyright, does not transfer the copyright to the purchaser; and the debtor is entitled, without reimbursing to the purchaser the money paid by the latter on such sale, to an injunction to restrain the purchaser from striking off and selling copies of the map: Stephens *v.* Cady, 14 How. (U. S.) 528; Stevens *v.* Gladding, 17 id. 447.}

[1] [The intention to infringe is immaterial: Fisbel *v.* Lueckel, 53 F. 499; Brady *v.* Daly, 83 id. 1007, U. S. App. The law affords no protection to a title apart from the composition which it designates: Corbett *v.* Purdy, 80 F. 901.]

[2] 2 Kent Comm. 382, 383; Godson on Patents, pp. 475, 476 (2d ed.); Maughan on Literary Property, part 3, c. 1, pp. 126–136; Gray *v.* Russell, 1 Story 11; {Jollie *v.* Jaques, 1 Blatchf. C. C. 618.} See Curtis on Copyright, c. 5, pp. 169–192, where the subject of originality is treated with clearness and just discrimination.

[3] Gray *v.* Russell, 1 Story 11; {Clayton *v.* Stone, 2 Paine C. C. 382.}

[4] 2 Kent Comm. 383, n. (*b*), 4th ed.; Roworth *v.* Wilkes, 1 Campb. 94.

[5] Ibid.; Godson on Patents, pp. 447, 478; Maughan on Literary Property, pp. 98, 99, 129–132; {Story's Executors *v.* Holcombe, 4 McLean C. C. 306.}

namely, where there is not only a considerable portion of the plaintiff's work taken, but also much that is not; and here the question, upon the whole, is, whether it is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, entitling it to the character of an original work.[6]

§ 515. **Defences.** In the *defence* of this action, on other grounds than that of defect in the plaintiff's case, it may be shown that the plaintiff's publication was itself pirated,[1] or that it was obscene, or immoral, or libellous, either on government or on individuals; or that it was in other respects of a nature mischievously to affect the public morals or interests.[2] But in equity, it seems, that an injunction may be granted notwithstanding the bad character of the subject, if the author, repenting of his work, seeks by this mode to suppress it.[3] If the defence is made under the plaintiff's *license* for the publication, the defendant, in an action at law, must prove it by a writing signed by the plaintiff, in the presence of two or more credible witnesses.[4]

[6] Wilkins *v.* Aikin, 17 Ves. 422, 426. It is sometimes said, that in these cases the question is whether it was done *animo furandi* or not. But the accuracy of this test is not very readily perceived. The subject of infringement is copiously discussed in Curtis on Copyright, c. 9, pp. 236–305. And see Webb *v.* Powers, 2 W. & M. 497. [As to what constitutes infringement, see Mead *v.* West Pub. Co., 80 F. 380; West Pub. Co. *v.* Lawyers' Co-op. Pub. Co., 51 U. S. App. 216; Simms *v.* Stanton, 75 F. 6; American, etc. Ass'n *v.* Gocher, 70 id. 237; Daly *v.* Webster, 1 U. S. App. 573; Walter *v.* Steinkopff, 1892, 3 Ch. 489; Brady *v.* Daly, 83 F. 1007, U. S. App.]

[1] In order to prove a prior publication in a foreign country, it is not enough to prove, by a witness, that he has seen it there in print, without accounting for the non-production of the printed copy: Boosy *v.* Davidson, 13 Jur. 678.

[2] Godson on Patents, pp. 478, 479; Maughan on Literary Property, pp. 88–99.

[3] Southy *v.* Sherwood, 2 Meriv. 438.

[4] Stat. U. S. 1831, c. 16, §§ 6, 7, 9.

PAYMENT.

§ 516. **Payment, how pleaded.** The defence of payment may be made under the general issue, in *assumpsit;* but, in an action of debt on a specialty or a record, it must be specially pleaded. In either case, the burden of proof is on the defendant, who must prove the payment of money, or something accepted in its stead,[1] made to the plaintiff, or to some person authorized in his behalf to receive it. The word "payment" is not a technical term; it has been imported into law proceedings from the exchange, and not from law treatises. When used in pleading, in respect to cash, it means immediate satisfaction; but when applied to the delivery of a bill or note, or other collateral thing, it does not necessarily mean payment in immediate satisfaction and discharge of the debt, but may be taken in its popular sense, as delivery only, to be a discharge when converted into money.[2]

§ 517. **Receipt only Prima Facie Proof.** If a *receipt* was given for the money, it is proper and expedient to produce it; but it is not necessary; parol evidence of the payment being admissible, notwithstanding the written receipt, and without accounting for its absence.[1] And if produced, it is not conclusive against the plaintiff, but may be disproved and contradicted by parol evidence.[2]

§ 518. **To whom made.** Respecting the *person to whom* the payment was made, if it was made to an *agent* of the plaintiff, his authority may be shown in any of the modes already stated under that title.[1] If it was made to an *attorney-at-law,* his employment by the creditor must be proved; in which case the payment is ordi-

[1] [Burton *v.* Willin, 6 Hous. 522.]

[2] Manning *v.* Duke of Argyle, 6 M. & G. 40. If payment of the whole sum due is pleaded, but the proof is of the payment of part only, the defendant is entitled to the benefit of this evidence by way of reduction of damages: Lord *v.* Ferrand, 1 Dowl. & L. 630. And proof of the payment and acceptance of the whole debt will support a plea of payment of debt and damages where the latter are merely nominal: Beaumont *v.* Greathead, 3 Dowl. & L. 631.

[1] Southwick *v.* Hayden, 7 Cowen 334.

[2] *Ante,* Vol. I. § 305; Skaife *v.* Jackson, 5 D. & R. 290; 3 B. & C. 421; Nicholson *v.* Frazier, 4 Harringt. 206.

[1] *Supra,* tit. Agency, per tot.; {Strayhorn *v.* Webb, 2 Jones Law (N. C.) 199; Simpson *v.* Eggington, 32 Eng. Law & Eq. 597; Underwood *v.* Nicholls, 33 id. 321; Bell *v.* Buckley, 34 id. 92. When one makes a payment to a person not the owner of the property on account of which the payment is made, or not the person with whom the contract for payment was made, the burden of proof is on the person making the payment to show that the person to whom he made it was duly authorized by the owner of the goods, or the contractor, to receive such payment: Seymour *v.* Smith, 114 N. Y. 481.} [Payment to a stranger is not authorized by the fact that the note is payable at his office (Klindt *v.* Higgins, 95 Iowa 529); even when that office is a bank

narily good, upon the custom of the country, until his authority has been revoked.[2] Payment of a judgment to the attorney of record who obtained it, though made more than a year after the judgment was recovered, has been held good;[3] but if the payment was made to an agent employed by the attorney, or to the attorney's clerk, not authorized to receive it, it is otherwise.[4] Even if land has been set off to the creditor by extent, in satisfaction of an execution pursuant to the statute in such cases, payment of the money to the creditor's attorney of record within the time allowed by law to redeem the land is a good payment.[5] But proof of payment made to the attorney after his authority has been revoked will not discharge the liability of the party paying.[6] It is also a good payment if made to a person *sitting in the counting-room* of the creditor, with account-books near him, and apparently intrusted with the conduct of the business;[7] but not if made to an *apprentice*, not in the usual course of business, but on a *collateral transaction*.[8] Payment is also good, if made to one of several partners, trustees, or executors.[9] And if the plaintiff has drawn an *order* on the defendant, payable to a third person, upon which the defendant has made himself absolutely liable to the holder, this, as against the plaintiff, is a good

(First N. B. *v.* Chilson, 45 Neb. 257). But see Scott *v.* Gilkey, 153 Ill. 168. But possession of the security with the consent of the owner gives ostensible authority to receive payment: Lanson *v.* Carson, 50 N. J. Eq. 370.]

[2] Hudson *v.* Johnson, 1 Wash. 10.

[3] Langdon *v.* Potter, 13 Mass. 219; Jackson *v.* Bartlett, 8 Johns. 361; Branch *v.* Burnley, 1 Call 147; Lewis *v.* Gamage, 1 Pick. 347; Kellogg *v.* Gilbert, 10 Johns. 220; Powell *v.* Little, 1 W. Bl. 8; [Shaffer *v.* McCrackin, 90 Iowa 578.]

[4] Yates *v.* Freckleton, 2 Doug. 623; Perry *v.* Turner, 2 Tyrw. 128; 1 Dowl. P. C. 300; s. c. 2 C. & J. 89.

[5] Gray *v.* Wass, 1 Greenl. 257.

[6] Parker *v.* Downing, 13 Mass. 465; Wurt *v.* Lee, 3 Yeates 7. {The death of the principal is a revocation of the authority of the agent, and a payment made thereafter to the agent does not bind the estate of the principal, although the death was not known at the time of making the payment to the person making the payment: Weber *v.* Bridgman, 113 N. Y. 600; [Long *v.* Thayer, 150 U. S. 520; Farmers' Loan & Trust Co. *v.* Wilson, 139 N. Y. 284, *contra*;] Cassiday *v.* McKenzie, 4 Watts & Serg. 282. In Rodrigues *v.* East R. Sav. Inst., 63 N. Y. 460, the Court of Appeals has decided that payment to the administrator of a supposed dead, but in fact living, intestate, is valid. [But this is not the law. See Scott *v.* McNeal, 154 U. S. 34;] Jochumsen *v.* Suffolk Sav. Bk., 3 Allen (Mass.) 87; A. L. Rev., July, 1876; Griffith *v.* Frazier, 8 Cranch 23; Allen *v.* Dundas, 3 T. R. 125.}

[7] Barrett *v.* Deere, 1 M. & Malk. 200.

[8] Saunderson *v.* Bell, 2 C. & Mees. 304; s. c. 4 Tyrw. 224.

[9] Porter *v.* Taylor, 6 M. & S. 156; Stone *v.* Marsh, Ry. & M. 364; Can *v.* Reed, 3 Atk. 695; {Bryant *v.* Smith, 10 Cush. (Mass.) 169.} [Even after the partnership is dissolved: Gordon *v.* Albert, 168 Mass. 150.] {When a bond has been assigned without the knowledge of the obligor, a payment by him to the obligee is a good payment: Preston *v.* Grayson County, 30 Gratt. (Va.) 496.

Payment of the principal of a mortgage to one who assumes to be the mortgagee's agent, to receive such payment, but is not such agent, is not a valid discharge of the debt: Cox *v.* Cutter, 28 N. J. Eq. 13. Payment of an execution by one of several defendants so far extinguishes it that it cannot be subsequently assigned to the debtor paying it, and be levied by him on the land of the other debtors: Adams *v.* Drake, 11 Cush. (Mass.) 505. And a payment of a promissory note by one promisor extinguishes the note: Pray *v.* Maine, 7 id. 253. See also Burr *v.* Smith, 21 Barb. (N. Y.) 262; Thorne *v.* Smith, 2 Eng. Law & Eq. 303.}

payment of his claim to that amount, even though the plaintiff has subsequently countermanded it.[10] The possession of the order, by the debtor on whom it was drawn, is *prima facie* evidence that he has paid it.[11]

§ 519. **Mode of Payment.** As to the *mode of payment*, it may be by any lawful method agreed upon between the parties, and fully executed.[1] The *meaning and intention* of the parties, where it can be distinctly known, is to have effect, unless that intention contravene some well-established principle of law. This intention is to be ascertained, in ordinary cases, by the jury; but it is sometimes legally presumed by the court.[2] Thus, the giving of a *higher security* is conclusively taken as payment of a simple contract debt. Where the payment is made by giving the *party's own security*, it

[10] Hodgson *v.* Anderson, 3 B. & C. 842; Tatlock *v.* Harris, 3 T. R. 180. {But a conditional acceptance of such an order does not operate as a payment, especially if it be afterwards given up to the debtor by such third party unpaid: Bassett *v.* Sanborn, 9 Cush. (Mass.) 58. If a debtor, on the application of the creditor, by an order, verbal or written, requests a third person to pay the debt, whether such third person is bound to do so or not, and he does pay it, it is a payment of the debt, and a discharge of the claim of the creditor: Tuckerman *v.* Sleeper, ib. 180.}

[11] {See *post*, §§ 527, 528. So when a promissory note or bill of exchange has been negotiated, and afterwards comes into the possession of one of the parties liable to pay it, such possession is *prima facie* evidence of payment by him: Baring *v.* Clark, 19 Pick. (Mass.) 220; McGee *v.* Prouty, 9 Met. (Mass.) 547. But this rule of law does not apply to a possession by one of two joint promisors in an action by him to recover of the other one-half the amount thereof: Heald *v.* Davis, 11 Cush. (Mass.) 319. Two bills of sale shown to have been intended, the one as a mortgage, the other as a release of the mortgagor's interest to the mortgagee, were held to show payment of the debt secured by the mortgage: Seighman *v.* Marshall, 17 Md. 550.}

[1] {When the parties to a contract agree to regard some article or substance as money in the payment of the contract price, this agreement will be binding upon them, and a payment made in the article so substituted for money will discharge the liability of the person who pays it just as if he had paid the price in money. Thus, where one manufactured shingles for another and agreed to accept payment "in shingles or their proceeds," and he is paid in shingles and negotiable paper, which was the proceeds of part of the shingles, such paper is received in payment, and any loss arising from the worthlessness of the paper falls on him: Mason *v.* Warner, 43 Mich. 439. So where one agreed to take part-payment in orders on a third person named, and the orders proved worthless, it was held that he could not require further payment from his debtor: Besley *v.* Dumas, 6 Ill. App. 291.

When a written contract specifies a particular kind of money, which is to be the medium of exchange in that contract, the court will decide upon the construction of the terms as to payment, and in what kind of money it should be made.

Thus, where a bond was executed in North Carolina in February, 1865, payable in "current funds," it was held to be payable in Confederate money, which was at that time current: Brickell *v.* Bell, 84 N. C. 82. So of one executed in 1863, payable in 1864 in West Virginia: Gilkeson *v.* Smith, 15 W. Va. 44. [Payment of a debt in a Confederate State made during the rebellion in Confederate money was good when accepted: Hendry *v.* Benlisa, 37 Fla. 609.]

Where the payment was to be so many "dollars in gold," and payments were made in currency, it was held that the value of the currency in gold should be credited to the debtor: Hittson *v.* Davenport, 4 Col. 169. If the creditor accepts payment in currency in such a case, as payment in full, he waives the stipulation as to payment, and will be held bound by his waiver: Lefferman *v.* Renshaw, 45 Md. 119. Or if he accepts payment in depreciated currency: Ritchie *v.* Sweet, 32 Tex. 333; Clark *v.* Bernstein, 49 Ala. 576.}

[2] Millikin *v.* Brown, 1 Rawle 397, 398; Watkins *v.* Hill, 8 Pick. 522, 523; Thatcher *v.* Dinsmore, 5 Mass. 299; Johnson *v.* Weed, 9 Johns. 310.

is either negotiable or not. Ordinarily, the giving of a new security of the same kind with the former, and for the amount due thereon, as a new note for an old one, familiarly known in the Roman and modern continental law as a Novation, is equivalent to payment of the latter;[3] but if it is for a less amount, it is not.[4] If a promissory note is taken as a satisfaction, by express agreement, it will be so held, even though the debt was due of record.[5]

§ 520. **By Negotiable Note.** Where the debtor's own *negotiable note* or *bill* is given for a pre-existing debt, it is *prima facie* evidence of payment, but is still open to inquiry by the jury.[1] The

[3] Story on Bills, § 441; Poth. Obl. by Evans, n. 546–564: Cornwall *v.* Gould, 4 Pick. 444; Huse *v.* Alexander, 2 Met. 157.

[4] Canfield *v.* Ives, 18 Pick. 253; Heathcote *v.* Crookshanks, 2 T. R. 24; Fitch *v.* Sutton, 5 East 230; Smith *v.* Bartholomew, 1 Met. 276.

[5] New York State Bank *v.* Fletcher, 5 Wend. 85; Clark *v.* Pinney, 6 Cowen 297.

[1] [The jury must be satisfied in some way that the parties intended the negotiable note which is given to the creditor, whether it be the debtor's own note or a third party's, to be received in satisfaction of the debt: Mehan *v.* Thompson, 71 Me. 492; Cake *v.* Lebanon Bank, 86 Pa. St. 303.

But it seems that the question whether the receipt of the note by the creditor is of itself enough to make a *prima facie* case of payment, or whether it is for the debtor to go further and show an agreement to take the note in payment, and not as further security, has been decided differently in different States. The rule in some States is that the acceptance by the creditor of the debtor's own negotiable note is *prima facie* evidence of payment. [Stevens *v.* Wiley, 165 Mass. 402.] Thus it was said in Bunker *v.* Barron, 79 Me. 66, that the rule of law is well settled in that State that a negotiable note given for a simple contract debt is *prima facie* to be deemed a payment or satisfaction of such debt; but that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties. Such evidence may be the fact that the payment would deprive the creditor of security existing at the time the note was given, or where the creditor takes the note in ignorance of the facts, or under a misapprehension of the rights of the parties, and in other cases where the facts show that the parties did not intend the note to be given and taken in payment of the debt. So, in a recent case in Massachusetts, the principle that allows the giving of a negotiable, promissory note as sufficient evidence of the payment of a pre-existing debt, but that this evidence may be rebutted by circumstances which show that the note was not intended to be received as payment, was reiterated and affirmed in the case of Quimby *v.* Durgin, 148 Mass. 108; and in another case it was held that if a party taking the note relied on as payment thereby relinquishes valuable security for his debt, the note is not to be considered payment, and, where a new note is given for the old one secured by a mortgage, these circumstances are sufficient to rebut the inference of payment of the mortgage note by the renewal, unless the intent appears affirmatively: O'Conner *v.* Hurley, 147 Mass. 150. See, also, Rice *v.* Howland, ib. 408. But, in [most] States, it is held that it must be proved that the parties intended it to operate as a satisfaction of the debt, and this must be done by the party relying on the payment: Feamster *v.* Withrow, 12 W. Va. 611; Haines *v.* Pearce, 41 Md. 221; Wilbur *v.* Jernegan, 11 R. I. 113; Belshaw *v.* Bush, 14 Eng. Law & Eq. 269; Coburn *v.* Odell, 30 N. H. 540; Noel *v.* Murray, 3 Kernan (N. Y.) 167; Vansteenburg *v.* Hoffman, 15 Barb. (N. Y.) 28; Mooring *v.* Mobile, etc. Ins. Co., 27 Ala. 254; Allen *v.* King, 4 McLean C. C. 128; Lyman *v.* United States Bank, 12 How. (U. S.) 225; [Otto *v.* Halff, 89 Tex. 384; Lowenstein *v.* Bresler, 109 Ala. 326; State *v.* Giese, 59 N. J. L. 130; Combination Steel Co. *v.* St. Paul R., 47 Minn. 207; Baker *v.* Baker, 2 S. D. 261.] Thus, it is held in Pennsylvania that a note given for an existing debt is not payment unless expressly stated as such, the presumption being that the note is not to be payment until it is itself paid: [Berlin Iron Bridge Co. *v.* Bonta, 180 Pa. 448.] And if the title to personal property depends upon payment therefor, giving a note does not vest the title in the purchaser: Levan *v.* Wilten, 135 id. 61. The acceptance, however, of a check or note, although only *prima facie* a conditional payment, implies an undertaking on the part of the person receiving the check or note to use due diligence in presenting it for payment; and in case of want of such diligence

reason is that, otherwise, the debtor might be obliged to pay the debt twice.[2] If such note or bill is given for part of the debt, it is deemed payment of such part,[3] even though the debt is collaterally secured by a mortgage.[4] If the creditor receives the debtor's *check* for the amount, it is payment, if expressly accepted as such;[5] unless it was drawn colorably, or fraudulently, and knowingly, without effects.[6] But in the absence of any evidence of an agree-

the loss will fall upon the person holding the check or note: Kilpatrick *v.* Building & Loan Ass'n, 119 id. 30. If, however, a course of dealing is proved in which checks of a third person, or of one of the parties, are uniformly received as cash, such evidence would rebut the presumption that they were not intended as payment; and the question would be left for the jury: Briggs *v.* Holmes, 188 id. 283. If a note is fraudulently given, as, for instance, if it is signed by the name of a corporation which has no existence, the person giving it knowing that such corporation had no existence, the person who receives the note is not bound by it as payment: Montgomery *v.* Forbes, 148 Mass. 252.

It has been said that an *express* agreement to receive the note as payment must be proved: Wilhelm *v.* Schmidt, 84 Ill. 183; Noel *v.* Murray, 13 N. Y. 167; The Kimball, 3 Wall. (U. S.) 37; Moses *v.* Trice, 21 Gratt. (Va.) 556; Page *v.* Hubbard, Sprague's Dec. 338.

But circumstantial evidence may, without any direct proof of an express agreement, show that the parties intended or did not intend the note to be received in satisfaction of the debt. Mehan *v.* Thompson, 71 Me. 492; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 170; Parkhurst *v.* Jackson, 36 Me. 404; Sweet *v.* James, 2 R. I. 270; [Macomber *v.* Macomber, R. I., 31 A. 753.]

The presumption that the receipt of a negotiable note is in payment of the debt may be rebutted and controlled by evidence or the admitted facts of the case, and it is controlled when its effect would be to deprive the party who takes the note of his collateral security or any other substantial benefit: Perham Sewing Machine Co. *v.* Brock, 113 Mass. 194; League *v.* Waring, 85 Pa. St. 244; *Re* Clap, 2 Low. 226; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 170; Parkhurst *v.* Jackson, 36 Me. 404; Sweet *v.* James, 2 R. I. 270.]

[2] Johnson *v.* Johnson, 11 Mass. 361; Hebden *v.* Hartsink, 4 Esp. 46; Thatcher *v.* Dinsmore, 5 Mass. 299; Holmes *v.* D'Camp, 1 Johns. 34; Pintard *v.* Tackington, 10 id. 104; Maneely *v.* McGee, 6 Mass. 143; Butts *v.* Dean, 2 Met. 76; Reed *v.* Upton, 10 Pick. 522; Jones *v.* Kennedy, 11 id. 125; Watkins *v.* Hill, 8 id. 522, 523; Cumming *v.* Hackley, 8 Johns. 202; Comstock *v.* Smith, 10 Shepl. 202; Dogan *v.* Ashbey, 1 Rich. 36. By the English decisions, it seems that the receipt of bills is not deemed payment, unless expressly so agreed, or the bills have been negotiated, and are outstanding against the defendant: Burden *v.* Halton, 4 Bing. 454; Rolt *v.* Watson, ib. 273. And see Raymond *v.* Merchant, 3 Cowen 147.

[3] Ilsley *v.* Jewett, 2 Met. 168.

[4] Fowler *v.* Bush, 21 Pick. 230.

[5] Barnard *v.* Grave, 16 Pick. 41; [Sutton *v.* Baldwin, 146 Ind. 361.]

[6] Dennie *v.* Hart, 2 Pick. 204; Franklin *v.* Vanderpool, 1 Hall (N. Y.) 78; Stedman *v.* Gouch, 1 Esp. 5; Puckford *v.* Maxwell, 6 T. R. 52. [So, where one, in payment of a loan by a bank to which he had given a certificate of stock as security, gave a check on a third person, who owed him nothing, as he well knew, and the bank gave up the collateral, and the memorandum of the loan marked "paid," this was held not to be such payment as discharged the loan: Holmes *v.* Fall River Bank, 126 Mass. 353. And to the same effect, Goodwin *v.* Massachusetts Loan & Tr. Co., 152 id. 201. If a check is given in payment of a debt, and the check is good at the time it is given, but by delay on the part of the payee of the check it is not presented until the funds in the bank have been withdrawn, the check constitutes a valid payment of the debt: Home Building & Loan Ass'n *v.* Kilpatrick, 140 Pa. St. 405. In Pennsylvania, it is well settled law that in the absence of any special agreement to the contrary, the mere acceptance by a creditor from his debtor, of a note or check of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute but conditional payment, defeasible on the dishonor or non-payment of the note or check, and in that event the debtor remains liable for his original debt. The evidence, however, may show that the check or note was taken as absolute payment, the question being for the

ment to receive a check or draft in payment, it is regarded only as the means whereby the creditor may obtain payment;[7] or, as payment provisionally, until it has been presented and refused; if it is dishonored, it is no payment of the debt for which it was drawn.[8] And if a bill of exchange, given in payment of a debt, is not admissible in evidence, by being written on a *wrong stamp*, it is not deemed as payment, even if the parties would have paid it on due presentment.[9]

§ 521. **By Debtor's Note not negotiable.** But where the debtor's own security, *not negotiable*, and of no higher nature, is taken for a simple contract debt, it is not ordinarily taken as payment, unless expressly so agreed; except where it is given as a renewal, as before stated. Whether it was intended as payment or not is a question for the jury.[1]

§ 522. **By Bank-bills.** Payment may be proved by evidence of the delivery and acceptance of *bank-notes;* which will be deemed as payment at their par value.[1] But if, at the time of delivery and acceptance of the notes, the bank had actually stopped payment, or the notes were counterfeit, the loss falls on the debtor, however innocent or ignorant of the facts he may have been.[2]

§ 523. **Notes of Third Persons.** Proof of the acceptance of the promissory *note or bill of a third person* will also support the defence of payment.[1] But here it must appear to have been the vol-

jury: Holmes *v.* Briggs, 131 id. 240; Beatty *v.* Lehigh Valley R. R Co., 134 id. 294.]

[7] Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; People *v.* Howell, 4 Johns. 296; Olcott *v.* Rathbone, 5 Wend. 490; [Lowenstein *v.* Bresler, 109 Ala. 326. Even though the creditor requests payment by "bank draft:" National L. I. Co. *v.* Goble, 51 Neb. 5.]

[8] Pearce *v.* Davis, 1 M. & Rob. 365; Everett *v.* Collins, 2 Campb. 515; Puckford *v.* Maxwell, 6 T. R. 52; Bond *v.* Warden, 9 Jur. 198; Zerano *v.* Wilson, 8 Cush. 424; Alcock *v.* Hopkins, 6 id. 484. [Or if the debtor commits an act of bankruptcy: *Re* Raatz, 1897, 2 Q. B. 80. Otherwise if the creditor has transferred the instrument: Davis *v.* Reilly, 1898, 1 Q. B. 1.]

[9] Wilson *v.* Vysar, 4 Taunt. 288; Brown *v.* Watts, 1 id. 253; Wilson *v.* Kennedy, 1 Esp. 245; s. p. Gordon *v.* Strange, 1 Exch. 477. [So where the note was void because given on Sunday: Hartshorn *v.* Hartshorn, N. H., 29 A. 406.]

[1] Howland *v.* Coffin, 9 Pick. 42; Cumming *v.* Hackley, 8 Johns. 202; Tobey *v.* Barber, 5 id. 68. So of the debtor's order on a third person: Hoar *v.* Clute, 15 id. 224. See Parker *v.* Osgood, 4 Gray 456.

[1] Phillips *v.* Blake, 1 Met. 246; Snow *v.* Perry, 9 Pick. 539, 542.

[2] Lightbody *v.* Ontario Bank, 11 Wend. 9; 13 id. 101; Markle *v.* Hatfield, 2 Johns. 455; Young *v.* Adams, 6 Mass. 182; Jones *v.* Ryde, 5 Taunt. 488; Gloucester Bank *v.* Salem Bank, 17 Mass. 42, 43. It has been said in Massachusetts, that the solvency of the bank, where both parties were equally innocent, was at the risk of the creditor. See 6 Mass. 185. But this was reluctantly admitted on the ground of supposed usage alone, and was not the point directly in judgment. The same has been held in Alabama: Lowry *v.* Murrell, 2 Porter 280. [The note of a third party, insolvent at the time of the transfer, but which fact was unknown to both purchaser and seller, is no payment: Roberts *v.* Fisher, 43 N. Y. 159. And payment in counterfeit money, made in good faith, is valid, if the payee does not with due diligence ascertain the fact of worthlessness, and notify the party paying: Atwood *v.* Cornwall, 28 Mich. 336. See also Corn Ex. Bk. *v.* Nat. Bk. Rep., 78 Pa. St. 233.]

[1] [Receipt of a new note in payment of a collateral note discharges the principal obligation: Post *v.* Union N. B., 159 Ill. 421.]

untary act and choice of the creditor, and not a measure forced upon him by necessity, where nothing else could be obtained.[2] Thus, where the creditor received the note of a stranger who owed his debtor, the note being made payable to the agent of the creditor, it was held a good payment, though the promisor afterwards failed.[3] So, where goods were bargained for, in exchange for a promissory note held by the purchaser as indorsee, and were sold accordingly, but the note proved to be forged, of which, however, the purchaser was ignorant, it was held a good payment.[4] So, where one entitled to receive cash receives instead thereof notes or bills against a third person, it is payment, though the securities turn out to be of no value.[5] But if the sale was intended for cash, the payment by the notes or bills being no part of the original stipulation,[6] or the vendor has been induced to take them by the fraudulent misrepresentation of the vendee, as to the solvency of the parties,[7] or they are forged,[8] or they are forced upon the vendor by the necessity of the case, nothing better being attainable,[9] it is no payment. If, how-

[2] {Risher *v.* The Frolic, 1 Woods C. C. 92. Where the defendant proved a transfer of the note of a third person by his indorsement of it without recourse, and plaintiff's receipt of payment in full by the note, it was held error to refuse to instruct the jury that defendant had made out a *prima facie* case: Davenport *v.* Schram, 9 Wis. 119. In New York the acceptance of the note of a third party on account of the debt does not satisfy the debt, unless so agreed at the time by the parties. The bill or note being taken on a precedent debt, the presumption is it was not taken as payment. Being taken contemporaneously with the contracting of the debt, the presumption is that it was taken as payment: Noel *v.* Murray, 13 N. Y. 167; Haines *v.* Pearce, 41 Md. 221. In League *v.* Waring, 85 Pa. St. 244, it was held that the note is *prima facie* a *conditional* payment, and that the burden of showing it to be an absolute discharge of the debt lies on the defendant. But in *Re* Clap, 2 Low. 226, 230, it is said that a negotiable bill or note is presumed *prima facie* to be taken as payment, and this presumption may be rebutted.} The creditor's omission to have the notes indorsed by the party from whom he receives them is *prima facie* evidence of an agreement to take them at his own risk: Whitebeck *v.* Van Ness, 11 Johns. 409; Breed *v.* Cook, 15 id. 241. Whether the security was accepted in satisfaction of the original claim, is a matter of fact for the jury: Hart *v.* Boller, 15 S. & R. 162; Johnson *v.* Weed, 9 Johns. 310.

[3] Wiseman *v.* Lyman, 7 Mass. 286. See also Benneson *v.* Thayer, 23 Ill. 374.

[4] Ellis *v.* Wild, 6 Mass. 321. And see Alexander *v.* Owen, 1 T. R. 225. So, though it be genuine: Harris *v.* Johnson, 3 Cranch 311.

[5] Fydell *v.* Clark, 1 Esp. 447. See also Rew *v.* Barber, 3 Cowen 272; Frisbie *v.* Larned, 21 Wend. 450; Arnold *v.* Camp, 12 Johns. 409.

[6] Ellis *v.* Wild, 6 Mass. 321. And see Owenson *v.* Morse, 7 T. R. 64. In this case, the vendor received the notes of bankers who were in fact insolvent, and never afterwards opened their house. See also Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

[7] Pierce *v.* Drake, 15 Johns. 475; Wilson *v.* Force, 6 id. 110; Brown *v.* Jackson, 2 Wash. C. C. 24.

[8] Markle *v.* Hatfield, 2 Johns. 455; Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333; Hargrave *v.* Dusenbury, 2 Hawks 326; {Farr *v.* Stevens, 26 Vt. 299. But see Corn Exch. Bk. *v.* Nat. Bk. Rep., 78 Pa. St. 233; [Second N. B. *v.* Wentzel, 151 Pa. 142; West Philadelphia N. B. *v.* Field, 143 id. 473.] Where one agreed to accept a note of the debtor with two sureties in payment of a previous note, and the debtor delivered such a note, but the signatures of the sureties proved to be forgeries, it was held that the original note was not discharged, though it had been delivered to the debtor and by him destroyed: Emerine *v.* O'Brien, 36 Ohio St. 491.}

[9] This was Lord Tenterden's view of the facts in Robinson *v.* Read, 9 B. & C. 449. {And whenever a security taken in payment of a demand is void, or is avoided for any cause, the creditor may bring an action and recover on the original cause of

ever, a creditor, who has received a draft or note upon a third person, delays for an unreasonable time to present it for acceptance and payment, whereby a loss accrues, the loss is his own.[10] So, if he alters the bill, and thus vitiates it, he thereby causes it to operate as a satisfaction of the debt.[11] So, if he accepts from the drawee other bills in payment of the draft, and they turn out to be worthless.[12]

§ 524. **By Foreclosure of Mortgage.** The *foreclosure of a mortgage*, given to secure the debt, may also be shown as a payment made at the time of complete foreclosure; but if the property mortgaged is not, at that time, equal in value to the amount due, it is only payment *pro tanto*.[1] A *legacy*, also, will sometimes be deemed a payment and satisfaction of a debt due from the testator. But to be so taken, the debt must have been in existence and liquidated, at the date of the will.[2] And parol evidence is admissible to prove extraneous circumstances, from which the intent of the testator may be inferred, that the legacy should go in satisfaction of the debt.[3]

§ 525. **Remittance by Post.** When payment is made by a *remittance* by post to the creditor, it must be shown, on the part of the debtor, that the letter was properly sealed and directed, and that it was delivered into the post-office, and not to a private carrier or porter. He must also prove, either the express direction of the creditor to remit in that mode, or a usage or course of dealing, from which the authority of the creditor may be inferred. Where these circumstances concur, and a loss happens, it is the loss of the creditor.[1]

action: Leonard *v.* Trustees, etc., 2 Cush. (Mass). 464; Perkins *v.* Cummings, 2 Gray (Mass.) 258; Swartwout *v.* Payne, 19 Johns. (N. Y.) 294; Sutton *v.* Toomer, 7 Barn. & Cress. 416; Atkinson *v.* Hawdon, 2 Ad. & El. 628; Sloman *v.* Cox, 5 Tyrw. 174.}

[10] Chamberlyn *v.* Delarive, 3 Wils. 353; Bishop *v.* Chitty, 2 Stra. 1195; Watts *v.* Willing, 2 Dall. 100; Popley *v.* Ashley, 6 Mod. 147; Raymond *v.* Barr, 13 S. & R. 318; Roberts *v.* Gallaher, 2 Wash. C. C. 191; Copper *v.* Power, Anthon 49. [Or a check: Kirkpatrick *v.* Puryear, 93 Tenn. 409.]

[11] Alderson *v.* Langdale, 3 B. & Ad. 660.

[12] Bolton *v.* Reichard, 1 Esp. 106.

[1] Amory *v.* Fairbanks, 3 Mass. 562; Hatch *v.* White, 2 Gall. 152; Omaly *v.* Swan, 3 Mason 474; West *v.* Chamberlin, 8 Pick. 336; Briggs *v.* Richmond, 10 id. 396; Case *v.* Boughton, 11 Wend. 106; Spencer *v.* Hartford, 4 id. 381.

[2] Le Sage *v.* Coussmaker, 1 Esp. 187. And see Strong *v.* Williams, 12 Mass. 391; Williams *v.* Crary, 5 Cowen 368; [Glover *v.* Patten, 165 U. S. 394, holding that an advancement to a child by a parent who is in debt to the child is presumed to be a satisfaction of the debt *pro tanto*. A devise of land will not be presumed to have been made in payment of a mortgage on the land: Deichman *v.* Arndt, N. J. Eq., 22 A. 799.]

[3] Cuthbert *v.* Peacock, 2 Vern. 593; Fane *v.* Fane, 1 id. 31, n. (2) by Mr. Raithby; *ante*, Vol. I. §§ 287, 288, 296. And see Clark *v.* Bogardus, 12 Wend. 67; Mulheran *v.* Gillespie, ib. 249; Williams *v.* Crary, 8 Cowen 246. {A legacy to a creditor of a sum less than his debt is not to be applied towards payment of the debt, without clear evidence of the testator's intention that it should be: Parker *v.* Coburn, 10 Allen 84; 2 Story Eq. Jur. §§ 1104, 1122. Where the debt was an unliquidated claim for services, and the legacy was for a less amount than the value of such services, evidence of the declarations of the testator that he intended the legacy as payment of the services was held to be inadmissible: Reynolds *v.* Robinson, 82 N. Y. 103.}

[1] Warwicke *v.* Noakes, 1 Peake 67; Hawkins *v.* Rutt, ib. 186; Walter *v.* Haynes, Ry. & M. 149. See True *v.* Collins, 3 Allen 438. It is held by some that the send-

§ 526. **Payment in Specific Articles.** Payment may also be proved by evidence of the delivery and acceptance of any *specific article* or *collateral thing* in satisfaction of the debt; as has already been shown in the preceding pages.[1] Such payment is a good discharge even of a judgment.[2] Payment even of part of the sum may be a satisfaction of the whole debt, if so agreed, provided it be in a manner collateral to the original obligation; as, if it be paid before the day, or in a manner different from the first agreement, or be made by a stranger, out of his own moneys, or under a fair compensation with all the creditors of the party.[3]

§ 527. **When presumed from Circumstances.** Payment may also be *presumed* or inferred by the jury from sufficient circumstances. Thus where, in the ordinary course of dealing, a security, when paid, is given up to the party who pays it, the possession of the security by the debtor, after the day of payment, is *prima facie* evidence that he has paid it.[1] But the mere production of a bill of exchange from the custody of the acceptor affords no presumption that he has paid it, without proof that it was once in circulation after he accepted it.[2] Nor is payment presumed from a receipt in-

ing of bank-notes, uncut, will not discharge the debtor; because among prudent people it is usual to cut such securities in halves, and send them at different times: Peake on Evid., by Norris, p. 412. [Acquiescence for years in payment for goods by check sent by post is not a request for payment in that manner, and the loss falls on the debtor: Pennington *v.* Crossley, 77 L. T. R. 43.]

[1] *Supra*, tit. Accord and Satisfaction.

[2] Brown *v.* Feeter, 7 Wend. 301.

[3] Co. Lit. 212 *b;* Steinman *v.* Magnus, 11 East 390; Lewis *v.* Jones, 4 B. & C. 506; Ellis on Debtor and Creditor, pp. 412, 413. And see, *supra*, tit. Accord and Satisfaction. {Where a sum of money is paid on a debt, and there is a conflict whether that sum is the whole amount due to the creditor, the payment of that sum will not, as matter of law, operate as a discharge; unless it is received in accord and satisfaction of a disputed claim: Grinnell *v.* Spink, 128 Mass. 25; Harriman *v.* Harriman, 12 Gray (Mass.) 341.

But if there is anything in the nature of a consideration for giving up the residue of such debt, the creditor will be bound by his agreement to take such part-payment in full satisfaction: Bohr *v.* Anderson, 51 Md. 205.

The plaintiff's attorney wrote to the defendant, requesting him to remit a balance due to the plaintiff, with 13*s.* 4*d.* costs. The defendant sent a bank-bill for the amount of the balance only. The plaintiff's attorney wrote in answer, that he would not receive the bank-bill unless the 13*s.* 4*d.* was paid, but did not return it. The jury having found that any objection to the remittance not being in money was waived, and that the bank-bill was refused only because it did not include the costs, it was held that there was evidence of payment: Caine *v.* Coulton, 1 H. & C. 764.}

[1] Bremridge *v.* Osborne, 1 Stark. 374; Gibbon *v.* Featherstonhaugh, ib. 225; Weidner *v.* Schweigart, 9 S. & R. 385; Smith *v.* Smith, 15 N. H. 55. See *ante*, Vol. I. § 38; {Baring *v.* Clark, 19 Pick. (Mass.) 220; McGee *v.* Prouty, 9 Met. (Mass.) 557; [Perez *v.* Bank, 36 Fla. 467; First N. B. *v.* Harris, 7 Wash. 139; Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556.] But see Buckley *v.* Saxe, 10 Mich. 326. But this rule does not apply to a possession by one of two joint promisors in an action by him to recover of the other one-half of the amount thereof: Heald *v.* Davis, 11 Cush. (Mass.) 319.{ [The presumption is rebuttable (Parks *v.* Smith, 155 Mass. 26), and does not exist where the debtor has access to the creditor's papers as a member of the same family: Grimes *v.* Hilliary, 150 Ill. 141. Possession by the insured of an insurance policy containing a recital of the payment of the premium is evidence of such payment: Fidelity Co. *v.* Chambers, 93 Va. 138; Massachusetts Benefit L. Co. *v.* Sibley, 158 Ill. 411.]

[2] Pfiel *v.* Vanbattenburg, 2 Campb. 439.

dorsed on the bill, without evidence that it is the handwriting of a person entitled to demand payment.[3] Nor will it be presumed from the circumstance of the defendant's having drawn a check on a bank, or on his banker, payable to the plaintiff or *bearer*, without proof that the money had been paid thereon to the plaintiff; and of this, the plaintiff's name on the back of the check will be sufficient evidence.[4] And where a bill of exchange, on presentment by the bankers of the indorsee to the acceptor, was not paid, but afterwards a stranger called on the banker's clerk and paid it, the clerk giving up the bill to him after indorsing upon it a general receipt of payment; this receipt was held no evidence of payment *by the acceptor*, in a subsequent action by the indorsee against him.[5]

§ 528. **From Lapse of Time.** Payment is also *presumed from lapse of time*. The lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even though it be due by specialty, which the court will apply without the aid of a jury.[1] But it may be inferred by the jury from circumstances, coupled with the lapse of a shorter period.[2] It may also be

[3] Pfiel *v.* Vanbattenburg, 2 Campb. 439. {But the burden is upon the plaintiff, where the note sued on has not left his hands, to overthrow the inference that he has made the indorsements and received the payments: Brown *v.* Gooden, 16 Ind. 444.}

[4] Egg *v.* Barnett, 3 Esp. 196.

[5] Phillips *v.* Warren, 14 M. & W. 379.

[1] *Ante*, Vol. I. § 39; Colsell *v.* Budd, 1 Campb. 27; Cope *v.* Humphreys, 14 S. & R. 15; Ellis on Debtor and Creditor, p. 414; {Morrison *v.* Funk, 23 Pa. St. 421; Martin *v.* Stoddard, 127 N. Y. 61; [O'Connor *v.* Waterbury, 69 Conn. 206; Stimis *v.* Stimis, 54 N. J. Eq. 17; Courtney *v.* Standenmayer, 56 Kan. 392.] This presumption may be controlled by evidence of part-payment of principal or interest, or other admissions or circumstances from which the jury would be authorized to find the debt still unpaid: Cheever *v.* Perley, 11 Allen (Mass.) 586.}

[2] Best on Presumption, § 137; Lewis *v.* Nones, 7 S. & R. 410; [Jones *v.* Wilkey, 78 F. 532.] If the debt paid is disputed by the defendant, who admits that it has not been paid, lapse of time, though it cannot afford any presumption of payment, may afford a presumption against the original existence of the debt: Christophers *v.* Sparke, 2 J. & W. 228; Bander *v.* Snyder, 5 Barb. S. C. 63. {So it has been held that a period less than twenty years, though it fall short by only a day, does not raise a legal presumption of payment: Sadler *v.* Kennedy, 11 W. Va. 187; Born *v.* Pierpont, 28 N. J. Eq. 7; [Porter *v.* Wheeler, 105 Ala. 451.]

The jury, however, as the author states in the text, may find the payment inferentially from the circumstances of the case: Sadler *v.* Kennedy, *supra*; Moore *v.* Smith, 81 Pa. St. 182. But when the presumption of payment does not arise from a lapse of time sufficient to make the statute of limitation a conclusive bar, evidence to rebut the presumption may be offered, as it is then simply an inference based upon the probabilities of payment, and after a lapse of a long time: Macauley *v.* Palmer, 125 N. Y. 742.

The presumption of payment arising from the lapse of twenty years is a rebuttable presumption: Hale *v.* Peck, 10 W. Va. 145; [Anthony *v.* Anthony, 161 Mass. 343; Knight *v.* McKinney, 84 Me. 107; Devereux's Estate, 184 Pa. 429.] The lapse of seven years after a legacy is payable does not raise a presumption of payment: Strohm's Appeal, 23 Pa. St. 351; Gould *v.* White, 26 N. H. 178; Sellers *v.* Holman, 20 Pa. St. 321; Kline *v.* Kline, ib. 503; Walker *v.* Wright, 2 Jones Law (N. C.) 156; McQueen *v.* Fletcher, 4 Rich. (S. C.) Eq. 152; Brubaker *v.* Taylor, 76 Pa. St. 83.} [There is a rebuttable presumption after twenty years that a legacy has been paid: Magee *v.* Bradley, 54 N. J. Eq. 326; Cox *v.* Bromer, 114 N. C. 422. This is not rebutted by proof that the interval between the death of the testator and the appointment of an administrator reduced the period during which there was a

inferred from the *usual course of trade* in general, or from the habit and course of dealing between the parties. Thus, where the defendant was regular in his dealings, and employed a large number of workmen, whom he was in the habit of paying every Saturday night, and the plaintiff had been one of his workmen, and had been seen among them waiting to receive his wages, but had ceased to work for the defendant for upwards of two years; this was held admissible evidence to found a presumption that he had been paid with the others.[3] So, where the course of dealing between the parties engaged in daily sales of milk to customers, was to make a daily settlement and payment of balances without writing, this was held a sufficient ground to presume payment, until the plaintiff should prove the contrary.[4] So, also, a receipt for the last year's or quarter's rent is *prima facie* evidence that all rents, previously due, have been paid.[5]

§ 529. **Appropriation of Payments.** In regard to the ascription or *appropriation of payments*, the general rule of law is, that a debtor owing several debts to the same creditor has a right to apply his payment, at the time of making it, to which debt he pleases.[1] But this rule applies only to voluntary payments, and not to those made under compulsory process of law.[2] If he makes a general payment without appropriating it, the creditor may apply it as he pleases.[3]

person to sue to less than twenty years; nor by the fact that the legatees were non-residents at the testator's death: Cox *v.* Bromer, *supra*. Proof of the debtor's inability to pay during the twenty years rebuts the presumption: Devereux's Estate, 184 Pa. 429.]

[3] Lucas *v.* Novosilieski, 1 Esp. 296.

[4] Evans *v.* Birch, 3 Campb. 10.

[5] *Ante*, Vol. I. § 38. {Where rent has not been paid for twenty years the presumption is that the rent previous to that time was paid, but there is no presumption that the covenant to *pay rent* has been discharged: Lyon *v.* Odell, 65 N. Y. 28.}

[1] [Patterson *v.* Van Loon, 186 Pa. 367.]

[2] Blackstone Bank *v.* Hill, 10 Pick. 129; U. S. *v.* Bradbury, Daveis 146; [Armstrong *v.* McLean, 153 N. Y. 490.] {Upon the subject of appropriation of payments, see a very elaborate article in the London Law Magazine for August, 1855, p. 21, reprinted in Livingston's Law Magazine, vol. iii. p. 739.}

[3] {Nash *v.* Hodgson, 31 Eng. Law & Eq. 555; [Fargo *v.* Jennings, 8 S. D. 99; Itasca Lumber Co. *v.* Gale, 62 Minn. 356; First Presbyterian Church *v.* Santy, 52 Kan. 462; Pearce *v.* Walker, 103 Ala. 250; Frazer *v.* Miller, 7 Wash. 521; Giles *v.* Vandiver, 91 Ga. 192; Henry Bill Pub. Co. *v.* Utley, 155 Mass. 366; Lenzen *v.* Miller, 53 Neb. 137; Sweeney Co. *v.* Fry, 151 Ind. 178. But see Dunnington *v.* Kirk, 57 Ark. 595.] The appropriation may be made on a debt not actionable, as being within the Statute of Frauds (Haynes *v.* Nice, 100 Mass. 327; Blake *v.* Sawyer, 83 Me. 129; *post*, §§ 531, 535); or any lawful demand due and payable (Bean *v.* Burne, 54 N. H. 395). And if the money is paid by the debtor, without any appropriation thereof, to an attorney of the creditors, the attorney may make the appropriation: Carpenter *v.* Goin, 19 id. 479. If neither party makes any application the principle is that the payment is applied to the earliest outstanding debt: [Cal. Civ. Code, § 1479; Coalter *v.* Hurst, Cal., 32 P. 248.] Thus, where a seaman earned wages under two successive masters on the same vessel, the court held that the payment of the second master must be applied, in absence of specific directions by him, to the payment of the earlier debt: Smith *v.* Oakes, 141 Mass. 451. But the principle applies, however, only when there is no equity in favor of third parties requiring a different application; also where there is no evidence of the intention of the parties to make a different application: Frost *v.* Mixsell, 38 N. J. Eq. 586. Money paid on open account cannot

And where neither party appropriates it, the law will apply it according to its own view of the intrinsic justice and equity of the case.[4]

be applied to charges on the account of later date than the payments, unless by special agreement: Hill *v.* Morrison, 46 N. J. L. 488.]

[4] Per Story, J., in Cremer *v.* Higginson, 1 Mason 338; 1 Story on Equity, § 459 *b*; U. S. *v.* Wardwell, 5 Mason 85; Seymour *v.* Van Slyck, 8 Wend. 403; Chitty on Contracts, p. 382, and cases there cited; Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. 605–607; Ellis on Debtor and Creditor, pp. 406–412; [Pawlet *v.* Kelley, 69 Vt. 398.] The doctrine of the Roman law on this subject, and its recognition in adjudged cases in the common law, are stated by Mr. Cowen, in a note to the case of Pattison *v.* Hull, 9 Cow. 747, as follows: "A moment's recurrence to the civil law will convince the learned reader how much we have borrowed from it almost without credit. The whole text of that law, in relation to the subject under consideration, is contained *passim* in the Digest (Lib. 46, tit. 3, *De solutionibus et liberationibus*), and is rendered into English by Strahan, from the French of Domat's Civil Law, in its natural order, as follows: —

"'1. If a debtor, who owes to a creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichsoever of them he pleases; and the creditor cannot refuse to receive payment of it; for there is not any one of them which the debtor may not acquit, although he pays nothing of all the other debts, provided he acquit entirely the debt which he offers to pay.'

"This is precisely the common law. Owing two debts to the same person, you may pay which you please, but you must tender the whole debt. The creditor is not bound to take part of it, though he may do so if he choose. (22 Ed. IV. 25; Br. Condition, pl. 181; Lofft's Gilb. 330; Pinnel's Case, 5 Co. 117; Colt *v.* Netterville, 2 P. Wms. 304; Anon., Cro. Eliz. 68.) Hawkshaw *v.* Rawlings (1 Stra. 23), that the debtor shall not apply the money, is not law. There are fifteen or twenty cases the other way.

"'2. If in the same case of a debtor who owes several debts to one and the same creditor, the said debtor makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge, whether it be that he gives him a sum of money indefinitely in part payment of what he owes him, or that there be a compensation [*i. e.*, a set-off] of debts agreed on between the debtor and creditor, or in some other manner, the debtor will have always the same liberty of applying the payment to whichsoever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he himself would discharge in the first place, in case he were the debtor, for equity requires that he should act in the affair of his debtor as he would do in his own. And if, for example, in the case of two debts, one of them were controverted, and the other clear, the creditor could not apply the payment to the debt which is contested by the debtor.'

"The right of the debtor to apply the payment, whether total or partial, if he do so at the time, is recognized by all the cases. As to the above doctrine restraining the creditor to an application most favorable to the rights of the debtor, one cannot read the case of Goddard *v.* Cox (2 Str. 1194) without being struck with the similarity both in principle and illustration. The defendant owed the plaintiff three debts: one he contracted himself, a second he owed absolutely in right of his wife, and the third was due from his wife as executrix. The defendant made several indefinite payments, after which his creditor sued him. Chief Justice Lee held the whole of the above civil-law doctrine. 1. It was agreed the defendant had the first right to apply the payments. 2. The Chief Justice held, there being no direction by him, that thereby the right devolved to the plaintiff. And the defendant being by the marriage equally a debtor for what his wife received *dum sola*, as for what was after, the plaintiff might apply the money received to discharge the wife's own debt. 'But as to the demand against her as executrix, the validity of which depended upon the question of assets, and manner of administering them, he was of opinion the plaintiff could not apply any of the money paid by the defendant to the discharge of that demand.'

"'3. In all cases where a debtor, owing several debts to one and the same creditor, is found to have made some payments, of which the application has not been made by the mutual consent of the parties, and where it is necessary that it be regulated either by a court of justice or by arbitrators, the payments ought to be applied to the debts which lie heaviest on the debtor, and which it concerns him most to discharge. (12 Mod. 559; 2 Brownl. 107, 108; 1 Vern. 24; 2 Freem. 261; 1 Ld. Raym. 286;

§ 530. **By Debtor.** An *appropriation by the debtor* may be proved, either by his express declaration, or by any circumstances from

1 Comb. 463; Peake N. P. Cas. 64). Thus a payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, and to costs and damages (12 Mod. 559; 2 Brownl. 107, 108; 1 Vern. 24; 2 Freem. 261; 1 Ld. Raym. 286; 1 Comb. 463; Peake N. P. Cas. 64; 4 Har. & Johns. 754; 2 id. 402; 8 Mod. 236); or in the payment of which his honor might be concerned, than to a debt of which the non-payment would not be attended with such consequences. Thus a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security (Marryatts *v.* White, 2 Stark. 101; Plomer *v.* Long, 1 id. 153, *contra*); or to the discharge of what he owes in his own name, rather than what he stands engaged for as surety for another. Thus a payment is applied to a debt for which the debtor has given pawns and mortgages, rather than to a debt due by a simple bond or promise (1 Vern. 24; 1 Har. & Johns. 754; 2 id. 402); rather to a debt of which the term has already come, than the one that is not yet due (Hammersly *v.* Knowlys, 2 Esp. 666; Niagara Bank *v.* Rosevelt, per Woodworth, J., 9 Cowen 412; Baker *v.* Stackpoole, per Savage, C. J., ib., 436); or to an old debt before a new one (1 Meriv. 608); and rather to a debt that is clear and liquid than to one that is in dispute (Goddard *v.* Cox, 2 Str. 1194); or to a pure and simple debt before one that is conditional (ibid., and 9 Cowen 412).'

"I have here interpolated the common-law cases in the text of the civil law. On examining them, it will be found that almost every word of the last quotation has been expressly sanctioned by the English courts.

"'4. When a payment made to a creditor to whom several debts are due, exceeds the debt to which it ought to be applied, the overplus ought to be applied to the discharge of the debt which follows, according to the order explained in the preceding article, unless the debtor makes another choice.'

"This follows, of course, from principles before stated.

"'5. If a debtor makes a payment to discharge debts which of their nature bear interest, such as treat of a marriage portion, or what is due by virtue of a contract of sale, or that the same be due by a sentence of a court of justice, and the payment be not sufficient to acquit both the principal and the interest due thereon, the payment will be applied in the first place to the discharge of the interest, and the overplus to the discharge of a part of the principal sum.

"'6. If, in the cases of the foregoing article, the creditor had given an acquittance in general for principal and interest, the payment would not be applied in an equal proportion to the discharge of a part of the principal and a part of the interest; but in the first place all the interest due would be cleared off, and the remainder would be applied to the discharge of the principal.'

"The last two paragraphs contain a doctrine perfectly naturalized by all our cases, from Chase *v.* Box (2 Freem. 261) to State of Connecticut *v.* Jackson (1 Johns. Ch. 17), and *vid.* Stoughton *v.* Linch (2 id. 209). *Vid.* also Hening's ed. of Maxims in Law in Equity, App. 1 to Francis's Maxims, pp. 106, 108, 113, and the cases there cited. Also Williams *v.* Houghtaling, 3 Cowen 86, 87, 88, 89, n. (*a*), with the cases there cited.

"'7. When a debtor, obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages, which he engages for the security of all the debts, the money which is raised by the sale of the pawns and mortgages will be applied in an equal proportion to the discharge of every one of the debts (Perry *v.* Roberts, 2 Ch. Cas. 84, somewhat similar in principle). But if the debts were contracted at divers times upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the pledge, after payment of the first, the moneys arising from the pledges would in this case be applied in the first place to the discharge of the debt of the oldest standing. And both in the one and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid before any part thereof be applied to the discharge of the principal.'

"This paragraph contains the familiar doctrine of priority of pledges; and follows out the corollary of applying partial payment to discharge interest in the first place. The proposition that a payment on pawns, etc., for simultaneous debts, shall be distributed between the two debts, has never been exactly adjudged with us, though the case interpolated is about the same in principle. And see what Holt, C. J., says in

which his intention can be inferred.[1] But it seems that this intention must be signified to the creditor at the time; for an entry made in his own books has been held insufficient to determine the application of the payment.[2] Thus, where the debtor owed his creditor a private debt, and also was indebted to him as the agent of several annuitants, for which latter debts his surety was also liable; and both the debtor and his surety being called upon in behalf of the annuitants, the debtor made a general payment, without any specific appropriation at the time; it was held, that the circumstances showed his intention to apply it to the annuities, and that the creditor was therefore not at liberty to ascribe it to his private debt.[3] So, if there be two debts, and the debtor pays, without appropriation, a sum precisely equal to what remains due on one of them, but greater than the amount of the other, this will be regarded as having been intended in discharge of the former debt.[4] So, if there be two debts, the validity of one of which is disputed, while the other is acknowledged, a general payment will be presumed to have been made on account of the latter.[5] But this right of the debtor to appropriate his payment is not without some limitation. Thus, for example, he cannot apply it to the principal only, where the debt carries interest; for, by law, every payment towards such debts shall be first applied to keep down the interest.[6]

§ 531. **By Creditor.** The right of *appropriation by the creditor*, where the debtor makes none, is subject to some *exceptions*. Thus, if one debt was due by the debtor as executor, and another was due in his private capacity, the creditor shall not ascribe a general payment to the former debt, for its validity will depend on the question of assets.[1] So, if one of two debts was contracted while the debtor

Styart *v.* Rowland (2 Show. 216)." See 9 Cowen 773–777. See also Smith *v.* Screven, 1 McCord 368; Mayor, etc. of Alexandria *v.* Patten, 4 Cranch 316; Mann *v.* Marsh, 2 Caines 99.

[1] Waters *v.* Tompkins, 2 C. M. & R. 723; s. c. 1 Tyrw. & Grang. 137; Peters *v.* Anderson, 5 Taunt. 596; Newmarch *v.* Clay, 14 East 239; Stone *v.* Seymour, 15 Wend. 19. The same rule applies to appropriations by creditors: Seymour *v.* Van Slyck, 8 id. 403.

[2] Manning *v.* Westerne, 2 Vern. 606. {The general rule is that notice of the appropriation, if it is made by the debtor, should be given to the creditor prior to or at the time of making the payment: Pickering *v.* Day, 2 Del. Ch. 333; Bell *v.* Radcliffe, 32 Ark. 645; Whittaker *v.* Groover, 54 Ga. 174; Jones *v.* Williams, 39 Wis. 300.}

[3] Shaw *v.* Picton, 4 B. & C. 715.

[4] Robert *v.* Garnie, 3 Caines 14; Marryatts *v.* White, 2 Stark. 101.

[5] Tayloe *v.* Sandiford, 7 Wheat. 20, 21; [The Peerless, 80 F. 942.]

[6] Gwinn *v.* Whitaker, 1 H. & J. 754; Frazier *v.* Hyland, ib. 98; Tracy *v.* Wikoff, 1 Dall. 124; Norwood *v.* Manning, 2 Nott & McCord 395; Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 194; [Belther *v.* Hodgman, 63 Minn. 30; *contra*, Olcott *v.* Davis, 67 Vt. 685. But where the interest is guaranteed by a third person, the creditor may have the proceeds of a mortgage foreclosure applied first to the payment of the principal: Smythe *v.* New England L. & T. Co., 12 Wash. 424.] {Payment upon conditions not objected to binds the payee to those conditions: Hall *v.* Holden, 116 Mass. 172.}

[1] Goddard *v.* Cox, 2 Stra. 1194.

was a trader within the bankrupt laws, and the other afterwards, the creditor will not be permitted to apply a general payment to the latter, so as to expose the debtor to a commission of bankruptcy.[2] So, if one of the creditor's claims is absolute, and the other is contingent, as if he is an indorser, or surety for the debtor, who makes a general payment; the creditor will be bound to appropriate it to the absolute debt alone.[3] If one of two claims is legal and the other equitable, the creditor is bound to apply the payment to the former.[4] If a partner in trade, being indebted both as a member of the firm, and also on his own private account, pays the money of the firm, the creditor is bound to apply it to the partnership debt.[5] And the account-books of the creditor, with proof that the entries were contemporaneous with the fact of payment, are competent evidence in his favor, to show to which of two accounts he applied a general payment.[6]

§ 531 *a*. **Principle of the Rule.** The *principle* on which these and other exceptions are founded seems to be this: that the debtor, by waiving his right of appropriation in favor of the creditor, could not have intended that it should be exercised to his own injury; but, on the contrary, that he relied on the creditor's making an appropriation to which he could not reasonably or justly object. The creditor, therefore, never acquires the right to apply a payment with a view merely to his own interest or convenience, unless the debtor has had an opportunity to direct its application by having the money pass through his own hands, or under his own control. And upon the above principle it has been held, that where a general payment was made to a creditor who held three promissory notes against the debtor, all which were within the bar of the statute of limitations, the creditor was not at liberty to apply a part of the money to each of the notes, so as to revive his remedy upon them all; but must make his election of one only, and apply the payment to that one alone.[1]

[2] Meggott *v.* Mills, 1 Ld. Raym. 287; Dawe *v.* Holdsworth, 1 Peake 64.

[3] Niagara Bank *v.* Rosevelt, 9 Cowen 409, 412.

[4] Birch *v.* Tebbutt, 2 Stark. 74; Goddard *v.* Hodges, 1 C. & Mees. 33; s. c. 3 Tyrw. 259. {See Upham *v.* Lefavour, 11 Met. (Mass.) 174, 185; Alden *v.* Capen, 5 id. 268.} But where the equitable debt was prior to the other, the creditor has in one case been permitted to apply the payment to the former: Bosanquet *v.* Wray, 6 Taunt. 597. And see also Bancroft *v.* Dumas, 6 Washb. 456; *ante*, § 529, n.

[5] Van Rensselaer *v.* Roberts, 5 Denio 470.

[6] Thompson *v.* Brown, 1 M. & Malk. 40.

[1] Ayer *v.* Hawkins, 19 Vt. 26. {The doctrine that the creditor may make application of payments, if the debtor has failed to do so, is unquestioned: Wittkowski *v.* Reid, 84 N. C. 21; Brice *v.* Hamilton, 12 S. C. 32; Nash *v.* Hodgson, 31 Eng. L. & Eq. 555. And he may do so by his attorney or agent: Carpenter *v.* Goin, 19 N. H. 479.

The limitation, however, to his right, *i. e.* that he must make the application most favorable to the rights of the debtor, is more doubtful. It has been held that a creditor receiving payments from his debtor, without any direction as to their application, may appropriate them to any debt which he holds against the debtor, although such application is not the one most favorable to the debtor. Thus, the creditor may apply the

§ 532. **Time of Appropriation.** At *what time* the creditor must exercise this right of appropriation, whether forthwith, upon the receipt of a general payment, or whether at any subsequent time, at his pleasure, is not clearly settled by the English decisions; but the weight of authority seems in favor of his right to make the election at any time when he pleases.[1] And this unlimited right has been recognized in the United States;[2] subject only to this restriction, that he cannot appropriate a general payment to a debt created after the payment was made.[3]

§ 532 *a*. **Appropriation rightly made, conclusive.** *After a payment has been rightfully ascribed* to one of several debts, it is not in the power of either party alone to change it.[1] But if both parties consent, the ascription may be changed to another debt; in which case the indebtment discharged by the former appropriation of the money is revived.[2]

§ 533. **Appropriation by Law.** Where neither party has applied the payment, but it is left to be *appropriated by law*, the general principle adopted by the American courts is to apply it as we have already stated, according to the intrinsic justice and equity of the case. But this principle of application is administered by certain rules found by experience usually to lead to equitable results. It has sometimes been held, that the appropriation ought to be made according to the interest of the debtor, such being his presumed intention. This is the rule of the Roman law, and probably is the law of modern continental Europe;[1] and it has been recognized in

payment to a debt barred by the statute of limitations, or of imperfect obligation: Philpott *v.* Jones, 4 Nev. & Man. 14; Rohan *v.* Hanson, 11 Cush. (Mass.) 44; Haynes *v.* Nice, 100 Mass. 327; Ramsay *v.* Warner, 97 id. 13; Pond *v.* Williams, 1 Gray (Mass.) 630; [Sanborn *v.* Cole, 63 Vt. 590.] Again, it has been held that a creditor to whom a debtor owes two debts may apply a payment to the unsecured debt, where the other is secured: Harding *v.* Tifft, 75 N. Y. 461; Upham *v.* Lefavour, 11 Met. (Mass.) 174; Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.) 270; Bean *v.* Burne, 54 N. H. 395.} [The creditor may apply a payment to the debt least secured: Post-Intelligencer Co. *v.* Harris, 11 Wash. 500; even as against a surety: First N. B. *v.* Johnson, 65 Vt. 382.]

[1] Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. 605, 607; Ellis on Debtor and Creditor, pp. 406–408; Mills *v.* Fowkes, 5 Bing. N. C. 455, per Coltman, J. [This is now the settled law: Cory *v.* Mecca, 1897 A. C. 286.]

[2] [Pearce *v.* Walker, 103 Ala. 250.]

[3] Mayor, etc. of Alexandria *v.* Patten, 4 Cranch 317; Baker *v.* Stackpoole, 9 Cowen 420, 436. And see Marsh *v.* Houlditch, cited in Chitty on Bills, p. 437, n. (*c*), 8th ed.; Upham *v.* Lefavour, 11 Met. 174, 184; Watt *v.* Hoch, 25 Pa. St. 411.

[1] [Pond *v.* O'Connor, 70 Minn. 266.]

[2] Rundlett *v.* Small, 12 Shepl. 29. And see Codman *v.* Armstrong, 5 id. 91; }Chancellor *v.* Schott, 23 Pa. St. 68; McMaster *v.* Merrick, 41 Mich. 505. So when the creditor, with the consent of a debtor, has applied payments to the discharge of a debt which is founded on an illegal transaction, *i. e.* an illegal sale of liquors, the debtor cannot afterwards retract his consent and refuse to allow such application: Brown *v.* Burns, 67 Me. 535; Feldman *v.* Gamble, 26 N. J. Eq. 494; Caldwell *v.* Wentworth, 14 N. H. 431.} [Where the amount paid was supposed to be less than the claim to which it is appropriated, the debtor cannot, on learning that he has paid more than that claim, direct the appropriation of the balance: Baum *v.* Trantham, 42 S. C. 104.]

[1] Poth. Obl. Part 3, c. 1, art. 7, § 530; 1 White's New Recopil. B. 2, tit. 11, pp.

several of the United States.[2] But, on the other hand, the correctness of this rule, as one of universal application, has been expressly denied by the highest authority. For as, when a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it; so, if neither party avails himself of his power, in consequence of which it devolves on the court, it would seem equally reasonable to suppose that both were content with the manner in which the court will exercise it; and that the only rule which it can be presumed that the court will adopt is the rule of justice and equity between the parties.[3] Therefore, where a general payment is made without application by either party, and there are divers claims, some of which are but imperfectly and partially secured, the court will apply it to those debts for which the security is most precarious.[4] So, where there are items of debt and credit in a running account, in the absence of any specific appropriation, the credits will ordinarily be applied to the discharge of the items of debt antecedently due, in the order of the account.[5] But this rule

164, 165; Van Der Linden's Laws of Holland, B. 1, c. 18, § 1, Henry's ed. p. 267; Grotius Introd. to Dutch Jurisp. B. 3, c. 39, § 15, p. 458, Herbert's Tr.; Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. 605, 606; Baker *v.* Stackpoole, 9 Cowen 435; Civil Code of France, arts. 1253–1256; Gass *v.* Stinson, 3 Sumn. 99, 110.

[2] Pattison *v.* Hull, 9 Cowen 747, per Cowen, J.; Civil Code of Louisiana, arts. 2159–2161. {Thus if the debtor owes a debt secured by a mortgage and one on a simple contract to the same creditor, the court will apply payments to the mortgage: Windsor *v.* Kennedy, 52 Miss. 164; Moore *v.* Kiff, 78 Pa. St. 96.}

[3] Field *v.* Holland, 6 Cranch 8, 27, 28. And see Chitty *v.* Naish, 2 Dowl. P. C. 511; Brazier *v.* Bryant, ib. 477; Henniker *v.* Wigg, 4 Ad. & El. N. S. 792; Cowperthwaite *v.* Sheffield, 1 Sandf. S. C. 416.

[4] Ibid. {That payments should be applied to unsecured debts in order to protect the rights of the creditor, see Bowen *v.* Fridley, 8 Ill. App. 597; Trullinger *v.* Kofoed, 7 Or. 228. [Otherwise where a mortgage executed by a married woman is partly void as securing her husband's debt: Kuker *v.* McIntyre, 43 S. C. 117.] Where the debtor is indebted under a several liability, and also under a joint liability, and makes a payment, there being no evidence that a different appropriation was intended, or that the money was derived from the fund from which the joint liability was to be met, the law applies it to discharge the several liability, that being the appropriation most favorable to the creditor: Livermore *v.* Claridge, 33 Me. 428.

It is probable that when the courts are called on to make an application of payments, they will decide upon the circumstances of each case, and make the application which seems most equitable: Dehner *v.* Helmbacher, etc. Mills, 7 Ill. App. 47.}

[5] Postmaster-General *v.* Furber, 4 Mason 333; Gass *v.* Stinson, 3 Sumn. 99, 112; U. S. *v.* Wardwell, 5 Mason 82, 87; U. S. *v.* Kirkpatrick, 9 Wheat. 720; Sterndale *v.* Hankinson, 1 Sim. 393; Smith *v.* Wigley, 3 M. & Scott 174; Thompson *v.* Brown, 1 M. & Malk. 40; [Rickerson Roller-Mill Co. *v.* Farrell Foundry Co., 43 U. S. App. 452; Zimms Mfg. Co. *v.* Mendelson, 89 Wis. 133; Winnebago Paper Mills *v.* Travis, 56 Minn. 480; Doherty *v.* Cotter, 38 A. 499, N. H.] {When accounts are settled yearly, and the balance is each year transferred to the new account, if no appropriation is made of the payments by the parties, they must be applied in the order of priority, so that each payment shall go to discharge the earliest debt: Sonder *v.* Schechterly, 91 Pa. St. 83; Pickering *v.* Day, 2 Del. Ch. 333; Sandwich *v.* Fish, 2 Gray (Mass.) 298, 301; Coleraine *v.* Bell, 9 Met. (Mass.) 499; Boston Hat Manuf. *v.* Messinger, 2 Pick. (Mass.) 223; Allcott *v.* Strong, 9 Cush. (Mass.) 323; Upham *v.* Lefavour, 11 Met. (Mass.) 174; Millikin *v.* Tufts, 31 Me. 497; Thompson *v.* Phelan, 22 N. H. 339; Shedd *v.* Wilson, 27 Vt. 478; Truscott *v.* King, 2 Selden (N. Y.) 147; Dows *v.* More-

may be varied by circumstances.[6] Thus, where an agent renders an account, charging himself with a balance, and continues afterwards to receive moneys for his principal, and to make payments, his subsequent payments are not necessarily to be ascribed to the previous balance, if the subsequent receipts are equal to such payments.[7] Where the mortgagee of two parcels of land, mortgaged for the same debt, released one of them for the assignee of the mortgagor of that parcel, the money received for the release was appropriated to the mortgage debt, in favor of an assignee of the other parcel, notwithstanding the mortgagor was indebted to the creditor on other accounts.[8] So, if one debt is illegal, and the other is lawful, or if one debt is not yet payable, but the other is already overdue, a general payment will be ascribed to the latter.[9] And if one debt bears interest, and another does not, the payment will be applied to the debt bearing interest.[10]

§ 534. **Secured Debts.** The mere fact that one of several debts is secured by a *surety* does not itself entitle that debt to a preference in the appropriation of a general payment.[1] And, therefore, where there was a prior debt outstanding, and afterwards a new debt was created, for which a bond was given with a surety, the creditor was held at liberty to ascribe a general payment to the prior debt, though the surety was not informed of its existence when he became bound; for he should have inquired for himself.[2] But where a guaranty

wood, 10 Barb. (N. Y.) 183; Harrison *v.* Johnston, 27 Ala. 445. And this, though the creditor has security on some of the items, and none on the others: Worthley *v.* Emerson, 116 Mass. 374. [Or though the debtor's property is exempt as against the later items: Sternberger *v.* Gowdy, 93 Ky. 146; or the earlier items are secured: Pond *v.* O'Connor, 70 Minn. 266.] But where all the payments or credits belong to one transaction, as where the credits all grow out of a single contract on which there is also a debit, these credits or payments will be applied to that debit alone, and will not be applied to items which have nothing to do with that transaction, although those items may be prior in date: Suter *v.* Ives, 47 Md. 520.}

[6] Wilson *v.* Hirst, 1 Nev. & Man. 746; [Cory *v.* Mecca, 1897, A. C. 286.

[7] Lysaght *v.* Walker, 2 Bligh N. S. 1.

[8] Hicks *v.* Bingham, 11 Mass. 300; Gwinn *v.* Whitaker, 1 H. & J. 754.

[9] Wright *v.* Laing, 3 B. & C. 165; s. c. 4 D. & R. 783; *Ex parte* Randleson, 2 Dea. & Chit. 534; McDowell *v.* Blackstone Canal Co., 5 Mason 11; Gass *v.* Stinson, 3 Sumn. 99, 112; Parchman *v.* McKinney, 12 S. & M. 631. {If a creditor holds two demands, one lawful, and another positively unlawful, as a claim for usurious interest, he cannot apply a general payment by the debtor to the illegal demand, although the debtor, if he so elects, may thus apply it: Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346; Phillips *v.* Moses, 65 Me. 70; Rohan *v.* Hanson, 11 Cush. (Mass.) 44; Bancroft *v.* Dumas, 12 Vt. 457; Backman *v.* Wright, 27 id. 187; Caldwell *v.* Wentworth, 14 N. H. 437. And in general, if the debtor has once made a payment on account of a debt arising out of an illegal transaction, or consented to the application by the creditor of a payment to an illegal debt, he cannot afterwards withdraw his consent: Brown *v.* Burns, 67 Me. 535; Feldman *v.* Gamble, 26 N. J. Eq. 494.}

[10] Heyward *v.* Lomax, 1 Vern. 24; Bacon *v.* Brown, 1 Bibb 334; *supra*, § 530.

[1] [That payment will be applied to the debt least secured, see Poling *v.* Flanagan, 41 W. Va. 191; California N. B. *v.* Ginty, 108 Cal. 148; Smythe *v.* New England L. & T. Co., 12 Wash. 424; Pope *v.* Transparent Ice Co., 91 Va. 79; Gardner *v.* Leck, 52 Minn. 522. And see *ante*, § 531 *a*, note; § 529, n. 4. This rule tends to promote the payment of all the liabilities of the debtor. See *contra*, however, Blackmore *v.* Granbery, 98 Tenn 277.]

[2] Kirby *v.* D. of Marlborough, 2 M. & S. 18. And see Brewer *v.* Knapp, 1 Pick.

was expressed to be for goods to be thereafter delivered, and not for a debt which then existed, and goods were accordingly supplied from time to time, and payments made, for some of which a discount was allowed for payments in anticipation of the usual term of credit upon such sales, it was held, in favor of the surety, that the payments ought to be applied to the latter account.[3]

§ 535. **When Debt is barred by Statute of Limitations.** And if one of two demands is within the operation of the *Statute of Limitations*, and the other is not, this circumstance does not prevent the ascription of a general payment to the former demand, where the debtor himself has not appropriated it at the time.[1] So, if one of two bills is void for want of *a stamp*, a general payment may still be applied to it by the creditor.[2]

§ 536. **Apportionment.** In some cases, the court, in the exercise of its discretion, and for the sake of equal justice, will apply general payments, in a *ratable proportion* to all the existing debts.[1] Thus, if a broker, having sold goods of several principals to one purchaser, receives from him a general payment in part, after which the purchaser becomes insolvent, the payment shall be applied in proportion to each debt.[2] So, if the agent blends a demand due to his principal with one due from the same debtor to himself, and receives a general payment thereon;[3] or if an insolvent assigns all his property for the benefit of his creditors, and a dividend is paid to one of them, who holds divers demands against the insolvent;[4] or if several demands, some of which are collaterally secured, are included in one judgment, and the execution is satisfied in part,[5] — in these and the like cases the payment will be ascribed in a ratable proportion to each debt.

337; Mitchell *v.* Dall, 4 G. & J. 361; Plomer *v.* Long, 1 Stark. 153; Clark *v.* Burdett, 2 Hall (N. Y.) 185.

[3] Marryatts *v.* White, 2 Stark. 101.

[1] Mills *v.* Fowkes, 5 Bing. N. C. 455; 3 Jur. 406; Williams *v.* Griffith, 5 M. & W. 300. See *ante*, §§ 529, 531. [The creditor may divide the payment, and apply part on each demand to stop the running of the statute: Young *v.* Alford, 118 N. C. 215. That he must obtain the debtor's consent to this, however, see McGaffey *v.* Mathie, 68 Vt. 403.]

[2] Biggs *v.* Dwight, 1 M. & Rob. 308.

[1] [Turner *v.* Hill, 39 A. 137, N. J. Eq.]

[2] Favenc *v.* Bennett, 11 East 36.

[3] Barrett *v.* Lewis, 2 Pick. 123; Cole *v.* Trull, 9 id. 325.

[4] Scott *v.* Ray, 18 Pick. 360; Commercial Bank *v.* Cunningham, 24 id. 270.

[5] Blackstone Bank *v.* Hill, 10 Pick. 129. And see Perris *v.* Roberts, 1 Vern. 34; 1 Poth. Obl. by Evans, Part 3, c. 1, art. 7, §§ 528–535; Shaw *v.* Picton, 4 B. & C. 715. [So where money is realized on foreclosure of mortgages given as security for different debts: Armstrong *v.* McLean, 153 N. Y. 490; Maddox *v.* Teague, 18 Mont. 593; or where money is paid by an assignee for creditors to a creditor holding several claims: Cohen *v.* L'Engle, Fla., 11 S. 44.]

PRESCRIPTION.

§ 537. **Prescription.** Prescription, in its more general acceptation, is defined to be "a title, acquired by possession, had during the time and in the manner fixed by law." After the lapse of the requisite period, the law adds the right of property to that which before was only possession.[1] The subject of prescription is real property; but the title to corporeal hereditaments, derived from exclusive adverse possession, being regulated by the statutes of limitation, of which we have already treated under that head, the title by prescription, in its strictest sense, is applied only to things incorporeal, such as rents, commons, ways, franchises, and all species of easements or liberties without profit, which one man may be entitled to enjoy in the soil of another, without obtaining any interest in the land itself.[2]

§ 538. **Foundation of Title by Prescription.** This prescriptive title to things incorporeal was originally founded on uninterrupted enjoyment for a period of indefinite antiquity, or beyond the memory of man, and is termed a positive prescription. When writs of right were limited to a fixed period, it was thought unreasonable to allow a longer time to claims by prescription; and accordingly prescriptive rights were held indefeasible, if proved to have existed previous to the first day of the reign of King Richard I., that being the earliest limitation of writs of right, and were invalidated if shown to have had a subsequent origin. When later statutes reduced the period of limitation of real actions to a certain number of years, computed back from the commencement of each action, it was to have been expected, that the period of legal memory in regard to prescriptions would have been shortened by the courts of law in like manner, upon the same reason; but it was not done, and the time of prescription for incorporeal rights remained as before. This unaccountable omission has occasioned some inconvenience in the administration of justice, and some conflict of opinion on the bench, and in the profession at large. The inconvenience, however, has been greatly obviated in practice, by introducing a new kind of title, namely, the

[1] Gale & Whateley on Easements, p. 86; Co. Lit. 113 *b*.

[2] See 3 Cruise's Digest, tit. xxxi. c. 1 (Greenleaf's ed. 1856). The law of Prescriptions is stated with great clearness by Mr. Best, in his Treatise on Presumptions, c. iii. pp. 87–110. See also Mr. Angell's Treatise on Adverse Enjoyment. {On this general subject see Sedgwick and Wait on Real Actions; Washburn on Real Property.} [And see the subject of Limitations, *ante*, §§ 430 *et seq.*]

presumption of a grant, made and lost in modern times; which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time. But whether this presumption is to be regarded as a rule of law, to be administered by the judges, or merely as a subject fit to be emphatically recommended to the jury, is still a disputed point in England, though now reduced to little practical importance, especially since the recent statute on this subject.[1]

§ 539. **Adverse Possession.** In the United States grants have been very freely presumed, upon proof of an *adverse, exclusive, and uninterrupted enjoyment for twenty years;* it being the policy of the courts of law to limit the presumption to periods analogous to those of the statutes of limitation, in all cases where the statutes do not apply; but whether this was a presumption of law or of fact was for a long time as uncertain here as in England, and perhaps may not yet be definitely settled in every State. But by the weight of authority, as well as the preponderance of opinion, it may be stated as the general rule of American law, that such an enjoyment of an incorporeal hereditament affords a conclusive presumption of a grant, or a right, as the case may be; which is to be applied as a *præsumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law.[1] In order, however, that the enjoy-

[1] See Gale & Whateley on Easements, pp. 89–97; Pritchard *v.* Powell, 10 Jur. 154. By Stat. 2 & 3 W. IV. c. 71, § 1, no prescription for any right in land, except tithes, rents, and services, where the profit shall have been actually taken and enjoyed by the person claiming right thereto, without interruption, for thirty years, shall be defeated by showing an earlier commencement. And if enjoyed in like manner for sixty years, the right is deemed indefeasible and absolute, unless shown to have been enjoyed by express consent or agreement, by deed or in writing. By § 2, a similar effect is given to the like enjoyment of ways, easements, and watercourses, and rights for the period of twenty years, unless defeated in some legal way other than by showing an earlier commencement; and for forty years, unless by consent in writing, as in the preceding section. And by § 3, the enjoyment of lights for twenty years without interruption confers an absolute and indefeasible title, unless it was by consent in writing, as in the other cases. Thus the enjoyment for the shorter period, in the first two cases, is made a *præsumptio juris* of title, excluding only one method of defeating it; and the enjoyment for the longer period, in every case, is made a *præsumptio juris et de jure*, against all opposing proof, except that of consent in writing. See Best on Presumptions, § 98, pp. 116–129.

[1] Tyler *v.* Wilkinson, 7 Mason, 402 per Story, J. And see *ante*, Vol. I. § 17, and cases there cited; Sims *v.* Davis, 1 Cheves 2; 3 Kent Comm. pp. 441, 442. On this subject, Mr. Justice Wilde, in delivering the opinion of the court in Coolidge *v.* Learned, 8 Pick. 504, remarked as follows: "That the time of legal memory, according to the law of England, extends back to the remote period contended for by the plaintiff's counsel, cannot be denied; but for what reason, or for what purpose, such a limitation should have been continued down to the present day, we are unable to ascertain. Cruise says, 'that it seems somewhat extraordinary that the date of legal prescription should continue to be reckoned from so distant a period.' And to us it seems that for all practical purposes, it might as well be reckoned from the time of the creation. The limitation in question (if it can now be called a limitation) was first established soon after the Stat. Westm. 2 (13 Edw. I. c. 39), and was founded on the equitable construction of that statute, which provided that no writ of right should be maintained except on a seisin from the time of Richard I.

"It was held that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession was sufficient also to give a title to the easement: 2 Roll. Abr. 269; 2 Inst. 238; R. *v.* Hudson, 2 Str. 909; 3 Stark. on Ev.

ment of an easement in another's land may be conclusive of the right, it must have been *adverse*, that is, under a claim of title, with the

1205. Upon this principle, the time of legal memory was first limited, and upon the same principle, when the limitation of a writ of right was reduced by the statute of 32 Hen. VIII. c. 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This was required not only by public policy, to quiet long-continued possessions, but by a regard to consistency, as it would have been only following up the principle upon which the first limitation was founded.

"And of this opinion was Rolle (2 Roll. Abr. 269), though he admits that at his time the practice was otherwise. Why the opinion of this eminent judge, founded as it was on reasoning so solid and satisfactory, was not adopted by the courts, does not appear. But it does appear, that the principle on which his opinion was founded was respected, and carried into operation in another form. For although the courts continued to adhere to the limitation before adopted, yet the long enjoyment of an easement was held to be a sufficient reason, not only to authorize, but to require, the jury to presume a grant. And it has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury the duty to presume a grant, and, in all such cases, juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession should not be disturbed.

"The period of twenty years was adopted in analogy to the statute of limitations, by which an adverse possession of twenty years was a bar to an action of ejectment, and gave a promissory title to the land. Thus it appears, that, although prescriptive rights commencing after the reign of Richard I. are not sustained in England, yet a possession of twenty years only is sufficient to warrant the presumption of a grant; which is the foundation of the doctrine of prescription. In the one case, the grant is presumed by the court, or rather is presumed by the law, and in the other case it is presumed by the jury, under the direction of the court. The presumption in the latter case is in theory, it is true, a presumption of fact, but in practice and for all practical purposes, it is a legal presumption, as it depends on pure legal rules; and, as Starkie remarks, 'It seems to be very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple, and any objection, as to the want of authority, would apply with equal if not superior force to the establishing such presumptions indirectly through the medium of a jury.

"But, however this may be, it is clear, that, when the law became settled as it now is, and a party was allowed to plead a non-existing grant, and the jury were bound to presume it, on proof of twenty years' possession, he would hardly be induced to set up a prescriptive right; and the limitation of legal memory thus became in most cases of very little importance. And this is probably the reason why the period of legal memory, as it was limited soon after the statute of Westm. 1, has been suffered to go on increasing to the present time, although it has long since ceased to be of any practical utility, and is utterly inconsistent with the principle on which the limitation was originally founded.

"The question then, is, whether the courts in this country were not at liberty to adopt the English law of prescription, with a modification of the unreasonable rule adhered to by the English courts in regard to the limitation of the time of legal memory. Certainly the law without the rule of limitation might have been adopted, and the courts here had competent authority to establish a new rule of limitation suited to the situation of the country. They had the same authority in this respect that the courts in England had to establish the English rule of limitation. This rule could not be adopted here without a modification, and it was modified accordingly; and in conformity with the principle of the English rule of limitation. This cannot be ascertained with certainty, but it is evident that the English rule could not have been adopted, and it is to be presumed that the period of sixty years was fixed upon as the time of limitation, in analogy to the statute of 32 Hen. VIII. c. 2, and in conformity with the opinion of Rolle. At what period of our history the law of prescription was first introduced into practice in the courts of Massachusetts cannot now be determined, but certainly it was before the time of legal memory, as we understand the limitation of it; and innumerable pleas of prescriptive rights are to be found in the records of

knowledge and acquiescence of the owner of the land, and uninterrupted; and the *burden of proving* this is on the party claiming the easement. If he leaves it doubtful, whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor.[2]

§ 539 *a*. **Adverse Enjoyment must be actionable.** It seems, that to constitute an *adverse* enjoyment of an incorporeal hereditament, the act of enjoyment must be of such a character as to afford ground for an action by the other party. It must be either a direct invasion of his vested rights, or else consequently injurious to their free exercise. The foundation of prescriptive title is the presumed grant of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such

our courts. So the cases reported by Dane show that the doctrine of prescription has been repeatedly recognized and sanctioned by this court. 3 Dane, 253, c. 79, art, 3, § 19. The only question has been, whether our time of legal memory was limited to sixty years, or whether it was to extend to a period beyond which no memory or record goes as to the right in question. The general opinion, we think, has been in favor of the limitation of sixty years; and we think it decidedly the better opinion. This seems to us a reasonable limitation, and, as before remarked, it is founded on the principle of the English rule of limitation, which was adopted in reference to the limitation of the writ of right by the statute of Westm. 1. Whether since the writ of right has been limited to forty years, a similar limitation of the time of legal memory ought to be adopted, is a question not raised in this case and upon which we give no opinion:" 8 Pick. 508–511. The conclusiveness of the presumption was again asserted in Sargent *v.* Ballard, 9 id. 251. Afterwards, the point of time being before the same court, it was adjudged that the exclusive uninterrupted use and enjoyment for forty years, of an incorporeal right affecting another's land, was sufficient to establish a title by prescription: Melvin *v.* Whiting, 10 id. 295. And, subsequently, a similar enjoyment for twenty years was held equally effectual: Bolivar Man. Co. *v.* Neponset Manuf. Co., 16 id. 241. This rule is now expressly recognized, in several of the States, by statutes. See Rev. Stat. Massachusetts, c. 60, § 27; Rev. Stat. Maine, c. 147, § 14. And it seems to be either assumed or necessarily implied in the legislation of other States. See Elmer's Dig. LL. New Jersey, pp. 314, 317, tit. Limitations, §§ 1, 16; Den *v.* McCann, Penningt. 331, 333; 1 Rev. Stat. N. Carolina, c. 64, § 1, pp. 371, 372; Rev. Stat. Delaware, 1839, tit. Limitations, § 1, p. 396; 2 LL. Kentucky, p. 1125, tit. Limitations, § 2 (Morehead & Brown's ed.); Morgan *v.* Banta, 1 Bibb 582; Simpson *v.* Hawkins, 1 Dana 306; Clay's Dig. LL. Alabama, p. 329, § 93; Rev. Stat. Missouri, p. 392, tit. Limitations, art. 1, § 1; 2 Rev. Stat. New York, p. 293, §§ 5, 7; 3 Cruise's Dig. tit. 31, c. 1, § 21, n. (Greenleaf's ed.). See also Shaw *v.* Crawford, 10 Johns. 236; Johns *v.* Stevens, 3 Vt. 316. The case of Bolling *v.* Mayor, etc. of Petersburg, 3 Rand 563, 577, which has been cited to the contrary, was a writ of right, respecting a corporeal hereditament, and turned upon the statute of limitations.

[2] Sargent *v.* Ballard, 9 Pick. 251; Davies *v.* Stevens, 7 C. & P. 570; Jarvis *v.* Dean, 3 Bing. 447. {Proof of an adverse and uninterrupted use of a way for twenty years, with the knowledge and acquiescence of the owner of the land, is sufficient to establish an incumbrance upon land without proof of an express claim of the right by the persons using the way, or of an express admission of the right by the owner of the land: Blake *v.* Everett, 1 Allen (Mass.) 248. Where no contract is shown, and the use came to the knowledge of the adverse party, or was so open and notorious that such knowledge would be presumed, the use will be presumed to have been under a claim of right, unless the contrary is shown: Arbuckle *v.* Ward, 29 Vt. 43. As this prescription is founded on the presumption of a grant, it follows that twenty years' user will not establish a right by prescription unless the owner of the subject prescribed for is capable of giving by express grant such a right as is claimed by prescription: Rochdale Canal *v.* Radcliffe, 12 Eng. Law & Eq. 409.}

party, no presumption of grant can be made.[1] Thus in the case of lights, if the building in which they are made is erected on the party's own land, and no building stands on the land of the adioining proprietor, it has been held, that, against the latter, no right is acquired by lapse of time.[2]

§ 540. **Two Kinds of Prescription.** There are two kinds of positive prescription: the one being a personal right, exercised by the party and his ancestors, or by a body politic and its predecessors; and the other being a right attached to an hereditament held in fee simple, and exercisable only by those who are seised of that estate; and this is termed a prescription in a *que estate*.[1]

[1] [Pennsylvania R. *v.* Hulse, 59 N. J. L. 54; Claflin *v.* Boston, etc. R., 157 Mass. 489; Vossen *v.* Dantel, 116 Mo. 379; Gaines *v.* Merryman, 95 Va. 660. Use with knowledge but without permission of the owner is adverse: Pavey *v.* Vance, 56 Ohio 162.] {So if the evidence in the case is such that the jury might find that the enjoyment by the party claiming the right was permitted by the party against whom he seeks to enforce the right, then the court cannot instruct the jury to presume a grant: Demuth *v.* Amweg, 90 Pa. St. 181. The possession will be presumed to be adverse unless some license or permission is shown: Steffy *v.* Carpenter, 37 Pa. St. 41. Cf. Lehigh Valley R. R. Co. *v.* McFarlan, 30 N. J. Eq. 180. It is held that complaints by the owner of the land of the user, and demands that it be stopped, are competent to prove the non-acquiescence of the owner in such use: Chicago, etc. R. R. Co. *v.* Hoag, 90 Ill. 339.

The enjoyment of the right must be adverse. This is absolutely necessary, and when the judge charged the jury that "a party who has for more than twenty years occupied, used, and enjoyed a right of way over another's land, under a claim of right, uninterruptedly, continuously, and with the knowledge of the owner," but omitted to say adversely, "had acquired an easement," it was held erroneous: McCardle *v.* Barricklow, 68 Ind. 356.}

[2] Pierre *v.* Fernald, 13 Shepl. 436. Shepley, J., in delivering the opinion of the court in this case, said: "Nothing in the law can be more certain than one's right to occupy and use his own land, as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass-plat, or passage-way without any loss or diminution of his rights. No other person can acquire any right or interest in it merely on account of the manner in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's lands, he does no more than exercise a legal right. This is admitted: Cross *v.* Lewis, 2 B. & C. 686. By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not therefore claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted that the defendant cannot obtain redress by any legal process. In other words, that his rights have not been encroached upon; and that he has no cause of complaint. And yet, while thus situated for more than twenty years, he loses his right to the free use of his land, because he did not prevent his neighbor from enjoying that which occasioned him no injury and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

"It may be safely affirmed, that the common law originally contained no such principles. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle by which rights and easements are acquired by the adverse claim and enjoyment of them for twenty years, to a case in which no adverse or injurious claim was either made or enjoyed." And see Parker *v.* Foote, 19 Wend. 309; Ray *v.* Lines, 10 Ala. 63.

[1] 3 Cruise's Dig. tit. xxxi. c. 1, §§ 8, 9 (Greenleaf's ed. 1856).

§ 541. **Conditions essential to Prescription.** Nothing can be claimed by prescription which owes its origin to, and can only be had by, *matter of record;* but lapse of time accompanied by acts done, or other circumstances, may warrant a jury in presuming a grant or title by record.[1] Nor can anything be claimed by prescription, unless it might have been created by *grant;* nor anything which the law itself gives of *common right.* Nor can anything be prescribed for in a *que estate,* unless it is appendant or appurtenant to land, and lies in grant.[2]

§ 542. **Customary Rights.** *Customary rights* differ from prescriptive rights only in this, that the former are local usages, belonging to all the inhabitants of a particular place or district; whereas the latter are rights belonging to individuals, wherever they may reside.[1]

§ 543. **Proof.** From this view of the present state of the law on this subject, it appears that the plea of prescription will be maintained by any competent evidence of an uninterrupted, exclusive enjoyment of the subject prescribed for during the period of twenty years, with claim of title, and with the actual or presumed knowledge of those adversely interested.[1] The time of enjoyment by a former owner, whose title has escheated to the State by forfeiture, cannot be added to the time of enjoyment by the grantee of the State, to make up the twenty years; but the times of enjoyment by those in privity with the claimant, as in the relation of heir and ancestor, or grantor and grantee, may be thus joined.[2]

§ 544. **Same Subject.** If the evidence of the claim extends over the requisite period of time, the prescriptive title will not be defeated by proof of *slight, partial,* or *occasional variations* in the exercise or extent of the right claimed.[1] Thus, if a watercourse is prescribed for to a fulling-mill, but the party has converted it into a grist-mill;[2] or, if the subject of prescription be a towing-path along the banks of a navigable river, and it has been converted by

[1] 3 Cruise's Dig. tit. xxxi. c. 1, § 10 (Greenleaf's ed. 1856); Farrar *v.* Merrill, 1 Greenl. 17; Battles *v.* Holley, 6 id. 145; *ante,* Vol. I. § 46; Best on Presumptions, § 111.

[2] 3 Cruise's Dig. tit. xxxi. c. 1, §§ 11, 17, 18, 19 (Greenleaf's ed. 1856).

[1] Ibid. § 7; Best on Presumptions, § 79.

[1] [Williams *v.* Barber, 104 Mich. 31.] {Where an uninterrupted user for twenty-one years is proved, the jury will be justified in presuming it adverse, unless that presumption be rebutted by proof of license or agreement: Steffy *v.* Carpenter, 37 Pa. St. 41; *ante,* § 539, n.}

[2] Sargent *v.* Ballard, 9 Pick. 251. {An adverse occupation of a fishery by A for a number of years, but afterwards abandoned, cannot be added to a subsequent occupation by B, to give B a prescriptive right, although A, after such abandonment, released all his right in the fishery to B. Nor will the occupation thereof by B for several years, while in the employment of A, give B any rights by prescription against C, although A claims adversely to C: McFarlin *v.* Essex Company, 10 Cush. 304. See also Sawyer *v.* Kendall, ib. 241; Kilburn *v.* Adams, 7 Met. 33.}

[1] [Kurtz *v.* Hoke, 172 Pa. 165. In order to acquire a way by prescription, a definite route must be used: Hoyt *v.* Kennedy, 170 Mass. 54.]

[2] Lutterel's Case, 4 Co. 86. And see Blanchard *v.* Baker, 8 Greenl. 253.

statute into a floating harbor,[3] — the right is not thereby lost: for, in the former case, the substance of the right is the mill, and not the kind of mill to which the same propelling power was applied; and, in the latter case, the use made by the public was essentially the same as before, namely, for facility of navigation. So, proof of the exercise of the right whenever the party had occasion to do so, as, for example, the right to take clay to make bricks, is sufficient, without showing that it was in fact exercised at all times of the year, though it is so alleged in the plea.[4] Thus, also, the plea will be supported by proof of a right, larger than the right claimed, if it be of a nature to include it.[5] And if the prescription is for a common appurtenant to a house and twenty acres, it will be supported by proof of a right appurtenant to a house and eighteen acres.[6] But the prescription, being an entire thing, must be *proved substantially* as laid;[7] and therefore a variance in any part, material or essentially descriptive, will be fatal. Thus, if the prescription is for common for commonable cattle, and the evidence is of common for only a particular species of commonable cattle;[8] or, if the prescription pleaded is general and absolute, but the proof is of a prescriptive right coupled with a condition;[9] or subject to exceptions;[10] or if the right claimed is of common in a certain close, and it appears that the claimant has released his title in part of the land:[11] in these, and in the like cases, the plea is not supported.

[3] R. *v.* Tippett, 3 B. & Ald. 193; Codling *v.* Johnson, 9 B. & C. 933.

[4] Clayton *v.* Corby, 8 Jur. 212; 2 Ad. & El. N. S. 813.

[5] Bailey *v.* Appleyard, 8 Ad. & El. 167; Bailiffs of Tewksbury *v.* Bicknell, 1 Taunt. 142; Welcome *v.* Upton, 6 M. & W. 540, per Alderson, B.; Buskwood *v.* Pond, Cro. El. 722. {When a right of way to certain lands exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may reasonably be required for the use of that estate while in the same condition: Parks *v.* Bishop, 120 Mass. 340; Sloan *v.* Holliday, 30 L. T. N. S. 757; Williams *v.* James, L. R. 2 C. P. 577; Dare *v.* Heathcote, 25 L. J. N. S. Exch. 245. But if the character and condition of the dominant estate are substantially altered, as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon, or of a way for agricultural purposes, to a farm which is afterwards turned into a manufactory or divided into building lots, the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate: Atwater *v.* Bodfish, 11 Gray (Mass.) 150; Parks *v.* Bishop, 120 Mass. 340; Wimbledon Commons *v.* Dixon, L. R. 1 Ch. Div. 362; Willes, J., in L. R. 2 C. P. 582. So if the prescription is for the right to empty a drain upon another's land, if during the twenty years the drain has been enlarged, deepened, or varied in its course and termination, the claim cannot be supported: Cotton *v.* Pocasset Manuf. Co., 13 Met. (Mass.) 429, 433.}

[6] Gregory *v.* Hill, Cro. El. 531; Rickets *v.* Salwey, 2 B. & Ald. 360.

[7] See *ante*, Vol. I. §§ 63, 67, 71, 72; Paddock *v.* Forrester, 1 Dowl. N. C. 527; Drewell *v.* Towler, 3 B. & Ald. 735; [M'Intyre *v.* M'Gavin, 1893, A. C. 268.]

[8] Bull. N. P. 59. And see R. *v.* Hermitage, Carth. 241.

[9] Gray's Case, 5 Co. 78 *b*; Lovelace *v.* Reignolds, Cro. El. 563; Paddock *v.* Forrester, 3 M. & G. 903.

[10] Griffin *v.* Blandford, Cowp. 62.

[11] Rotherham *v.* Green, Cro. El. 593.

§ 545. **Defeated by Interruption.** The claim of a prescriptive right may be *defeated* by evidence showing that it has been *interrupted* within the legal period; but this must be an interruption of the *right*, and not simply an interruption of the use or possession.[1] Thus, if estovers for a house be by prescription, and the house be pulled down and rebuilt, the right is not lost.[2] Nor will the right be destroyed by a *tortious* interruption, nor by a discontinuance by the lease of a terre-tenant.[3] It may also be defeated by proof of *unity of title* to the easement and to the land to which it was attached, where both titles are of the same nature and degree;[4] or, by evidence of the final *destruction* of the subject to which the right was annexed;[5] or, by showing that its commencement and continuance were by the *agreement and consent* of the adverse party or by his *express grant*, within the legal period. But proof of an older grant will not defeat the claim, if it appear to be in *confirmation* of a prior right.[6] And if the exercise of the right claimed was by consent of one who had only a *temporary interest* in the land, as, for example, a tenant for life, his negligence in not resisting the claim will not be allowed to prejudice the owner of the inheritance.[7] The acquiescence of the owner, however, may be inferred from circumstances;[8] and where the time has once begun to run against him, the interposition of a particular estate does not stop it.[9]

§ 546. **Usage and its Effect.** It is hardly necessary to add, that, though the usage proved may not be sufficiently long to support the

[1] Co. Lit. 114 *b*; 2 Inst. 653, 654; Canham *v.* Fisk, 2 C. & J. 126, per Bayley, B.; Carr *v.* Foster, 3 Ad. & El. N. S. 581; [Alcorn *v.* Sadler, 71 Miss. 634.] {In order to constitute such interruption of the enjoyment of a right as will prevent the acquisition of a title by prescription, a mere assertion of exclusive right is not enough; there must be some act which will prevent the use of the easement, at least for the time being. So, placing a gate in an alley-way, which any one could use who chose, is not enough: Demuth *v.* Amweg, 90 Pa. St. 181. But bringing a suit for trespass against the party claiming such a right of way, is a sufficient interruption of the enjoyment to stop the acquisition of an easement: Ferrell *v.* Ferrell, 57 Tenn. 329.}

[2] 4 Co. 87; Cowper *v.* Andrews, Hob. 39.

[3] 2 Inst. 653, 654.

[4] {Easements which are apparent and continuous, though they lie dormant during the unity of title, revive when the dominant and servient estates are severed: Hurlburt *v.* Firth, 10 Phila. (Pa.) 135.

If the easement is not destroyed by such unity of title, yet the time during which such unity lasts cannot be included by the party claiming the easement by prescription, so as to make out twenty years' enjoyment: Mansur *v.* Blake, 62 Me. 38.}

[5] Co. Lit. 114 *b*; 3 Cruise's Dig. tit. xxxi. c. 1, §§ 35, 36 (Greenl. ed. 1856); 6 Com. Dig. 83, tit. Prescription, G; Morris *v.* Edgington, 3 Taunt. 24.

[6] Addington *v.* Clode, 2 W. Bl. 989; Biddulph *v.* Ather, 2 Wils. 23; Best on Presumptions, § 87.

[7] Bradbury *v.* Grinsell, 2 Saund. 175 *d*, note by Williams; Daniel *v.* North, 11 East 372; Barker *v.* Richardson, 4 B. & Ald. 579; Runcorn *v.* Doe, 5 B. & C. 696; Wood *v.* Beal, 5 B. & Ald. 454. See also Gale & Whateley on Easements, pp. 108–117. So if it was by mutual mistake: Campbell *v.* Wilson, 3 East 294.

[8] Gray *v.* Bond, 2 B. & B. 667

[9] Cross *v.* Lewis, 2 B. & C. 686; Best on Presumptions, § 89.

claim of a right by prescription, yet, coupled with other circumstances, it may be sufficient to support the plea of title by a lost grant, which the jury will be at liberty, and sometimes be advised, to find accordingly.[1]

[1] Bealey *v.* Shaw, 6 East 208; *ante*, Vol. I. §§ 17, 45, and cases there cited; Best on Presumptions, §§ 86–90; Gale & Whateley on Easements, pp. 93–95.

REAL ACTIONS.

§ 547. **Variety of Real Remedies.** The principal rules of evidence, applicable to actions for the recovery of lands and tenements, have already been considered, under the title of Ejectment; this being the form of remedy pursued in most of the United States. But in several of the States this remedy has been essentially modified, as in *South Carolina*, where its fictions are abolished, and an action of "trespass to try titles" is given by statute; and in *Alabama*, where a similar action, or a writ of ejectment, is given at the election of the party. In other States, namely, in *Georgia*, *Iowa*, *Texas*, *California*, and *Louisiana*, the remedy in this, as in all other civil cases, is by petition or complaint, in which the entire case of the plaintiff is fully and distinctly stated, and is answered by the defendant, much in the manner of proceedings in equity. In others, as in *Maine*, *New Hampshire*, *Connecticut*, and *Illinois*, the forms of action known to the common law are all recognized, but the remedies in most frequent use are the writ of right, the writ of dower *unde nihil habet*, the writ of *formedon*, in the very few cases of entailments which now occur, and especially a writ properly termed a writ of entry upon disseisin. This last is now almost the only remedy resorted to, except for dower, since the limitation of all real actions and rights of entry, in all the States last mentioned, except *Connecticut*, as well as in most others, is now reduced to one uniform period of twenty years. In *Connecticut* the limitation is fifteen years, and in one or two other States the period is still shorter.[1]

§ 548. **Mesne Profits.** There is diversity in the laws of the several States on another point; namely, the remedy for *mesne profits*. In some States, this remedy is by an action of trespass as at common law. In others, as in *Massachusetts*, *Maine*, and *Illinois*, and, to a limited extent, in *Vermont*, the damages for mesne profits are assessed by the jury, in the trial of the writ of entry, the real action being thus changed by statute into a mixed action. In *Pennsylvania*, *North Carolina*, *South Carolina*, *Tennessee*, *Alabama*, *Wisconsin*, and *Missouri*, they are assessed, with various restrictions, by the jury, in the trial of the writ of ejectment. In *Ohio* and *Alabama*, where the value of his lasting improvements is claimed by

[1] See 3 Cruise's Dig. (Greenleaf's ed. 1856), *sub fine*, for a synopsis of the Statutes of Limitation of Real Actions in the several States. [See also tit. Ejectment, *ante*, §§ 303 *et seq.*]

the defendant, and the value of the land, exclusive of the improvements, is also assessed at the request of the plaintiff, the claim for mesne profits is merged and barred, by statute, in these proceedings.

§ 549. **Improvements.** The proceedings last mentioned relate to another feature, peculiar in the law of real remedies of some of the United States, but unknown in others; namely, the right of the occupant of land to recover against the true owner, on eviction by him, the value of the *lasting improvements*, popularly termed *betterments*, which, in good faith, he has made upon the land. This right, to a certain extent, is a familiar doctrine in courts of equity, and it is freely administered whenever the owner, after recovery of the land, resorts to a bill in equity against the late occupant, for an account of the rent and profits; but whether those courts would sustain a bill originally brought by the occupant for the value of his improvements was, until of late, wholly an open question, but is now, in one class of cases, settled in favor of the remedy.[1] At com-

[1] See 2 Kent Comm. pp. 334–338; Bright *v.* Boyd, 1 Story 478. In this case, which was a bill in equity, the plaintiff had purchased the premises in question at a sale, made by the administrator of the defendant's ancestor, for payment of his debts; but, the title being defective, by reason of illegality in the administrator's proceedings, the defendant, who was the devisee under a foreign will, had recovered the land from the present plaintiff in an action at law. The present plaintiff, not having had possession of the land for a sufficient length of time to enable him to claim the value of his lasting improvements, under the statute of Maine, in the action at law, now filed this bill for that and some other purposes, in the Circuit Court of the United States. The principal question was discussed by Mr. Justice Story, in the following terms: "The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, 'Nemo debet locupletari ex alterius incommodo;' or as it is still more exactly expressed in the Digest, 'Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem.' (*a*) I am aware, that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. (*b*) So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. (*c*) In each of these cases, the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. (*d*) But it has been supposed that courts of equity do not and ought not to go further, and to grant active relief in favor of such a *bona fide* possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor,

(*a*) Dig. lib. 50, tit. 17, l. 206.

(*b*) 2 Story on Eq. Jurisp. § 799 *a*, § 799 *b*, §§ 1237, 1238, 1239; Green *v.* Biddle, 8 Wheat. 77–81.

(*c*) See also 2 Story Eq. Jurisp. § 799 *b*, and note; ib. §§ 1237, 1238.

(*d*) Ibid.

mon law, it is well known that no such claim could be maintained; but the situation of the United States, as a new country in the course

against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in Putnam *v.* Ritchie, 6 Paige 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just, that in such a case the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what in a just sense he never had the slightest title to; that is, the house. It is not answering the objection; but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose, and grant relief?

"I have ventured to suggest, that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity: 'Jure naturæ æquum est.' And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. 'Certe' (say the Institutes) 'illud constat; si in possessione constituto ædificatore, soli Dominus petat domum suam esse me solvat pretium materiæ et mercedes fabrorum; posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse.' (*e*) It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land. (*f*) The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate ('quatenus pretiosior res facta est' (*g*), and beyond what he has been reimbursed by the rents and profits. (*h*) The like principle has been adopted into the law of the modern nations, which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier, with his accustomed strong sense of equity, and general justice and urgent reasoning. (*i*) Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have an allowance of all expenses, which have enhanced the value of the estate, so far as the increased value exists. (*j*)

"The law of Scotland has allowed the like recompense to *bona fide* possessors making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent. (*k*) The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded

(*e*) Just. Inst. lib. 2, tit. 1, §§ 30, 32; 2 Story on Eq. Jurisp. § 799 *b*; Vinn. Com. ad Inst. lib. 2, tit. 1; Just. § 30, n. 3, 4, pp. 194, 195.

(*f*) See Green *v.* Biddle, 8 Wheat. 79, 80.

(*g*) Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; ib. l. 38; Pothier, Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48.

(*h*) Dig. lib. 6, tit. 1, l. 48.

(*i*) Pothier, De la Propriété, n. 343–353; Code Civil of France, arts. 552, 555.

(*j*) Pothier, De la Propriété, n. 350; Vinn. ad Inst. lib. 2, tit. 1, l. 30, n. 4, p. 195.

(*k*) Bell, Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair Inst. b. 1, tit. 8, § 6.

of rapid and even tumultuous occupation, having given rise to great uncertainties in the titles to land, the rule of the common law was found to operate inequitably in very many cases, and sometimes to work gross injustice; and hence several of the States have been led to provide remedies at law for the protection of honest occupants, and for securing to them the fruits of their labor, fairly bestowed in the permanent improvement of the land.

in natural justice and equity. (*l*) Grotius, Puffendorf, and Rutherford, all affirm the same doctrine, as founded in the truest principles, *ex æquo et bono*. (*m*)

"There is still another broad principle of the Roman law, which is applicable to the present case. It is that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. (*n*) Now, in the present case, it cannot be overlooked that the lands of the testator now in controversy were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So that he is now enjoying his lands, free from a charge which, in conscience and equity, he and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement in order to avoid a circuity of action, to get back the money from the administrator, and thus subject the lands to a new sale, or at least, in his favor in equity to the old charge. I confess myself to be unwilling to resort to such a circuity, in order to do justice, where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable.

"These considerations have been suggested, because they greatly weigh in my own mind, after repeated deliberations on the subject. They, however, will remain open for consideration upon the report of the master, and do not positively require to be decided until all the equities between the parties are brought by his report fully before the court. At present, it is ordered to be referred to the master to take an account of the enhanced value of the premises, by the ameliorations and improvements of the plaintiff, and those under whom he claims, after deducting all the rents and profits received by the plaintiff, and those under whom he claims, and all other matters will be reserved for the consideration of the court upon the coming in of his report." See 1 Story, 494–499. Afterwards, upon the coming in of the report, by which the increased value of the land, by reason of the plaintiff's improvements, was ascertained at a certain sum, the learned judge decreed that the plaintiff was entitled to that sum, as a lien and charge on the land; concluding thus: "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine as a doctrine of equity, that so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and I may add, common sense and common justice, for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate." See 2 Story, 607, 608. See also Swan *v.* Swan, 8 Price 518; 3 Powell on Mort. 957, n. Q, by Coventry.

(*l*) 1 Mor. & Carl. Partid. b. 3, tit. 28, l. 41, pp. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102.

(*m*) Grotius, b. 2, c. 10, §§ 1, 2, 3; Puffend. Law of Nat. & Nat. b. 4, c. 7, § 61, Rutherf. Inst. b. 1, c. 9, § 4, p. 7.

(*n*) Dig. lib. 6, tit. 1, l. 65; Pothier, Pand. lib. 6, tit. 1, n. 43; Pothier, De la Propriété, n. 343.

§ 550. **Same Subject.** There is great diversity also in the modes by which this object is effected. In some of the States, the value of the improvements is allowed only by way of set-off to the claim of the plaintiff for mesne profits. In others the occupant has a remedy by filing a declaration in a special action on the case, after judgment for possession has been entered against him in the action of ejectment; in which case the writ of possession is stayed until a trial is had of the action for the value of the improvements, and the judgment in the latter case constitutes a lien on the land. In other States, upon the trial of the possessory action, the jury, at the request of the respective parties, are required to assess, on the one hand, the increased value of the premises, by reason of the improvements made by the occupant and those under whom he claims; and, on the other hand, the value of the land, exclusive of those improvements; and the plaintiff is put to his election, either to take the land and pay the ascertained value of the improvements, or to abandon the land to the tenant at the price found by the jury; and the payments in either case are made by instalments fixed by law, and enforced by issuing or withholding the writ of possession.[1]

§ 551. **Character of the Occupancy.** The *character of the occupancy*, also, is the subject of some diversity of legislation. In general, the occupancy must have been in good faith,[1] and without actual fraud.[2] But, in some States, the right to remuneration for improvements is given to all occupants who have been in possession,

[1] {The proof of improvements for which the occupier of the land may claim compensation should include all those which have been put in during the time for which the plaintiff claims mesne profits: Johnson *v.* Fitch, 57 Miss. 73. But improvements which are not of a permanent nature, so as to give an increased value to the land (which is what the defendant claims allowance for), cannot be deducted from the plaintiff's claim for mesne profits (Morris *v.* Tinker, 60 Ga. 466), nor can a defendant in ejectment recover for improvements made after the suit is begun: Haslett *v.* Crain, 85 Ill. 129.

If the value of the improvements is equal to the value of the mesne profits, this may be set up as a defence in an action for the mesne profits: Ege *v.* Kille, 84 Pa. St. 333.

In Hatcher *v.* Briggs, 6 Oreg. 31, the cases on the subject of allowance for improvements were fully considered, and the doctrine stated in the author's text, § 549, note, confirmed. See also Sedgwick & Wait on Real Actions.}

[1] [The good faith of the occupier is presumed: Fish *v.* Blasser, 146 Ind. 186.]

[2] {If the tenant's ignorance of the defect in his title was the result of his own negligence, he cannot claim the value of his improvements: Foley *v.* Kirk, 33 N. J. Eq. 170. To illustrate the variety of decisions on this point it may be noted that in Kansas it has been held that where one enters into possession under an illegal contract of sale, he may still claim his improvements (Stephen *v.* Ballou, 25 Kan. 618); while in Iowa, he must hold the property in an honest belief that it is his, and not have actual notice of the claim against him (Read *v.* Howe, 49 Iowa 65; [Brown *v.* Baldwin, 121 Mo. 106; Kendall *v.* Tracy, 64 Vt. 522);] in California, in good faith and with a color of title (Field *v.* Columbet, 4 Sawyer C. C. 523).

In Mississippi, it is held that a fatal defect in title, shown in the records of the county, is not enough to deprive the defendant in ejectment of a right to be paid for the increased value of the land caused by his improvements, although the rule is that he must have held the land under a colorable title and a *bona fide* belief in it. To deprive him of such right, he must have known of the paramount title or there must be circumstances from which the jury will infer that he did: Cole *v.* Johnson, 53 Miss. 94.}

claiming the exclusive title for a certain number of years; which of course includes disseisors, as well as those claiming under them; while, in other States, it is restricted to persons claiming under patents, and public grants, and by deeds of conveyance; thus intending to exclude all who knowingly enter by wrong, and without color of title.[3] In others again, the improvements, made after notice of the paramount title, are expressly excluded from the consideration of the jury.

§ 552. **Scope of this Chapter.** It is obvious, that, in a work like the present, it would be inexpedient to treat of all these varieties of remedy, or indeed to do anything more than to state the very few general rules of the common law which are recognized in the absence of any statutory provisions; referring the reader to the statutes and decisions of each particular State for whatever is peculiar in its own jurisprudence.

§ 553. **Plaintiff must show Title.** It is a general rule in all these actions, as we have already remarked in respect to ejectments, that the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's; and that he must show, that he has the legal interest, and a possessory title, not barred by the statute of limitations.[1] The same rules also apply here, which have been already mentioned under the title of ejectment, in regard to the method of proving the *plaintiff's title*.[2]

§ 554. **Seisin; Writ of Right.** In a *writ of right*, proof of a seisin is necessary, as well as in other cases; but a title by disseisin is sufficient to maintain the action, if the tenant cannot show a better title;[1] and the devisee of vacant and unoccupied land has, by operation of law, a sufficient seisin to maintain this action, without an actual entry.[2] Proof of actual perception of profits is not necessary, the averment of the taking of esplees not being traversable;[3] and the tenant's right of possession is no bar to the demandant's right of recovery in this action.[4] The *mise*, when joined, puts in issue the whole title, including the statute of limitations; and under it the tenant may give in evidence a release from the demandant, after action brought, or any other matter, either establishing his own

[3] [Seymour *v.* Cleveland, 9 S. D. 94; Anderson *v.* Williams, 59 Ark. 144; Thomas *v.* Thomas, 69 Miss. 564; Young *v.* Mahoning County, 53 F. 895.]

[1] See *supra*, § 303; [Hewes *v.* Coombs, 84 Me. 434.] The writ of right being now limited to the same period with writs of entry, the proof of the right involves, of course, the proof of a possessory title.

[2] See *supra*, §§ 305, 307–314, 316, 317, 318, 329.

[1] Bradstreet *v.* Clark, 12 Wend. 602; Hunt *v.* Hunt, 3 Met. 175; Speed *v.* Buford, 3 Bibb 57; Jackson on Real Actions, p. 280; {Slater *v.* Rawson, 6 Met. (Mass.) 439; Hubbard *v.* Little, 9 Cush. (Mass.) 475; Hough *v.* Patrick, 26 Vt. 435.}

[2] Ward *v.* Fuller, 15 Pick. 185; Green *v.* Chelsea, 24 id. 71. But if the land be not vacant and unoccupied, the devisee must prove his own seisin: Wells *v.* Prince, 4 Mass. 64.

[3] Green *v.* Liter, 8 Cranch 246; Ward *v.* Fuller, 15 Pick. 185.

[4] Jackson on Real Actions, pp. 282, 283.

title, or disproving that of the demandant, except a collateral warranty.[5] But, if a deed from the demandant to a stranger is shown, it may be rebutted by evidence showing, that, at the time of its execution and delivery, the grantor was disseised, and that therefore nothing passed by the deed.[6]

§ 555. **Proof of Seisin.** The *seisin* of the plaintiff or demandant, in any real action, is proved *prima facie* by evidence of his actual possession, which is always sufficient against a stranger. Such a possession, with claim of title, is sufficient to enable a grantor to convey; and the grantee, entering under such a conveyance, acquires a freehold,[1] even though the grantor be a person *non compos mentis;* the deed in that case being voidable only, and not void. But no seisin is conveyed by a naked release.[2] A seisin may also be proved by the extent of an execution on the land of a judgment debtor, which gives a seisin to the creditor.[3] If the actual possession is mixed and concurrent, the legal seisin is in him who has the title; and a legal seisin also carries with it the possession, if there is no adverse possession.[4] It is sufficient, *prima facie*, to prove a seisin at any time anterior to the period in question, since it will be presumed to continue until the contrary is shown.[5]

§ 556. **Plea of Nul Disseisin.** The plea of *nul disseisin*, in a writ of entry, puts in issue the legal title to the land, or, in other words, the seisin on which the demandant has counted, and the lawfulness of the tenant's entry.[1] If, therefore, it is pleaded in bar of an action brought by a trustee against the *cestui que trust*, it entitles the demandant to recover.[2] Under this issue, the tenant cannot avail himself of any objection to the form of the action;[3] he cannot give non-tenure in evidence;[4] nor show that he is but a tenant at will;[5] nor give in evidence the title of a stranger under which he does not

[5] Ten Eyck *v.* Waterbury, 7 Cowen 51; Poor *v.* Robinson, 10 Mass. 131, 134.

[6] Knox *v.* Kellock, 14 Mass. 200.

[1] Newhall *v.* Wheeler, 7 Mass. 189, 199; Higbee *v.* Rice, 5 id. 345, 352; Ward *v.* Fuller, 15 Pick. 185.

[2] Wait *v.* Maxwell, 5 Pick. 217; Kennebec Prop'rs *v.* Call, 1 Mass. 483.

[3] Langdon *v.* Potter, 3 Mass. 215. [As to a mortgagee's right to recover, see Day *v.* Philbrook, 85 Me. 90.]

[4] Codman *v.* Winslow, 10 Mass. 146; Kennebec Prop'rs *v.* Call, 1 id. 483, 484.

[5] Kennebec Prop'rs *v.* Springer, 4 Mass. 416; Brimmer *v.* Long Wharf Prop'rs, 5 Pick. 131, 135; Osgood *v.* Coates, 1 Allen 77.

[1] Jackson on Real Actions, pp. 5, 157; Green *v.* Kemp, 13 Mass. 515, 520; Wolcott *v.* Knight, 6 id. 418, 419. [The demandant is required to prove only that he is entitled to the estate he claims, and that he has a right of entry; he need not prove an actual wrongful dispossession or an adverse possession by the tenant: Twomey *v.* Linnehan, 161 id. 91. A plea of *nul disseisin* as to an undivided part is a good plea, since the other undivided part may be recovered: Hazen *v.* Wright, 85 Me. 314.]

[2] Russell *v.* Lewis, 2 Pick. 508, 510.

[3] Green *v.* Kemp, 12 Mass. 515, 520.

[4] Higbee *v.* Rice, 5 Mass. 532, per Parsons, C. J.; Roberts *v.* Whiting, 16 id. 186; Alden *v.* Murdock, 13 id. 256, 259; {Washington Bank *v.* Brown, 2 Met. (Mass.) 293; Wheelwright *v.* Freeman, 13 id. 155; Burridge *v.* Fogg, 8 Cush. (Mass.) 184.}

[5] Ibid.; Pray *v.* Pierce, 7 Mass. 381.

claim, nor though he claims to hold as his servant;[6] nor a title acquired by himself by conveyance from a third person since the commencement of the action.[7] But under this issue, he may show a conveyance from the demandant or his ancestor to a stranger, for the purpose of disproving the demandant's allegation of seisin;[8] and the demandant, as has already been remarked, in the case of a writ of right, may rebut this evidence by proof, that at the time of the conveyance, the grantor was not seised, and so nothing passed by the deed.[9]

§ 557. **Title by Disseisin.** Where the tenant claims by a *disseisin*, ripened into a good title by lapse of time, he must show an actual, open, and exclusive possession and use of the land as his own, adversely to the title of the demandant.[1] It must be known to the adverse claimant, or be accompanied by circumstances of notoriety, such as erecting buildings or fences upon the land, from which he ought and may be presumed to know, that there is a possession adverse to his title.[2] But a fence made by the mere felling of trees on a line, lapping one upon another, is not sufficient for this pur-

[6] Mechanics' Bank *v.* Williams, 17 Pick. 438; Stanley *v.* Perley, 5 Greenl. 369; Shapleigh *v.* Pilsbury, 1 id. 271; Heath *v.* Knapp, 4 Barr 230.

[7] Andrews *v.* Hooper, 13 Mass. 472, 476; {Curtis *v.* Francis, 9 Cush. (Mass.) 427; Tainter *v.* Hemmenway, 7 id. 573. Nor is it a defence to a writ of entry that the tenant is the owner of an easement in the demanded premises, and therefore has a right, as against the demandant, to use it for ever as a passage-way: Morgan *v.* Moore, 3 Gray (Mass.) 322; [First N. B. *v.* Morrison, 88 Me. 162;] nor that the demandant holds the land subject to a resulting trust in his (the tenant's) favor: Crane *v.* Crane, 4 Gray (Mass.) 323. But the demandant is not precluded from maintaining his writ by having mortgaged the land pending the action: Woodman *v.* Smith, 37 Me. 21.} [Equitable defences are now often allowed by statute in legal actions: Twomey *v.* Linnehan, 161 Mass. 91.]

[8] King *v.* Barns, 13 Pick. 24, 28; Stanley *v.* Perley, 5 Greenl. 369; Hall *v.* Stevens, 9 Met. 418; Noyes *v.* Dyer, 12 Shepl. 468; Cutler *v.* Lincoln, 3 Cush. 125; Bruce *v* Mitchell, 39 Me. 390.

[9] Knox *v.* Kellock, 14 Mass. 200; Wolcott *v.* Knight, 6 id. 18; *supra*, § 554.

[1] {When such actual, notorious, exclusive, and adverse possession is once shown, it is presumed to continue: Clements *v.* Lampkin, 34 Ark. 598. A *donee* of land, under a parol gift, when he has entered and occupies the land, holds adversely to the donor: Graham *v.* Craig, 81 Pa. St. 465. One who enters under an *agreement* to buy, does not begin to hold adversely till he has performed his agreement so as to be entitled to a conveyance: Clouse *v.* Elliott, 71 Ind. 302; Hudson *v.* Putney, 14 W. Va. 561; *Re* Public Parks Department, 73 N. Y. 560. When one enters on land by permission, his holding does not become adverse till some act of disclaimer is proved: Hudson *v.* Putney, *supra*.}

[2] Kennebec Prop'rs *v.* Springer, 4 Mass. 416; Doe *v.* Prosser, Cowp. 217; Kennebec Prop'rs *v.* Call, 1 Mass. 483; Little *v.* Libby, 2 Greenl. 242; Poignard *v.* Smith, 6 Pick. 172; Norcross *v.* Widgery, 2 Mass. 506; *supra*, § 311; Bryon *v.* Atwater, 5 Day 181, 188, 189; Mitchell *v.* Warner, 5 Conn. 521; Teller *v.* Burtis, 6 Johns. 197; {Stearns *v.* Hendersass, 9 Cush. (Mass.) 497. To maintain a title by disseisin it is not enough to show that the legal owner had actual knowledge of, and assented to, acts of ownership upon his lands, unless the acts are of such a nature as to work a disseisin: Cook *v.* Babcock, 11 Cush. (Mass.) 210. See also Slater *v.* Jepherson, 6 id. 129; Arnold *v.* Stevens, 24 Pick. 106; Smith *v.* Lloyd, 25 Eng. Law & Eq. 492; Putnam Free School *v.* Fisher, 38 Me. 324. A wife has no such privity of estate with her husband in land of which he died in an adverse possession to the real owner, that her continual adverse possession after his decease can be tacked to his to give her a complete title by disseisin: Sawyer *v.* Kendall, 10 Cush. (Mass.) 241. See also Cruise's Digest, tit. 1, §§ 32–34, vol. i. p. 53 [*52]; Greenleaf's 2d ed. 1856, and notes.}

pose;[3] much less is the running and marking of lines by a surveyor, under the direction of one not claiming title; nor the occasional cutting of the grass.[4] An entry and occupancy under a deed of conveyance from a person without title will constitute a disseisin of the true owner;[5] extending to the whole tract described in the conveyance, if the deed is registered; because the extent of the disseisor's claim may be known by inspection of the public registry.[6] But an entry under a registered deed, and the payment of taxes assessed upon the land, is not sufficient evidence of a disseisin, unless there was also a continued and open possession.[7] Where an enclosure of the land by fences is relied upon, it must appear that the fences were erected with that intent, and not for a different purpose, such as the enclosure and protection of other lands of the party; of which the jury are to judge.[8] So, if the owner of a parcel of land should, through inadvertency, or ignorance of the dividing line, include a part of the adjoining tract within his enclosure, it is no disseisin of the true owner.[9]

§ 558. **Disseisin; Rebuttal.** The evidence of disseisin may be *rebutted* by proof that the disseisor had consented to hold under the

[3] Coburn *v.* Hollis, 3 Met. 125.

[4] Kennebec Prop'rs *v.* Springer, 4 Mass. 416.

[5] Warren *v.* Child, 11 Mass. 222; Northrop *v.* Wright, 7 Hill (N. Y.) 476, 487–489, per Walworth, Ch. The party thus in possession may take a deed from a hostile claimant, for the mere purpose of quieting his title, without thereby abandoning his character of an adverse possessor: ibid. See also Blight *v.* Rochester, 7 Wheat. 535; Fox *v.* Widgery, 4 Greenl. 214.

[6] Kennebec Prop'rs *v.* Laboree, 2 Greenl. 275. {When one enters on vacant land, under a deed, his occupancy extends over the whole extent of the land described in his deed, and he is a disseisor to that extent. If, however, the true owner is in actual possession of part of the land, he is constructively in possession of the whole, *except* so much as the disseisor *actually* occupies: Hunnicutt *v.* Peyton, 102 U. S. 333; Thompson *v.* Burhans, 79 N. Y. 93; Humphries *v.* Huffman, 33 Ohio St. 395; Scott *v.* Delany, 87 Ill. 146. So where one claiming title under a worthless deed entered upon a large tract of land and built a house, and actually occupied a small portion of land around his house, but constructively occupied the whole, and later, the owner of the true title entered upon the tract, claiming the whole, it was held that the constructive possession of the owner of the bad title ceased on the entry of the true owner, and that he could only claim what he actually occupied: Semple *v.* Cook, 50 Cal. 26. If an entry is made without color of title and under no deed, such entry is confined to the actual land occupied: Bristol *v.* Carroll County, 95 Ill. 84; Ferguson *v.* Peden, 33 Ark. 150; Humphries *v.* Huffman, *supra*. When a tenant in common conveys the whole estate to a stranger and the stranger enters, this operates as disseisin of the other tenants in common: Foulke *v.* Bond, 41 N. J. L. 527.}

[7] Little *v.* Megquier, 2 Greenl. 176; Bates *v.* Norcross, 14 Pick. 224.

[8] Dennett *v.* Crocker, 8 Greenl. 239. And see Weston *v.* Reading, 5 Conn. 257, 258.

[9] Brown *v.* Gay, 3 Greenl. 126; Gates *v.* Butler, 3 Humphr. 447. {When an error was made in running a boundary line, and the adjoining farms were occupied up to this erroneous line for more than twenty years, and then the correct line was run, it was held that if the parties supposed the erroneous line to be the true line, and occupied up to it as such, the statute of limitations would prevent any alteration of it. But if the erroneous line was regarded as only a provisional line, to be afterwards tested, the statute would not apply, and the new line would be the correct one, — the question of the intent of the parties being of course for the jury: Hiatt *v.* Kirkpatrick, 48 Iowa 78; Bunce *v.* Bidwell, 43 Mich. 542. *Contra*, Houx *v.* Batteen, 68 Mo. 84. Cf. Proprietors, etc. *v.* Nashua, etc. Ry. Co., 104 Mass. 1.}

disseisee; or, that he had abandoned his possession.[1] But a mere mistake of the party in possession, which, as we have just seen, will not constitute a disseisin, will not, for the like reason, amount to proof of an abandonment of his possession.[2]

§ 559. **Improvements.** Where the tenant by the laws of the State is allowed a compensation for the *lasting improvements* made by him on the land, the evidence is to be directed, not to the amount of his expenditures, but to the present increased value of the premises, by reason of the improvements.[1] And these ordinarily consist of buildings, wells, valuable trees planted by the tenant, durable fences, and other permanent fixtures.[2]

[1] Small *v.* Proctor, 15 Mass. 495.
[2] Ross *v.* Gould, 5 Greenl. 204.
[1] [Hicks *v.* Blakeman, 74 Miss. 459; Bourne *v.* Odain, 32 S. W. 398, Ky.; Lothrop *v.* Michelson, 44 Neb. 633; Young *v.* Mahoning County, 53 F. 895.]
[2] [But not fertilizers placed on the land: Effinger *v.* Kenny, 92 Va. 245.]

REPLEVIN.

§ 560. **When the Action lies.** This action lies for the recovery, *in specie*, of any personal chattel which has been taken and detained from the owner's possession, together with damages for the detention; unless the taking and detention can be justified or excused, or the right of action is suspended or discharged.[1] It lies at common law, not only for goods distrained, but for goods taken and unjustly detained for any other cause whatever; except that, where goods are taken by process of law, the party against whom the process issued cannot replevy them; but, if the goods of a stranger to the process are taken, he may replevy them from the sheriff.[2]

[1] Hammond's Nisi Prius, p. 372. {Real property is not subject to replevin: Riewe *v.* McCormick, 11 Neb. 261. [But see Michigan Ins. Co. *v.* Cronk, 93 Mich. 49.] But if buildings are not so attached to the realty as to be fixtures, or if it has been agreed by the parties to regard them as personalty, they may be the subjects of a replevin suit: Dorr *v.* Dudderar, 88 Ill. 107; Brearley *v.* Cox, 4 Zabr. (N. J.) 387; Chatterton *v.* Saul, 16 Ill. 149; [McDaniel *v.* Lipp, 41 Neb. 713.] As to the replevin of growing crops, the same principle applies: if they have been treated in such a way by the parties as to show that they were dealing with them as personal property, *e. g.* if they sell the crops by measure as if they were severed from the realty, an action of replevin will lie: Garth *v.* Caldwell, 72 Mo. 622. But cf. Jones *v.* Dodge, 61 id. 368, where it was held that an action for a certain number of bushels of corn will not lie when the crop is standing ungathered in the field. [As to oil, see Giffin *v.* Southwest Pipe Lines, 172 Pa. 580.]

Replevin will lie for the goods of the plaintiff, though they have been mixed with those of the defendant, if it was done by a third party, and they can be separated without injury to the defendant: Wilkinson *v.* Stewart, 85 Pa. St. 255. If an action of replevin is dismissed for informality in the replevin bond, and judgment is given for the defendant for a return, and the plaintiff returns the property to the place whence he first took it, he may afterwards maintain another action of replevin for the same property, against the same defendant, upon the original unlawful taking, although the defendant has not taken out a writ of return, nor actually received the property under the judgment in the first action: Walbridge *v.* Shaw, 7 Cush. (Mass.) 560; Fisher *v.* Whoollery, 25 Pa. St. 197.}

[2] Gibbert on Replevin, p. 141; Rooke's Case, 5 Co. 99; Callis on Sewers, p. 197; Clark *v.* Skinner, 20 Johns. 470. This point is treated ably and with deep research in 12 Am. Jurist, pp. 104, 117, where the above authorities with others are reviewed. See also Allen *v.* Crary, 10 Wend. 349; Seaver *v.* Dingley, 4 Greenl. 306. In New York, the right of a stranger to replevy goods taken by the sheriff is limited to goods not in the actual possession of the judgment debtor at the time of the taking: Thompson *v.* Button, 14 Johns. 84; Judd *v.* Fox, 9 Cowen 259. {An action will lie against an officer who attaches the goods of plaintiff on a writ against a third party: Samuel *v.* Agnew, 80 Ill. 553; [Wheeler *v.* Eaton, 39 A. 901, N. H.: even when the plaintiff is the assignee for creditors of the execution debtor: Kingman *v.* Reinemer, 166 Ill. 208. If the goods are exempt, replevin will generally lie: Allen *v.* Ingram, 39 Fla. 239; Mills *v.* Pryor, 45 S. W. 350, Ark.] In Connecticut, however, it is held that replevin should be brought against the attaching creditor, not the officer: McDonald *v.* Holmes, 45 Conn. 157. But in the cases of Richardson *v.* Reed, and Skilton *v.* Winslow, 4 Gray (Mass.) 441, the question was whether replevin could be maintained against a creditor at whose suit an attachment was made of goods, not the property of his debtor, either

§ 561. Plaintiff must prove Title.[1] Where the issue raises the question of title, the plaintiff must prove that at the time of the

alone or jointly with the attaching officer, and it was decided that the action would not lie. The opinion of the court, by Metcalf, J., was as follows: "Though an officer who attaches, and a plaintiff who directs him to attach, A's goods, on a writ against B, are joint trespassers, and may be sued jointly in an action of trespass or trover, yet they cannot be sued jointly in an action of replevin. The grounds and incidents of a replevin suit are incompatible with the joinder of the creditor and officers as defendants. The writ of replevin assumes that the goods which are to be replevied have been taken, detained, or attached by the defendant, and are in his possession or under his control; and it directs that they shall be replevied and delivered to the plaintiff, provided he shall give bond conditioned, among other things, to restore and return the same goods to the defendant, and pay him damages, if such shall be the final judgment in the action. But attached goods are in the legal custody and possession of the officer only. The attaching creditor has no property in them, general or special; no right to the possession of them; and no right of action against a third person who may take them from the officer or destroy them: Ladd *v.* North, 2 Mass. 516. How then can the goods be returned, on a writ of return or reprisal, to him who never had possession of them, nor the right of possession? Or how can he be entitled to damages for the taking and detaining of goods in which he had no property?

"The plaintiff's counsel cited Allen *v.* Crary, 10 Wend. (N. Y.) 349, as an authority for sustaining these actions. In that case the plaintiff, whose goods had been taken on an execution against a third person, maintained replevin against the judgment creditor who directed the officer to take the goods. The court proceeded on the ground, that, as both the officer and creditor were trespassers, replevin would lie against either of them, because it would lie wherever trespass *de bonis asportatis* would. And in a subsequent case, in the same State, the court maintained an action of replevin against the officer and creditor jointly: Stewart *v.* Wells, 6 Barb. (N. Y.) 79. But we cannot admit the position that replevin will lie wherever trespass *de bonis* will. The two actions are not, in all cases, concurrent. By the common law, replevin cannot be maintained where trespass cannot; for, by that law, an unlawful taking of goods is a prerequisite to the maintenance of replevin: 2 Leigh N. P. 1323; Meany *v.* Head, 1 Mason 322; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 373. But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly *in rem*, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept. Thus, replevin will not lie against him who takes goods and destroys them, or sells and delivers them to a stranger; yet he might be sued in trespass. So, where an officer seized A's property, first on an execution against B, and then on an execution against A, it was held, by the court that decided the case of Allen *v.* Crary, that although A might maintain trespass for the first seizure, yet he could not replevy the property, because he had no right to the possession of it after the last seizure: Sharp *v.* Whittenhall, 3 Hill (N. Y.) 576. In that case and in Brockway *v.* Burnap, 12 Barb. (N. Y.) 351, the former *dicta*, that replevin would lie wherever trespass *de bonis* would, were denied; and in the latter case it was said that in Allen *v.* Crary the court, by sustaining replevin against a defendant who had not the property in his possession, 'pushed out the analogy between trespass *de bonis asportatis* and replevin further than is warranted by the cases.' See also Roberts *v.* Randel, 2 Sandf. (N. Y.) 712, 713.

"In our opinion, replevin cannot be maintained, in this Commonwealth, against a person who has no possession or control of the goods to be replevied; replevied goods cannot be restored and returned to a person from whom they were never taken; and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin:" [House *v.* Turner, 106 Mich. 240.] But see Estey *v.* Love, 32 Vt. 744, where it is held that replevin may be maintained against the attaching creditor and the officer jointly, when the former assisted in taking the property, and took it into his own possession after the attachment.

Where one seeks to support an action of replevin on the ground of a fraudulent sale, he must show that the sale, if it is voidable only, has been avoided by him, and

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[1] [As to what is sufficient title, see Keystone Lumber Co. *v.* Kolman, 94 Wis. 465; Peoples' Savings Bank *v.* Jones, 114 Cal. 422. As to replevin of hides of wild goats, see Garcia *v.* Gunn, 119 id. 315.]

caption he had the general or a special *property* in the goods taken, and the right of *immediate and exclusive possession*.[2] But a *mere servant*, or a depositary for safe custody, has not such property as will support this action, his possession being that of the master or bailor.[3] It is not always necessary to prove a taking of the goods, since the action may be maintained against a bailee, by proof of an unlawful *detention*.[4] But when a taking is to be shown, it must be

in any case that it has not been ratified by him: Ormsby *v.* Dearborn, 116 Mass. 386; Morford *v.* Peck, 46 Conn. 380; Moriarty *v.* Stofferan, 89 Ill. 528; Gittings *v.* Carter, 49 Iowa 338; [Morse *v.* Hamill, 97 id. 631.] So if the sale was conditional he must show that the sale was avoided by breach of the condition: Ketchum *v.* Brennan, 53 Miss. 596; [Oester *v.* Sitlington, 115 Mo. 247.] Replevin should be brought only against one who has the immediate possession of the goods: [Willis *v.* De Witt, 3 S. D. 281.] Thus, where one seized goods illegally and sold and delivered them to another, replevin will not lie against the former: Moses *v.* Morris, 20 Kan. 208. The owner of goods cannot maintain an action against an officer for taking them in the due service of a writ of replevin against another person who had them in his possession: Willard *v.* Kimball, 10 Allen (Mass.) 211;} [Wise *v.* Grant, 140 N. Y. 593.]

[2] Co. Lit. 145 *b*; Gordon *v.* Harper, 7 T. R. 9; Gates *v.* Gates, 15 Mass. 310; Collins *v.* Evans, 15 Pick. 63; Rogers *v.* Arnold, 12 Wend. 30; Wheeler *v.* Train, 4 Pick. 168; Smith *v.* Williamson, 1 Har. & J. 147; Ingraham *v.* Martin, 3 Shepl. 373; {Lake Shore, etc. R. R. Co. *v.* Ellsey, 85 Pa. St. 283; Lamb *v.* Johnson, 10 Cush. (Mass.) 126; Esson *v.* Tarbell, 9 id. 407; Kimball *v.* Thompson, 4 id. 441; Lockwood *v.* Perry, 9 Met. (Mass.) 440; Kidd *v.* Belden, 19 Barb. (N. Y.) 266; Rockwell *v.* Saunders, ib. 473; Quinn *v.* Kimball, 23 Pa. St. 193; Harlan *v.* Harlan, 15 id. 507. A plaintiff in replevin must maintain his case on the strength of his own title; and if he fails to show title in himself, it is immaterial whether the defendant has or has not any title: Johnson *v.* Neale, 6 Allen (Mass.) 227. See also *post*, § 637, n.; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44; [Fuller *v.* Brownell, 48 Neb. 145.] The plaintiff must prove an *exclusive* right to possession (Mathias *v.* Sellers, 86 Pa. St. 486; [Moseley *v.* Cheatham, 62 Ark. 133; Bray *v.* Raymond, 166 Mass. 146; Jenkins *v.* Mitchell, 40 Neb. 664);] and the burden of proof on the question of title is on him (Lamotte *v.* Wisner, 51 Md. 543; McFarlan *v.* McLellan, 3 Ill. App. 295). An allegation of right of possession is proved by evidence of ownership of the property where no special right of possession is shown by the opposite party: Cassel *v.* Western Co., 12 Iowa 47. The defendant, in controverting this allegation of title in the plaintiff, will have judgment if he shows a special property in the goods which entitles him to the possession, *e. g.* a lien for repairs: Halstead *v.* Cooper, 12 R. I. 500; Lytle *v.* Crum, 50 Iowa 37; [Esshom *v.* Watertown Hotel Co., 7 S. D. 74; Sutton *v.* Stepham, 101 Cal. 545.]

The value to be recovered by one who has only a special or limited property in the goods replevied is the value of his interest, not the valne of the goods: Pico *v.* Martinez, 55 Cal. 148. [*Contra*, Coos Bay, etc. R. *v.* Siglin, 53 P. 504, Or.] It is therefore always competent for the plaintiff, when the defendant has judgment, to show the value of the defendant's interest in the property: McArthur *v.* Howett, 72 Ill. 358.}

[3] Templeman *v.* Case, 10 Mod. 25; Waterman *v.* Robinson, 5 Mass. 303; Ludden *v.* Leavitt, 9 id. 104; Warren *v.* Leland, ib. 265; Dunham *v.* Wyckoff, 2 Wend. 280; Miller *v.* Adsit, 16 id. 335. {Nor can an agent who is employed by his principal to receive, pay for, and forward to him certain goods contracted for by the principal, part of which have been delivered to the agent, maintain replevin for the balance not delivered, which the contractor had promised, but failed to deliver, and which the agent had paid for: Dixon *v.* Hancock, 4 Cush. (Mass.) 96. See also Updike *v.* Henry, 14 Ill. 378. An auctioneer, who, as agent of the owner, sells and delivers goods on a condition which is not complied with, may maintain replevin therefor: Tyler *v.* Freeman, 3 Cush. (Mass.) 261. The holder of a carrier's receipt for goods, not negotiable, delivered to him by the owner as a security for advances, with intent to transfer the property, may maintain replevin against an officer who attaches them as the property of the general owner: Nat. Bk. of Green Bay *v.* Dearborn, 115 Mass. 219; Bk. of Rochester *v.* Jones, 4 Comst. (N. Y.) 497.}

[4] F. N. B. (69) G; Badger *v.* Phinney, 15 Mass. 359, 362, per Putnam, J.; Shannon *v.* Shannon, 1 Sch. & Lefr. 327, per Ld. Redesdale; Baker *v.* Fales, 16 Mass. 147;

an *actual taking*. Thus, it has been held that merely entering at the custom-house, by the agent of the owners, goods already in the public stores, and paying the duties thereon, without any actual removal, but taking a permit for their delivery on payment of storage, is not such a taking as will support an action of replevin against the agent.[5] So this action cannot be maintained against a sheriff, who has made an attachment of the plaintiff's goods, but has left them in the custody of the plaintiff as his bailee, without any actual taking and removal of them.[6]

§ 562. **General Issue.** The general issue in this action is *non cepit*,[1] which admits the plaintiff's title, and under which it is incumbent on the plaintiff to prove that the defendant had the goods in the place mentioned in the declaration; for, the action being local, the place is material and traversable.[2] Proof of the original taking in that place is not necessary, for the wrongful taking is continued in every place in which the goods are afterwards detained.[3] But under this issue the defendant cannot have a return of the goods, if found for him; it merely protects him

Illsley *v.* Stubbs, 5 id. 284; Seaver *v.* Dingley, 4 Greenl. 306; Galvin *v.* Bacon, 2 Fairf. 28; Osgood *v.* Green, 10 Foster (N. H.) 210. But see Meany *v.* Head, 1 Mason 319, 322, that replevin does not lie without a tortious taking. See also Reeves *v.* Morris, 1 Armstr. Macartn. & Ogle, 159; Harwood *v.* Smethurst, 5 Dutch. (N. J.) 195.

[5] Whitewell *v.* Wells, 24 Pick. 25. {If evidence is offered that the officer went to the plaintiff and read a writ of attachment against a third person, and at the same time declared that he attached certain property of the plaintiff, and went and inspected the property, but did not take it in possession, this proof will not support a writ of replevin: Libby *v.* Murray, 51 Wis. 371. So, too, an ineffectual levy of an execution on property, whereby it is left in the lawful possession of the owner, will not support replevin by the owner: Hickey *v.* Hinsdale, 12 Mich. 99.}

[6] Lathrop *v.* Cook, 2 Shepl. 414. {Nor can it be maintained against a pound-keeper who receives and impounds beasts for going at large, and refuses to deliver them to the owner, on demand, unless his fees and those of the field-driver are paid: Folger *v.* Hinckley, 5 Cush. (Mass.) 263; Radkin *v.* Powell, Cowp. 476; [McJunkin *v.* Mathers, 158 Pa. 137.] And a tender of such fees and costs, made after the writ of replevin has been unconditionally put into the hands of the officer for service, will not be sufficient to sustain the action: Bills *v.* Vose, 7 Fost. (N. H.) 212. Nor can a purchaser maintain replevin for goods purchased that formed a portion of, and were intermingled with, a larger quantity of the same kind of goods owned by the vendor, until they are specifically set apart or designated in some way as his: Scudder *v.* Worster, 11 Cush. (Mass.) 573; Dillingham *v.* Smith, 30 Me. 370; Winslow *v.* Leonard, 24 Pa. St. 14; Jackson *v.* Hale, 14 How. (U. S.) 525; [Lawry *v.* Ellis, 85 Me. 500.] See Neff *v.* Thompson, 8 Barb. (N. Y.) 213. [A tenant in common of grain may replevy his share withheld by another: Fines *v.* Bolin, 36 Neb. 621.] Replevin does not lie in a State court against a marshal of the United States for property attached by him on mesne process from a United States court against a third person: Freeman, in error, *v.* Howe, 24 How. (U. S.) 450. Reversing decision in Howe *v.* Freeman, 14 Gray (Mass.) 566.}

[1] [By statute in Vermont, "not guilty:" Campbell *v.* Camp, 69 Vt. 97.]

[2] Weston *v.* Carter, 1 Sid. 10; 1 Saund. 347, n. (1) by Williams; McKinley *v.* McGregor, 3 Whart. 369; Dover *v.* Rawlings, 2 M. & Rob. 544. {The action may be brought either in the county where the defendant resides or where the property is situated, but not properly in any other: Hibbs *v.* Dunham, 54 Iowa 559; Ellison *v.* Lewis, 57 Miss. 588.}

[3] Walton *v.* Kersop, 2 Wils. 354; Bull. N. P. 54; 1 Saund. 347 *a*, note by Williams; Johnson *v.* Wollyer, 1 Stra. 507; Abercrombie *v.* Parkhurst, 2 B. & P. 480.

from damages.[4] If he would defend on the ground that he never had the goods in the place mentioned, he should plead *cepit in alio loco*, which is a good plea in bar of the action.[5] This plea does not admit the taking as laid in the declaration; and therefore the plaintiff must prove such taking, or fail to recover.[6]

§ 563. **Plea of Property.** If the defendant, besides the plea of *non cepit*, also pleads *property*, either in himself or a stranger, and traverses the right of the plaintiff, which he may do with an avowry of the taking, the material inquiry will be as to the property of the plaintiff, which the plaintiff must be prepared to prove, the *onus probandi* of this issue being on him; for if the former issue is found for him, but the latter is either not found at all or is found for the defendant, the plaintiff cannot have judgment.[1] And where the issue is on the plaintiff's property, his right to the possession, at the time of taking, is also involved in the issue.[2]

§ 564. **Avowry.** An *avowry* or *cognizance* of the taking is ordinarily necessary, whenever the defendant would obtain judgment for a return of the goods, thereby making himself an actor in the suit, and obliging himself to make out a good title in all respects. Where the avowry or cognizance is for rent, it admits that the property in the goods was in the plaintiff; but the terms of the contract or tenancy must be precisely stated, and proved as laid, or the variance will be fatal.[1] But it is not necessary to prove that all the rent was due which is alleged; for an allegation of two years' rent in arrear will be supported by proof of one only; the substance of the allegation being, that some rent was in arrear, and not the precise amount.[2]

[4] {So where the pleas are *non cepit* and *non detinet*, a judgment for return of the goods is bad: Mattson *v.* Hanisch, 5 Ill. App. 102. So if an action of replevin is defeated solely by reason of its being prematurely commenced, judgment for a return of the goods replevied will not be ordered: Martin *v.* Bayley, 1 Allen (Mass.) 381.} [See Banning *v.* Marleau, 101 Cal. 238.]

[5] 1 Saund. 347 *a*; Bullythorpe *v.* Turner, Willes 475; Anon., 2 Mod. 199; Williams *v.* Welch, 5 Wend. 290; Prosser *v.* Woodward, 21 id. 205.

[6] People *v.* Niagara C. P., 2 Wend. 644.

[1] 5 Com. Dig. 757, tit. Pleader, K, 12; Presgrave *v.* Saunders, 1 Salk. 5; Bemus *v.* Beckman, 3 Wend. 667; Sprague *v.* Kneeland, 12 id. 161; Rogers *v.* Arnold, ib. 30; Boynton *v.* Page, 13 id. 425; Clemson *v.* Davidson, 5 Binn. 399; Seibert *v.* McHenry, 6 Watts 301; Hunt *v.* Chambers, 6 Pa Law Journ. 82; 1 N. J. 620; *ante*, § 561, n. {Any evidence which tends to disprove the property of the plaintiff in the goods, *e. g.* proof of title in a stranger, is open to the defendant on such a plea (Schulenberg *v.* Harriman, 21 Wall. 44; [Neeb *v.* McMillan, 98 Ia. 718; *contra*, Puffer Mfg. Co. *v.* May, 78 Md. 74),] or special property in the defendant entitling him to the possession of the goods (see *ante*, § 561, n. 2).}

[2] Redman *v.* Hendricks, 1 Sandf. S. C. 32; Meritt *v.* Lyon, 3 Barb. S. C. 110. {An officer who holds the goods under a valid legal process has such a property in them as will protect him in a replevin suit. This is true not only of those officers who execute the processes of the courts of the State, *e. g.* sheriffs and constables, but of marshals, and others executing the process of the Federal courts: Hannebut *v.* Cunningham, 3 Ill. App. 353.}

[1] Clarke *v.* Davies, 7 Taunt. 72; Brown *v.* Sayce, 4 id. 320; Phillpot *v.* Dobbinson, 6 Bing. 104; 3 M. & P. 320; Cossey *v.* Diggons, 2 B. & Ald. 546; Davies *v.* Stacey, 12 Ad. & El. 506; Tice *v.* Norton, 4 Wend. 663. See also Jack *v.* Martin, 14 id. 507.

[2] Forty *v.* Imber, 6 East 434; Cobb *v.* Bryan, 3 B. & P. 348.

§ 565. **Answer to Avowry.** Under the issue of *non demisit* or *non tenuit*, which is usually pleaded by the plaintiff, to an avowry for rent in arrear, the defendant must prove a demise, an agreement for one being not sufficient; and the demise proved must be precisely the same as that stated in the avowry.[1] But under this plea the plaintiff ordinarily cannot give in evidence anything which amounts to a plea of *nil habuit in tenementis;* for as the tenant is not permitted directly to deny the title of his landlord by plea, he shall not be permitted to do it indirectly, by evidence to the same effect under another issue.[2] But where the defendant's title expired before the rent became due, or the plaintiff came in under another title, and had paid rent to the defendant in ignorance of the defect of his title to demand it, or has been evicted by the lessor, he may show this under the plea of *non tenuit.*[3] Proof of payment of rent to the avowment is always *prima facie* evidence that the title is in him.[4]

§ 566. **Plea of Riens en Arrere.** The plea of *riens en arrere* admits the demise as laid in the avowry, putting in issue only the fact that nothing is due; if, therefore, as has just been stated, the avowment proves that any rent is due, he will be entitled to recover, though he should fail to prove that all is due which is alleged.[1] Under this issue, the plaintiff may prove that he has paid the rent in arrear to one who had a superior title, such as a prior mortgagee of the lessor,[2] or a prior grantee of an annuity or rent charge.[3]

§ 567. **Distraint as Bailiff.** The allegation in the cognizance, that the conusor made the distress as *bailiff* to another, is traversable; but it may be proved by evidence of a subsequent assent to the distress, by the person in whose behalf it was made.[1] If it were made by one of several parceners, joint-tenants, or tenants in common, in behalf of all, no other evidence will be necessary, the title itself giving an authority in law to each one to distrain for all.[2] If the conusor justifies as bailiff of an executor, for rent due to the testator, the plea will be supported by proof of a distress in the name

[1] Dunk *v.* Hunter, 5 B. & Ald. 322.

[2] Parry *v.* House, Holt's Cas. 489, and note by the reporter; Alchorne *v.* Gomme, 2 Bing. 54; Cooper *v.* Blandy, 1 Bing. N. C. 45. The rule that the tenant shall not deny the title of his landlord applies only where there is a tenancy in fact: Brown *v.* Dean, 3 Wend. 208.

[3] Gravenor *v.* Woodhouse, 1 Bing. 38; England *v.* Slade, 4 T. R. 682; Rogers *v.* Pitcher, 5 Taunt. 209; Fenner *v.* Duplock, 2 Bing. 10; Duggan *v.* O'Conner, 1 Hudson & Brooke, 459; Hopcraft *v.* Keys, 9 Bing. 613; Bridges *v.* Smith, 5 id. 411.

[4] Johnson *v.* Mason, 1 Esp. 90, 91; Knight *v.* Bennett, 3 Bing. 361; Mann *v.* Lovejoy, Ry. & M. 355.

[1] Hill *v.* Wright, 2 Esp. 669; Cobb *v.* Bryan, 3 B. & P. 348; Bloomer *v.* Juhel, 8 Wend. 449; Harrison *v.* Barnby, 5 T. R. 248; Waltman *v.* Allison, 10 Barr 464.

[2] Johnson *v.* Jones, 9 Ad. & El. 809; Pope *v.* Biggs, 9 B. & C. 245.

[3] Taylor *v.* Zamira, 6 Taunt. 524. And see Stubbs *v.* Parsons, 3 B. & Ald. 516; Carter *v.* Carter, 5 Bing. 406; Dyer *v.* Bowley, 2 id. 94; Alchorne *v.* Gomme, ib. 54; Sapsford *v.* Fletcher, 4 T. R. 511.

[1] Lamb *v.* Mills, 4 Mod. 378; Trevilian *v.* Pine, 11 id. 112; 1 Saund. 347 *c*, note (4), by Williams.

[2] Leigh *v.* Shepherd, 2 B. & B. 465.

of the testator, and by his previous direction, but made after his death, and afterwards assented to by the executor.[3]

§ 568. **Avowry for Damage Feasant.** Where the avowry is for *damage feasant*, with a plea of title in the defendant to the *locus in quo*, which is traversed, the evidence will be the same as under the like plea of title in an action of trespass *quare clausum fregit*. And in general, whatever right is pleaded, the plea must be maintained by proof of as large a right as is alleged. If a larger right be proved, it will not vitiate; but proof of a more limited right will not suffice.[1] And if an absolute right is pleaded, and the right proved is coupled with a condition or limitation, the plea is not supported; but evidence of an additional right, founded on another and subsequent consideration, will not defeat the plea.[2] If issue is taken on the averment that the cattle distrained were levant and couchant, and the evidence is that only part of them were so, the averment is not proved.[3]

§ 569. **Tender.** A *tender*, whether of rent or of amends for damage by cattle, if made before the taking, renders the distress unlawful; and if made after the distress, but before impounding, it renders the detention unlawful.[1] But it must appear that the tender, if not made to the party himself, was made to a person entitled to receive the money in his behalf; for if it was made to one who was not his receiver, but only his bailiff to make the distress, or to his receiver's agent, it is not sufficient.[2] And a tender, even to a receiver, is bad, if the principal be present, for in such case it should have been made to the principal.[3]

§ 570. **Competency of Witnesses.** The party under whom the defendant makes cognizance as bailiff is not a *competent witness* for the defendant, for he comes in support of his own title.[1] But he is competent to testify for the plaintiff, and therefore the plaintiff cannot give in evidence his declarations.[2] And if distinct cognizances are made for the same goods, under different parties, not

[3] Whitehead *v.* Taylor, 10 Ad. & El. 210.

[1] Bull. N. P. 59, 60; *supra*, tit. Prescription, § 544; Johnson *v.* Thoroughgood, Hob. 64; Bushwood *v.* Pond, Cro. El. 722; Bailiffs of Tewksbury *v.* Bricknell, 1 Taunt. 142.

[2] Bull. N. P. 59; Gray's Case, 5 Co. 79; s. c. Cro. El. 405; Lovelace *v.* Reynolds, Cro. El. 546; Brook *v.* Willett, 2 H. Bl. 224.

[3] Bull. N. P. 299; 2 Roll. Abr. 706, pl. 41; 1 Saund. 346 *d*, note by Williams.

[1] The Six Carpenters' Case, 8 Co. 146; Pilkington's Case, 5 id. 76.

[2] Pilkington's Case, 5 Co. 76; Pimm *v.* Grevill, 6 Esp. 95; Browne *v.* Powell, 4 Bing. 230.

[3] Gilbert on Replevin, p. 63; Pilkington *v.* Hastings, Cro. El. 813.

[1] Golding *v.* Nias, 5 Esp. 272; Upton *v.* Curtis, 1 Bing. 210. {Where several actions of replevin are tried together by order of the court, a surety in one of the replevin bonds is a competent witness to testify in those cases in which he is not interested, in the same manner as if the actions had been separately tried; and the party offering such witness cannot be required, before calling him, to substitute a new surety in his place on the replevin bond: Kimball *v.* Thompson, 4 Cush. (Mass.) 441. Parties and interested persons are now almost, if not quite, universally competent.}

[2] Hart *v.* Horn, 2 Campb. 92.

connected in interest, but one of the cognizances is abandoned at the trial, the party under whom it was made is thereby rendered a stranger to the suit, and, therefore, a competent witness.[3] A commoner who claims by the same custom as the plaintiff, is not a competent witness in support of the custom; but, where the plaintiff claims by prescription, a person claiming under a like prescription is still competent to testify for the plaintiff; for his interest at most is in the question only, and not in the subject-matter or event of the suit.[4]

[3] King *v.* Baker, 2 Ad. & El. 333. But a mere offer to abandon is not sufficient to render the witness competent: Gridlestone *v.* McGowran, 1 Car. & Kir. 702.

[4] *Ante*, Vol. I. §§ 389, 405.

SEDUCTION.

§ 571. **Plaintiff's Case.** In an action for seduction,[1] the plaintiff must be prepared to prove, (1) that the person seduced was his servant; and (2) the fact of seduction: both these points being put in issue by the plea of not guilty.[2]

[1] For the evidence of an action for *criminal conversation* with the plaintiff's wife, see *supra*, tit. Adultery, and tit. Marriage. {The statutes of the various States on this and kindred subjects are very numerous, and are intended to give more ample redress to the injured party or to punish the wrong as a crime. Thus in some States the allegation of loss of service, which is a material allegation in the common-law action on the case, is made unnecessary, by statute. Va. Code, c. 145, § 1. Michigan Comp. L. 1871, § 6175. Kentucky Rev. Stats. c. 1, § 2. Again, in some States, an action for seduction is given by statute [or judicial legislation] to the seduced woman herself. In such an action of course the averments of the relation of master and servant and of loss of services are immaterial: 2 Ind. Rev. St. (1876) p. 43; Smith *v.* Yaryan, 69 Ind. 445; Buckles *v.* Ellers, 72 id. 220; [Ferguson *v.* Moore, 98 Tenn. 342; Hood *v.* Sudderth, 111 N. C. 215; Rabeke *v.* Baer, 73 N. W. 242, Mich.]

In many of the States, seduction, and seduction under a promise of marriage, are made crimes and prosecuted by the State: State *v.* Dunn, 53 Iowa 743; N. Y. Laws 1840, c. 111; Boyce *v.* People, 55 N. Y. 644; Wood *v.* State, 48 Ga. 192;} [State *v.* Marshall, 137 Mo. 463; People *v.* Nelson, 153 N. Y. 90; State *v.* King, 9 S. D. 628; Bailey *v.* State, 36 Tex. Cr. App. 540; State *v.* Whalen, 98 Ia. 662.]

[2] Holloway *v.* Abell, 7 C. & P. 528. It has been disputed, whether this action should be in the form of trespass or case; but it is now settled, that it may well be brought in either form: Chamberlain *v.* Hazlewood, 5 M. & W. 515; 3 Jur. 1079; s. c. 7 Dowl. P. C. 816; Parker *v.* Bailey, 4 D. & R. 215. See *supra*, tit. Case, § 226; Moran *v.* Dawes, 4 Cowen 412; Parker *v.* Elliott, 6 Munf. 587.

The form of the declaration in case is as follows: "For that the said (defendant) on —— and on divers days and times after that day, and before the commencement of this suit, debauched and carnally knew one E. F., she then being the [daughter and] servant of the plaintiff; whereby the said E. F. became sick and pregnant with child, and so continued for a long time, to wit, until the —— day of ——, when she was delivered of the child of which she was so pregnant; by means of all which the said E. F. was unable to perform the business of the plaintiff, being her [father and] master aforesaid, from the day first aforesaid hitherto, and the plaintiff has wholly lost her service and been put to great expenses for her delivery, cure, and nursing. To the damage," etc.

The form in trespass is thus: "For that the said (defendant) on —— and on divers days and times after that day and before the commencement of this suit, with force and arms assaulted one E. F., she then being the [daughter and] servant of the plaintiff, and then debauched and carnally knew the said E. F., whereby [here proceed as in the preceding form, to the end, concluding thus] and other wrongs to the plaintiff the said (defendant), then and there did, against the peace. To the damage," etc.

Where the injury was done in the house of the father or master, the remedy may be pursued in trespass *quare clausum fregit*, the seduction being laid in aggravation of the wrong: 1 Chitty on Plead. 128. {"The defendant, by limiting his pleading to the general issue, will, as it seems, be held to admit that the relationship of master and servant subsisted as alleged in the declaration (Torrence *v.* Gibbens, 5 Q. B. 297; s. c. 1 D. & Mer. 226, overruling Holloway *v.* Abell, 7 C. & P. 528); but still the plaintiff will be bound under that plea to establish not only the fact of seduction, but the *consequent loss* of service, without proof of which the action cannot be maintained (Eager *v.* Grimwood, 1 Ex. 61; Davies *v.* Williams, 10 Q. B. 725;" Taylor's Evidence, 285).}

§ 572. **What Service due Plaintiff.** (1) Though the relation of *servant* to the plaintiff is indispensable to the maintenance of this action,[1] yet it is not necessary to prove an express contract of service;[2] nor is the amount or value of the service actually performed of any importance, if the plaintiff had the right to command the immediate service or personal attendance of the party at the time of the seduction.[3] If this right existed, it is not material whether the servant was seduced while at home, or abroad on a visit.[4] Nor is it material whether the servant was a minor or of full age; nor whether the relation of master and servant still continues, it being sufficient if it existed when the act of seduction was committed.[5] Neither does the concurrent existence of any other relation, such as that of parent or other relative, affect the action; for such relation will not aid to support the action, if the party seduced was actually emancipated and free from the control of the plaintiff when the injury was committed.[6]

§ 573. **Same Subject.** It has accordingly been held, that this part of the issue is maintained by evidence that the party seduced was the adopted child of the plaintiff,[1] or his niece,[2] or his daughter,[3] as well as where she was merely his hired servant,[4] it also

[1] [Beaudette *v.* Gagne, 87 Me. 534. Changed by statute in some States: Schmit *v.* Mitchell, 59 Minn. 251.]

[2] Bennett *v.* Alcott, 2 T. R. 166. {It is sufficient if the relation of master and servant exist constructively: Mulvehall *v.* Milward, 1 Kernan (N. Y.) 343. To constitute the constructive relation, the master must have the right to command the service of the servant. The relation exists constructively between a father and his infant daughter, although the latter is in the service of another, provided the former has a right to reclaim her services at any time: Furman *v.* Van Sise, 56 N. Y. 435; Mohry *v.* Hoffman, 86 Pa. St. 358; *contra*, White *v.* Murtland, 71 Ill. 252. But a step-father is not as such entitled to the services of his step-daughter, and is not liable for her support: Bartley *v.* Richtmyer, 4 N. Y. 38. See this case also for a consideration of the action of seduction generally, the cases relating thereto being fully cited and commented on.}

[3] Maunder *v.* Venn, 1 M. & Malk. 323.

[4] {Blanchard *v.* Illsley, 120 Mass. 487; Blagge *v.* Illsley, 127 id. 191.}

[5] {Kendrick *v.* McCrary, 11 Ga. 603. If a step-daughter leave the house of her step-father, and is seduced while in the service of a third person, the step-father cannot maintain his action, although before the birth of the child she returns to his house, engages in his service, and is there nursed and attended during her confinement: Bartley *v.* Richtmyer, 4 Comst. 38. In Lipe *v.* Eisenler, 32 N. Y. 229, it was held that where a daughter twenty-nine years of age resided with her father, and by a tacit understanding continued to perform certain domestic services, and was supported by him with food and clothing, the relation of master and servant existed. See the dissenting opinion of Campbell, J., ib. 729. And see Davidson *v.* Abbot, 52 Vt. 570; West *v.* Strouse, 38 N. J. L. 184.} Though the father turned the daughter out of doors, upon discovery of her pregnancy, he may still maintain this action: 3 Steph. N. P. 2353.

[6] 2 Selw. N. P. 1103, 1104 (10th ed.); 3 Steph. N. P. 2351–2353; Roberts *v.* Connelly, 14 Ala. 235.

[1] Irwin *v.* Dearman, 11 East 23. Or step-daughter: Bartley *v.* Richtmyer, 2 Barb. S. C. 182; s. c. 4 Comst. 38. And see Ingersoll *v.* Jones, 5 Barb. S. C. 661; Kelley *v.* Donnelly, 5 Md. 211.

[2] Edmondson *v.* Machell, 2 T. R. 4; Manvelle *v.* Thompson, 2 C. & P. 303.

[3] 2 Selw. N. P. 1103; Bennett *v.* Alcott, 2 T. R. 166.

[4] Fores *v.* Wilson, 1 Peake 55.

appearing that she was actually subject to his commands, and was bound to perform such offices of service or of kindness and duty as were usually performed by persons in that relation, and in similar rank in society.[5] So it is held sufficient, if any acts of service or of duty are performed, though the party were a married woman, separated from her husband, and had returned to live with the plaintiff, who is her father.[6] The smallest degree of service will suffice, such as presiding at the tea-table,[7] even though she slept in another house, or was absent on a visit, if she was still under the plaintiff's control.[8] But if she was not in his service in any of these modes, the father cannot maintain this action, though he received part of her wages, and she was under age.[9] If the defendant himself hired her as his own servant, with the fraudulent intent to obtain possession of her person and seduce her, this is no bar to the father's action, though she was of full age, provided she was in her father's family at the time of the hiring; for in such case, the hiring being fraudulent, the relation of master and servant was never contracted between them.[10]

§ 574. **Same Subject.** On the other hand, it has been decided that where the daughter was in the domestic service of another person at the time of the injury, though with the intent to return to her father's house as soon as she should quit that service, unless she

[5] {Clem *v.* Holmes, 33 Gratt. (Va.) 722.}

[6] Harper *v.* Luffkin, 7 B. & C. 387. This action has also been held to lie in favor of a widowed mother, living with her daughter who was seduced; the daughter being of full age and owning the household establishment, but performing acts of service to the mother and family: Villepigue *v.* Shular, 2 Strobh. 462. {But see Manly *v.* Field, 7 C. B. N. S. 96, S. C. 6 Jur. N. S. 300, where it is held that where a daughter rented a house, and carried on the business of a milliner at the time of her seduction, the circumstances of her mother and the younger branches of the family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), did not constitute such services as to entitle the father to maintain the action. Where the daughter did not reside in the house with her parent, but being a domestic servant, living in the house of her master, though with the permission of her master, she had been in the habit, during any leisure time, of assisting in the work by which her parent earned a livelihood, it was held the parent could not maintain an action for the daughter's seduction: Thompson *v.* Ross, 5 H. & M. 162. Where, however, the daughter of the plaintiff was employed by the defendant as an outdoor farm-servant a part of the year, being absent during the usual working-hours from her father's house, where she passed the remainder of her time, sleeping there, and assisting in the household duties, it was held that these facts constituted a sufficient service to the father to support an action at his suit for the seduction: Rist *v.* Faux, 4 B. & S. 409; 10 Jur. N. S. 202.}

[7] Carr *v.* Clarke, 2 Chitty 261, per Abbott, C. J.; Blaymire *v.* Hayley, 6 M. & W. 56; Manvell *v.* Thompson, 2 C. & P. 304; Knight *v.* Wilcox, 15 Barb. 279.

[8] Mann *v.* Barrett, 6 Esp. 32; Holloway *v.* Abell, 6 C. & P. 528. And see Anon., 1 Smith 333; Harris *v.* Butler, 2 M. & W. 542; Martin *v.* Payne, 9 Johns. 387; Moran *v.* Dawes, 4 Cowen 412; Nickleson *v.* Stryker, 10 Johns. 115; Hornketh *v.* Barr, 8 S. & R. 36. But see Boyd *v.* Bird, 8 Blackf. 113. See Griffiths *v.* Teetgen, 28 Eng. Law & Eq. 371.

[9] Carr *v.* Clarke, 2 Chitty 260; Postlethwaite *v.* Parkes, 3 Burr. 1878; Grinnell *v.* Wells, 7 Man. & Gr. 1033. {Where the marriage of the parents of the child is void, the actual relation of master and servant must be proved: Howland *v.* Howland, 114 Mass. 517.}

[10] Speight *v.* Oliviera, 2 Stark. 493.

should go into another, the action cannot be maintained.[1] Much less can it be maintained where she had no such intention of returning.[2]

§ 575. **Same Subject.** Though the slightest proof of the relation of master and servant will suffice, yet, as the action is founded upon that relation, it must be shown to have existed at the time.[1] Therefore it has been held that where the seduction took place in the lifetime of the father, the action could not be maintained by the mother, after his decease, though the expenses of the daughter's confinement fell upon the mother.[2] Nor can the mother maintain the action in any case, without proof of service.[3]

§ 576. **Same Subject.** Where the daughter was a minor, and under the father's control, proof of this alone will suffice to maintain this part of the issue, service in that case being presumed; but where she was of full age, the plaintiff ought to be provided with some additional evidence of service in fact, though, as has already been stated, slight evidence will suffice.[1]

§ 577. **Proof of Seduction.** (2) The *fact of seduction* may be proved by the testimony of the person herself; but it is not necessary to produce her, though the withholding of her is open to observation.[1] Her general character for chastity is considered to be involved in the issue, and may therefore be impeached by the defendant by general evidence, and supported by the plaintiff in the like manner; but she cannot be asked, whether she had not been previously criminal with other men.[2] But though the defendant

[1] Blaymire *v.* Hayley, 6 M. & W. 55. And see Postlethwaite *v.* Parkes, 3 Burr. 1878; Davies *v.* Williams, 10 Ad. & El. N. S. 725; Dain *v.* Wicoff, 3 Selden (N. Y.) 191. [Otherwise if the father still has the legal right to demand service: Ingwaldson *v.* Skrivseth, 7 N. D. 388.]

[2] Dean *v.* Peel, 5 East 45; Anon., 1 Smith 333.

[1] The allegations of her relation of servant, and the *per quod servitium amisit* are material; and the omission of them will not be supplied by an averment that the plaintiff, her father, being of sufficient ability, was compelled to support her: Grinnell *v.* Wells, 7 Man. & Gr. 1034.

[2] Logan *v.* Murray, 6 S. & R. 175; George *v.* Van Horn, 9 Barb. 523. But see Coon *v.* Moffet, 2 Penningt. 583. {Where both parents are alive the father is the proper person to bring the suit, as he is the only one who is entitled to the services of the daughter generally; but if he is dead, or the custody of the daughter has been given to the mother by a decree of court, she should bring the suit: Davidson *v.* Abbott, 52 Vt. 570; Hobson *v.* Fullerton, 4 Ill. App. 282; Furman *v.* Van Sise, 56 N. Y. 435. If the mother in such a case remarries, she is still the person to institute the suit: Kennedy *v.* Shea, 110 Mass. 147; Lampman *v.* Hammond, 3 N. Y. Supreme Ct. 293; Hedges *v.* Tagg, L. R. 7 Ex. 283. After the cause of action has once accrued to the father, if he dies, the personal representative may sue: Noice *v.* Brown, 39 N. J. L. 569.}

[3] Satterthwaite *v.* Dewhurst, 4 Doug. 315; 5 East 47, n. [Where the father resides out of the State the mother may sue: Abbott *v.* Hancock, 31 S. E. 268, N. C.]

[1] Nickleson *v.* Stryker, 10 Johns. 115; Martin *v.* Payne, 9 id. 387; Hornketh *v.* Barr, 8 S. & R. 36; Logan *v.* Murray, 6 id. 177; Vanhorn *v.* Freeman, 1 Halst. 322; Mercer *v.* Walmsley, 5 Harr. & Johns. 27; Kendrick *v.* McCrary, 11 Ga. 603; Kelley *v.* Donnelly, 5 Md. 211.

[1] Revill *v.* Satterfit, Holt's Cas. 451; Cock *v.* Wortham, 2 Stra. 1054.

[2] Bamfield *v.* Massey, 1 Campb. 460; Dodd *v.* Norris, 3 Campb. 519; Bate *v.* Hill, 1 C. & P. 109; *ante*, Vol. I. §§ 54, 458. And see Magrath *v.* Browne, 1 Armstr. &

cannot interrogate the party herself as to acts of unchastity with others, yet he may call those other persons to testify to their own criminal intercourse with her, and the time and place; but notwithstanding this evidence, if the jury are satisfied from the whole evidence, that the defendant was the father of the child, their verdict must be for the plaintiff, though perhaps for diminished damages.[3]

§ 577 *a*. **Mere Criminal Connection insufficient.** The mere fact that the defendant has had a *criminal connection* with the plaintiff's servant is not alone sufficient to maintain this action, without proof of *some* injury thence resulting to the plaintiff; for otherwise, it is in principle nothing but the case of an assault upon the servant without damage to the master; and if such connection were held to be a loss of service, it is difficult, as a learned judge has remarked, to see where it would stop. Therefore, where a parent brought an action for the seduction of his daughter, then in his service, and it was proved that the defendant had had connection with her, and also that she had been delivered of a child, but the jury found that the child was not the defendant's, it was held that the jury were rightly instructed to return a verdict for the defendant, there being no loss of service from his act.[1]

§ 578. **Defence.**[1] In the *defence* of this action, under the general issue, the defendant may not only show that the person seduced was

Macartn. 136; Carpenter *v.* Wahl, 11 Ad. & El. 803. Where she had been abandoned by her seducer, and in consequence of that abandonment became ill, whereby her services were lost to the father, it has been contended, that, for such a loss of service, an action might be maintained; but the particular case was disposed of on another point: Boyle *v.* Brandon, 13 M. & W. 738. {But the plaintiff cannot give evidence of the general good character of the person seduced in the absence of any impeaching testimony by the defence: Haynes *v.* Sinclair, 23 Vt. 108. "In modern times, it has frequently been held, that in actions for seduction, and on indictments for rape, the principal female witness might be cross-examined, with the view of showing that she had previously been guilty of incontinence with the defendant, or even with other men, or with some particular person named; and, when she has denied the facts imputed, witnesses have been called for the purposes of contradiction:" R. *v.* Robins, 2 M. & Rob. 512, per Coleridge and Erskine, JJ.; Verry *v.* Watkins, 7 C. & P. 308, per Alderson, B.; Andrews *v.* Askey, 8 C. & P. 7, per Tindal, C. J.; Taylor Ev. 1164; 14 Am. Rep. 309. But character and conduct after the seduction are inadmissible: McKern *v.* Calvert, 59 Mo. 243. Intimacy with the defendant before marriage, if the marriage took place on the recommendation of the defendant, is not admissible in mitigation of damages: Stumm *v.* Hummel, 39 Iowa 478. See also *ante*, Vol. I. § 35, n.}

[3] Verry *v.* Watkins, 7 C. & P. 308. {But evidence of particular acts of immorality or indecorum, as well as proof of general bad character, must be confined to what occurred *previously* to the defendant's misconduct: Taylor Ev. 327; Elsam *v.* Fawcett, 2 Esp. 562.}

[1] Eager *v.* Grimwood, 34 Legal Obs. 360; s. c. 1 Exch. 61; {Bartley *v.* Richtmyer, 4 N. Y. 38. The loss of service must be direct and immediate. Damages resulting as a remote consequence of the seduction, as sickness through fear of exposure, is not sufficient: Knight *v.* Wilcox, 14 id. 413. But this action will lie against a defendant for debauching plaintiff's servant, and communicating to her a venereal disease, by which she was made sick and unable to labor: White *v.* Nellis, 31 id. 405. So it will lie for any impairment of health destroying capacity to labor: Abrahams *v.* Kidney, 104 Mass. 222. It is no defence to an action for seduction, that the offence was rape, and not seduction. This action will lie, although trespass *vi et armis* might also be sustained: Furman *v.* Applegate, 3 Zabr. (N. J.) 28.}

[1] [Infancy is no defence: Becker *v.* Mason, 93 Mich. 336.]

not the servant of the plaintiff,[2] but he may also prove, in bar of the action, that the plaintiff was guilty of gross misconduct, in permitting the defendant to visit his daughter as a suitor, after he knew that he was a married man, and had received a caution against admitting him into his family, or in otherwise conniving at her criminal intercourse with him.[3]

§ 579. **Damages.** The *damages* in this action are given not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury. Therefore, if the plaintiff is the parent of the seduced, the jury may consider his loss of the comfort as well as the service of the daughter, in whose virtue he can feel no consolation, and his anxiety as the parent of other children, whose morals may be corrupted by her example.[1] The plaintiff may give evidence of the terms on which the defendant visited his house, and that he was paying his addresses upon the promise or with intentions of marriage;[2] and the defendant, on the other hand, may give evidence not only of the loose character and conduct of the daughter, but also, as it seems, of the profligate principles and dissolute habits of the plaintiff himself.[3]

[2] Holloway *v.* Abell, 7 C. & P. 528.

[3] Reddie *v.* Scoolt, 1 Peake 240; Akerly *v.* Haines, 2 Caines 292; Seager *v.* Slingerland, ib. 219. [As to what is sufficient misconduct, see Tourgee *v.* Rose, 19 R. I. 432.]

[1] Bedford *v.* McKowl, 3 Esp. 119; Dain *v.* Wycoff, 7 N. Y. 191; Lipe *v.* Eisenlerd, 32 id. 229. And see Tullidge *v.* Wade, 3 Wils. 18; Andrews *v.* Askey, 8 C. & P. 7; Irwin *v.* Dearman, 11 East 24; Grinnell *v.* Welles, 8 Scott N. R. 741; 7 M. & Gr. 1033; {Knight *v.* Wilcox, 18 Barb. (N. Y.) 212. But he cannot recover the probable expense of supporting the illegitimate child of which his daughter had been delivered: Haynes *v.* Sinclair, 23 Vt. 108. He may show the character of his own family and the pecuniary circumstances of the defendant: McAulay *v.* Birkhead, 13 Ired. (N. C.) 28; Peters *v.* Locke, 66 Ill. 206, where James *v.* Biddington, *ante*, § 55, is denied; Buller N. P. 27; Mayne on Damages, 385; Grable *v.* Margrave, 3 Scam. (Ill.) 372; *ante*, §§ 55, 89, 269. *Contra*, Dain *v.* Wycoff, 7 N. Y. 191. And damages in such a case for the injury to the parents' feelings may be recovered, although there is no separate averment thereof in the declaration; such damages being a natural consequence of the principal injury: Taylor *v.* Shelkett, 66 Ind. 297; Rollins *v.* Chalmers, 51 Vt. 592; Phillips *v.* Hoyle, 4 Gray (Mass.) 568. The rule as to damage is the same whether the daughter be a minor or of full age: Lipe *v.* Eisenlerd, 32 N. Y. 229.}

[2] Elliot *v.* Nicklin, 5 Price 641; Tullidge *v.* Wade, 3 Wils. 18; Brownell *v.* McEwen, 5 Denio 367; Capron *v.* Balmond, 3 Steph. N. P. 2356; Watson *v.* Bayless, and Murgatroyd *v.* Murgatroyd, cited 2 Stark. on Evid. 732, n. (*t*); *supra*, § 269. But see Dodd *v.* Norris, 3 Campb. 519; *contra*, Haynes *v.* Sinclair, 23 Vt. 108; Dain *v.* Wycoff, 7 N. Y. 191.

[3] Dodd *v.* Norris, 3 Campb. 519. Held otherwise in Dain *v.* Wycoff, 7 N. Y. 191 (1852). But an offer of marriage, after the seduction, cannot be shown in mitigation of damages: Ingersoll *v.* Jones, 5 Barb. S. C. 661. {It is held in some States that the relative social position of the plaintiff and defendant may be shown to aggravate or mitigate the damages: White *v.* Murtland, 71 Ill. 250. A subsequent marriage of the daughter with the seducer, and an acquittal of the latter on an indictment for the seduction, may be shown in mitigation of damages: Eichar *v.* Kistler, 14 Pa. St. 282. And it has been held that an offer of marriage may be shown to mitigate the damages: White *v.* Murtland, 71 Ill. 250.}

SHERIFF.

§ 580. **Sheriff responsible for his Subordinates.** The law of evidence in actions against any officers, for misconduct in regard to civil process in their hands for service, will be treated under this head; the sheriff being the officer principally concerned in that duty. He is identified, in contemplation of law, with all his under-officers, and is directly responsible, in the first instance, for all their acts done in the execution of process.[1]

§ 581. **Grounds of Action.** Actions against sheriffs are either for non-feasance, or mere omission of duty, — such as, (1) not serving process; (2) taking insufficient pledges or bail; (3) not paying over money levied or collected; or, for misfeasance, or improperly doing a lawful act, — such as, (4) suffering the party arrested to escape; (5) making a false return; or, for malfeasance, or doing an unlawful act, under color of process, — such as, (6) extortion; (7) seizing the goods of one who is a stranger to the process. These will be considered briefly in their order.

§ 582. **Proof of Official Character.** Where the action for any of these causes is founded on the misconduct of an *inferior officer*, acting under the sheriff, his *connection with the sheriff* must be proved. If he is an under-sheriff or deputy, recognized by statute as a public officer, it will be sufficient, *prima facie*, to show that he has acted publicly and notoriously in that character.[1] But if he is only a private agent or servant of the sheriff, other evidence is necessary. In these cases, a warrant is delivered to the bailiff, authorizing him to serve the process in question; and as this is the most satisfactory

[1] Saunderson *v.* Baker, 2 W. Bl. 832; Jones *v.* Perchard, 2 Esp. 507; Smart *v.* Hutton, 2 N. & M. 426; s. c. 8 Ad. & El. 568, n.; Anon., Lofft 81; Ackworth *v.* Kempe, 1 Doug. 40; Woodman *v.* Gist, 8 C. & P. 213; Watson *v.* Todd, 5 Mass. 271; Draper *v.* Arnold, 12 id. 449; Knowlton *v.* Bartlett, 1 Pick. 271; People *v.* Dunning, 1 Wend. 16; Gorham *v.* Gale, 7 Cowen 739; Walden *v.* Davison, 15 Wend. 575; M'Intire *v.* Trumbull, 7 Johns. 35; Grinnell *v.* Phillips, 1 Mass. 530; [Brown *v.* Weaver, 23 S. 388, Miss.; Rogers *v.* Carroll, 111 Ala. 610; Dishneau *v.* Newton, 91 Wis. 199; Frizzell *v.* Duffer, 58 Ark. 612.] {No action lies against a sheriff upon a judgment recovered against his deputy: Pervear *v.* Kimball, 8 Allen (Mass.) 199. In Morgan *v.* Chester, 4 Conn. 387, the sheriff is said to be a joint trespasser with his deputy; but in Campbell *v.* Phelps, 1 Pick. (Mass.) 62, it is held that the party injured must elect which to sue, regarding them as master and servant. They are held to be joint trespassers, however, in Waterbury *v.* Westervelt, 9 N. Y. 604, where the cases are fully examined, and the dissenting opinion of Wilde, J., in Campbell *v.* Phelps, *supra*, approved.}

[1] *Ante*, Vol. I. §§ 83, 92. If the allegation is, that the defendant was sheriff on the day of delivery of the writ to him, and until the return-day thereof, proof of the former averment is sufficient, the latter being immaterial: Jervis *v.* Sidney, 3 D. & R. 483.

evidence of his appointment, it is expedient to produce it, or to establish its loss, so as to admit secondary evidence of its existence and contents.[2] A paper, purporting to be a copy of the warrant left with the debtor by the bailiff, is not sufficient, it being the mere act of the bailiff, and of the nature of hearsay; nor will it suffice to produce a general bond of indemnity, given by the bailiff to the sheriff; for this does not make him the sheriff's general officer, but is only to cover each distinct liability that he may come under, in regard to every several warrant.[3] But any subsequent act of recognition of the bailiff's authority, by the sheriff, such as returning the process served by the bailiff, or giving instructions for that purpose, is admissible to establish the agency of the bailiff.[4] The bailiff himself is a competent witness to prove the warrant under which he acted; but it will seldom be expedient for the plaintiff to call him, as he will be liable to cross-examination by the defendant, in a cause which is virtually his own.[5]

§ 583. **Admissions of Deputy as against Sheriff.** It may also here be stated, that the *admissions* of an under sheriff, or deputy, tending to charge himself, are receivable in evidence against the sheriff, wherever the under-officer is bound by the record; and he is thus bound, and the record is conclusive evidence against him, both of the facts which it recites, and of the amount of damages, wherever he is liable over to the sheriff, and has been duly notified of the pendency of the action, and required to defend it.[1] This principle applies to all declarations of the under-officer, without regard to the time of making them. But in other cases, where the record is not evidence against the under-officer, his declarations seem to be admissible against the sheriff, only when they accompanied the act which he was then doing in his character of the sheriff's agent and as part of the *res gestæ*,[2] or while the process was in his hands for service.[3] Upon the same general principle of identity in interest,

[2] *Ante*, Vol. I. §§ 559–563, 574, 575, 84, n.

[3] Drake *v.* Sykes, 7 T. R. 113; as explained in Martin *v.* Bell, 1 Stark. 413.

[4] Martin *v.* Bell, 1 Stark. 413; Saunderson *v.* Baker, 3 Wils. 309; 2 W. Bl. 832; Jones *v.* Wood, 3 Campb. 228. The return of a person styling himself deputy sheriff is not of itself sufficient evidence, against the sheriff, of the deputy's appointment: Slaughter *v.* Barnes, 3 A. K. Marsh. 413. {To discharge the sheriff from liability for the acts of his deputy, in obeying the instructions of the plaintiff, it must appear that the deputy, in his departure from duty, was obeying or attempting to obey the instructions of the plaintiff: Sheldon *v.* Payne, 7 N. Y. 453. See also 10 id. 398.}

[5] Morgan *v.* Brydges, 2 Stark. 314. And see *ante*, Vol. I. § 445.

[1] See *ante*, Vol. I. § 180 and n. {In those States where the common-law rule still prevails, that interest in the result of a suit disqualifies a witness, a sheriff's deputy is not a competent witness for the sheriff, where the action is based on such deputy's misconduct: Odom *v.* Gill, 59 Ga. 180. But, in general, this objection now goes only to the credibility of the witness: *ante*, Vol. I. § 418 *et seq.*}

[2] See *ante*, Vol. I. § 180 and n. See also Vol. I. §§ 113, 114; Bowsheer *v.* Cally, 1 Campb. 391, n.; North *v.* Miles, ib. 389; Snowball *v.* Goodricke, 4 B. & Ad. 541.

[3] Jacobs *v.* Humphrey, 2 C. & M. 413; s. c. 4 Tyrw. 272; Mott *v.* Kip, 10 Johns 478; Mantz *v.* Collins, 4 H. & McHen. 216. In order to render the admissions of the deputy competent evidence against the sheriff, it is ordinarily sufficient to prove that

the declarations of the creditor, who has indemnified the sheriff, are admissible in evidence against the latter in an action by a stranger for taking his goods.[4]

§ 584. **Non-service of Process.** (1) Where the action is against the sheriff for *not serving mesne process*, it is incumbent on the plaintiff to prove the *cause of action;* for which purpose any evidence is competent which would be admissible in the suit against the debtor.[1] Hence the acknowledgment of the debtor that the debt is justly due is admissible against the sheriff.[2] The plaintiff must also prove the *issuing of process*, and the *delivery* of it to the officer.[3] If the process has been returned, the regular proof is by a copy; if not, its existence must be established by secondary evidence; and, if it is traced to the officer's hands, he should be served with notice to produce it.[4] And here, and in all other cases, where the issuing of process is alleged, the allegation must be precisely proved, or the variance will be fatal.[5] Some evidence must also be given of the officer's *ability to execute* the process; such as, that he knew, or ought to have known, that the person against whom he held a *capias* was within his precinct; or, that goods, which he might and ought to have attached, were in the debtor's possession.[6] The averment of *neglect* of official duty, though negative, it seems ought to be supported by some proof on the part of the plaintiff, since a breach of duty is not presumed; but, from the nature of the case, very slight evidence will be sufficient to devolve on the defendant

he was a deputy of the sheriff, and that he acted *colore officii*, at the time, without proving the issuing and delivery of the precept under which he professed to act: Stewart *v.* Wells, 6 Barb. S. C. 79.

[4] Proctor *v.* Lainson, 7 C. & P. 629.

[1] Gunter *v.* Cleyton, 2 Lev. 85, approved in Alexander *v.* Macauley 4 T. R. 611; Parker *v.* Fenn, 2 Esp. 477, n.; Sloman *v.* Herne, ib. 695; Riggs *v.* Thatcher, 1 Greenl. 68.

[2] Gibbon *v.* Coggon, 2 Campb. 188; Williams *v.* Bridges, 2 Stark. 42; Sloman *v.* Herne, 2 Esp. 695; Kempland *v.* Macaulay, 4 T. R. 436; Dyke *v.* Aldridge, 7 id. 665.

[3] {A defect in the process which is delivered to the sheriff, and for *failure to enforce which* he is sued, which renders the process voidable, will not excuse the officer for failure to enforce it; otherwise if the process is totally void: Forsyth *v.* Campbell, 15 Hun (N. Y.) 235. On the other hand, when the sheriff undertakes to *act* by virtue of a process which is absolutely void, he is not protected by it in a suit by the party against whom it was enforced, *e. g.* where a State court process was issued and delivered to a sheriff as a means of enforcing a pilot's claim for wages, the State court in such case having no jurisdiction of such a claim, the process is no defence to the sheriff: Campbell *v.* Sherman, 35 Wis. 103; Fisher *v.* McGirr, 1 Gray (Mass.) 45; Kennedy *v.* Duncklee, ib. 71; Twitchell *v.* Shaw, 10 Cush. (Mass.) 46. But if the process is regular on its face, and issued by a magistrate having jurisdiction over the subject-matter, the officer is protected by it, though it may be voidable for some defect: Clarke *v.* May, 2 Gray (Mass.), 413; Donahoe *v.* Shed, 8 Met. (Mass.), 326; Johnson *v.* Fox, 59 Ga. 270. Cf. Campbell *v.* Sherman, 35 Wis. 103.}

[4] See *ante*, Vol. I. §§ 521, 560.

[5] *Ante*, Vol. I. §§ 63, 64, 70, 73; Phillipson *v.* Mangles, 11 East 516; Bevan *v.* Jones, 4 B. & C. 403; Bromfield *v.* Jones, ib. 380; Webb *v.* Herne, 1 B. & P 281. See, further, Stoddart *v.* Palmer, 4 D. & R. 624; 3 B. & C. 2; Lewis *v.* Alcock, 6 Dowl. P. C. 78.

[6] Beckford *v.* Montague, 2 Esp. 475; Frost *v.* Dougal, 1 Day 128.

the burden of proving that his duty has been performed.[7] The *damages* will at least be nominal, wherever any breach of duty is shown;[8] and may be increased, according to the evidence [9]

§ 585. **Defence.** In *defence* of actions of this description, where the suit is for neglecting to attach or seize goods, the sheriff may show that there were reasonable doubts as to the ownership of the goods, and that the plaintiff refused to give him an indemnity for taking them;[1] or that they did not belong to the debtor.[2] And where the neglect was in not serving a writ of execution, he may impeach the plaintiff's judgment by showing that it is founded in fraud;[3] first proving that he represents a judgment creditor of the same debtor, by a legal precept in his hands.[4] He may also show, in defence of such action, that there were attachments on the same goods prior to that of the plaintiff, for which he stood liable to the attaching creditors, whose liens still existed, and that these would absorb the entire value of the goods.[5] And his return to a *fieri facias*, setting forth a valid excuse for not having sold the goods, such as, that they were casually destroyed by fire, [6] or that proceedings were stayed by a judge's order, or the like, is *prima facie* evidence of the fact, in his own favor.[7]

[7] See *ante*, Vol. I. §§ 78–81. {The question of negligence in these cases is governed by the same general rules as in other cases. See *ante*, § 230. If, on the evidence offered, the judge is prepared to say that there is *no evidence* of negligence, he may direct the jury to find for the defendant, but not otherwise. It has been held in an action for a false return of *non est inventus*, that the fact that the sheriff, when he was given a writ to serve, did not inquire of the plaintiff where the defendant resided, is not, as matter of law, evidence of negligence: Koch *v.* Coots, 43 Mich. 30. Where a sheriff is shown to be guilty of negligence in failing to serve a writ, the onus of showing that the defendant was insolvent falls on him: Jenkins *v.* Troutman, 7 Jones (N. C.) L. 169.}

[8] {So where a sheriff fails to return an execution within the time prescribed by law, this gives an action for damages: People *v.* Johnson, 4 Ill. App. 346.}

[9] Baker *v.* Green, 2 Bing. 317; Clifton *v.* Hooper, 8 Jur. 958; 6 Ad. & El. N. S. 468; Williams *v.* Mostyn, 4 M. & W. 145; Marzetti *v.* Williams, 1 B. & Ad. 415. If the deputy sheriff undertakes to receive the amount of the debt and costs, on mesne process, and stay the service of the writ, the sheriff is liable forthwith for the amount received, without any previous demand: Green *v.* Lowell, 3 Greenl. 373.

[1] Marsh *v.* Gold, 2 Pick. 975; Bond *v.* Ward, 7 Mass. 123; Perley *v.* Foster, 9 id. 112. See also Weld *v.* Chadbourne, 37 Me. 221.

[2] Canada *v.* Southwick, 16 Pick. 556. [But not that he had legal advice that he could not levy in the place where the goods were (Stiff *v.* McLaughlin, 19 Mont. 300); nor that the defendant said he had procured a stay (Steele *v.* Crabtree, 40 Neb. 420); nor a mistake of law as to the time for serving summons (Rogers *v.* Carroll, 111 Ala. 610), or for returning process (Cowan *v.* Sloan, 95 Tenn. 424).]

[3] Pierce *v.* Jackson, 6 Mass. 242. But he cannot impeach it on any other ground: Adams *v.* Balch, 5 Greenl. 188.

[4] Clark *v.* Foxcroft, 6 Greenl. 296. See *infra*, §§ 593, 597.

[5] Commercial Bank *v.* Wilkins, 9 Greenl. 28.

[6] {So, when the property is destroyed by fire during the temporary absence of the sheriff, if he has not been negligent: Price *v.* Stone, 49 Ala. 543.}

[7] Browning *v.* Hanford, 7 Hill (N. Y.) 120. {In any action against a sheriff or his deputies, where a return of the writ has been made, this return is admissible as evidence. The *effect* of this evidence is stated by Metcalf, J., in Whithead *v.* Keyes, 3 Allen (Mass.) 495. The action was against a sheriff for the default of his deputy in suffering an escape. The defendant claimed that the return on the writ of *a rescue* was conclusive, but the judge ruled that it was not conclusive, but was evidence for

§ 586. **Taking Insufficient Bail.** (2) As to the action for *taking insufficient pledges or bail.* Here also, though the allegation of the insufficiency of the sureties is negative in its terms, yet some evidence to support it must be produced by the plaintiff, though slight proof will suffice, the fact of their sufficiency being best known to the defendant, who took them;[1] and it is a legal maxim that all evidence is to be weighed according to the proof which it is in the power of one side to produce, and in the power of the other to contradict.[2] To establish the fact of the insufficiency of sureties, it is

the consideration of the jury. Metcalf, J., says: "We are of opinion that the judge correctly ruled that the return of Thomas on the writ against Stoddard, was not conclusive in this action against the defendant for an escape. The defendant relies on the positive rule often found in the books, that an officer's return cannot be contradicted by parties and privies, except in an action against him for a false return. But we cannot see on principle any more reason why his return should be conclusive in this action for an escape which assumes that the return was false, than in an action directly charging him with a false return. If his return be true, he may prove it to be so, as well in this action as in the other. His return is *prima facie* evidence of a rescue, and the burden is on the plaintiff to prove it false, as well in this action as in the other. And not one of the numerous books cited by the defendant's counsel, nor any case in any English book, shows that an officer's return of a rescue has ever been decided to be conclusive evidence in his favor in an action brought against him for an escape. On the contrary, there are recent English authorities which show that it is not conclusive. It was so decided by Holroyd, J., in Adey *v.* Bridges, 2 Stark. R. 189. In Jackson *v.* Hill, 10 Ad. & El. 492, Patteson, J., denied that a return was conclusive in all cases except in an action for a false return, and said, 'The case cited from the Year Book (5 Edw. IV. 1) is strong to show that a return is conclusive only in the particular cause in which it is made, and there is no authority the other way. See also Vin. Abr. Return, O, 25; 1 Saund. Pl. & Ev. (2d ed.) 1074; Atkinson's Sheriff Law, 247, 248; Watson's Sheriff, 72; 3 Phill. Ev. (4th Am. ed.) 701; 1 Tayl. Ev. 702, 703. If there are any decisions in this country which support the defendant's exception to the ruling on this point, we cannot follow them. We adopt the views of the Supreme Court of Vermont, in the case of Barrett *v.* Copeland, 18 Vt. 67, which cannot be distinguished in principle from the case before us. That was an action for an assault and battery, and false imprisonment at B. The defendant pleaded in justification that he was constable of the town of M.; that he arrested the plaintiff at M. on an execution; that the plaintiff escaped, and that he pursued and recaptured him in the town of B., and conveyed him to M. on the way to prison.

"On the trial in the county court, the defendant gave in evidence the execution and his return thereon, in which he set forth the arrest of the plaintiff at M., as averred in the plea. The plaintiff offered evidence to contradict the return, but it was excluded, and the defendant obtained a verdict on which judgment was rendered. The Supreme Court reversed that judgment. 'The question,' said Royce, J., 'now presented is whether the official return of a public officer is conclusive evidence in favor of such officer, in the prosecution or defence of a collateral action. We find it laid down as undoubted law, that such a return is admissible evidence in the officer's favor, as also to affect the rights of third persons. But these authorities uniformly assert that when evidence is offered for that purpose it is but *prima facie* evidence. Its admissibility is put upon the ground of the general credit due to the return of such an officer, in cases where it is his duty to make a return. But upon principle it should be subject to contradiction by third persons, because they are neither parties nor privies to the transaction, and because they would not, according to any precedent with which I am acquainted, be entitled to a remedy against the officer for a false return. It should also be open to contradiction collaterally, even by a party to the process. We are therefore of opinion that the plaintiff was entitled to go into evidence to disprove the alleged arrest at M.; and for the rejection of the evidence offered for that purpose, the judgment of the County Court must be reversed.' See also Francis *v.* Wood, 28 Me. 69." Cf. Briggs *v.* Green, 33 Vt. 565.]

[1] Saunders *v.* Darling, Bull. N. P. 60.

[2] Per Ld. Mansfield, Cowp. 65.

admissible to prove that they have been pressed for payment of their debts by the importunity of creditors, and have violated their repeated promises to pay.[3] It is not necessary for the plaintiff to aver and prove that the sheriff knew the sureties to be insufficient; it is enough *prima facie* to charge him, if it appears that they were in fact so at the time when he accepted them.[4] This liability the sheriff may avoid by showing that they were at the time apparently responsible, and in good credit; or, that he exercised a reasonable and sound discretion in deciding upon their sufficiency; of which the jury are to judge.[5] But their own statement to the sheriff as to their responsibility is not enough; though they are competent witnesses for him on the trial.[6] On the other hand, the plaintiff may show, that the sheriff had notice of their insufficiency, or did not act with due caution, under the circumstances of the case; or that their pecuniary credit was low, in their own neighborhood.[7] And it is not necessary for the plaintiff to show that he has taken any steps against the bail, in order to establish their insufficiency, as the fact may be proved by any other competent evidence.[8]

§ 587. **Non-payment of Money.** (3) As to the action *for not paying over money* levied and collected. The money, in this case, as soon as it comes into the officer's hands, is money had and received to the creditor's use; and, where the precept does not otherwise direct him, he is bound to pay it over to the creditor on the return day of the process under which it was levied, without any demand, and earlier if demanded; upon failure of which an action lies.[1] The evidence, on the part of the plaintiff, consists of proof of the receipt of the money by the officer, and, where a demand is

[3] Gwyllim *v.* Scholey, 6 Esp. 100.

[4] Concanen *v.* Lethbridge, 2 H. Bl. 36; Evans *v.* Brander, ib. 547; Yea *v.* Lethbridge, 4 T. R. 433; Sparhawk *v.* Bartlett, 2 Mass. 188. [But not that execution against them was subsequently returned *nulla bona:* Busch *v.* Moline Co., 52 Neb. 83.] If the officer accepts a forged bail-bond, he is liable to the plaintiff, though he believed it to be genuine: Marsh *v.* Bancroft, 1 Met. 497.

[5] Hindle *v.* Blades, 5 Taunt. 225; Jefferey *v.* Bastard, 4 Ad. & El. 823; Sutton *v.* Waite, 8 Moore 27; [Watterson *v.* Fuellhart, 169 Pa. 612.]

[6] Ibid.

[7] Scott *v.* Waithman, 3 Stark. 168. Bail is still regulated by the Statute 23 Hen. VI. c. 10, which has always been recognized in the United States as common law. The first branch of this statute, for it consists of only one section, requires the sheriffs to "let out of prison all manner of persons arrested, or being in their custody, by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprise," etc. This clause was introduced for the benefit of the sheriff; and, therefore, though he may insist upon two sureties, yet he may admit to bail upon a bond with one surety only: 2 Saund. 61 *d*, n. (5), by Williams. But where he takes but one surety, the sheriff is responsible for his solvency, at all events: Long *v.* Billings, 9 Mass. 479; Rice *v.* Hosmer, 12 id. 129, 130; Glezen *v.* Rood, 2 Met. 490; Sparhawk *v.* Bartlett, 2 Mass. 194.

[8] Young *v.* Hosmer, 11 Mass. 89.

[1] Dale *v.* Birch, 3 Campb. 347; Wilder *v.* Bailey, 3 Mass. 294, 295; Rogers *v.* Sumner, 10 Pick. 387; Longdill *v.* Jones, 1 Stark. 345. And see Morland *v.* Pellatt, 8 B. & C. 722, 725, 726, per Bailey, J.; Green *v.* Lowell, 3 Greenl. 373.

requisite, that it has been demanded. The most satisfactory proof of the receipt of the money is the officer's return on the writ of execution; which is shown by an examined copy, if the precept has been returned, and by secondary evidence, if it has not. The return is conclusive evidence against the sheriff, that he has received the money;[2] but it does not prove, nor will it be presumed, that the money has been paid over to the creditor.[3] If the money was levied by an under-officer or bailiff, his connection with the sheriff must be established by further evidence, as already has been stated.[4]

§ 588. **Defence.** In the *defence* of an action for this cause, the sheriff may show that the goods, out of which he made the money, were not the property of the judgment debtor, but of a stranger, to whom he is liable; or that the judgment debtor had become bankrupt, and that the money belonged to his assignees; and this notwithstanding his return, that he had levied on the goods of the debtor.[1] He may also show that the plaintiff had directed him to apply the money to another purpose, which he had accordingly done;[2] or that it was absorbed in the expenses of keeping the goods.[3] The amount due to him, for his collection fees or poundage, is to be deducted from the gross amount in his hands.[4]

§ 589. **Escape.** (4) In an action against the sheriff for an *escape*, the plaintiff must prove, first, his character as creditor; secondly, the delivery of the process to the officer; thirdly, the arrest; fourthly, the escape; and, lastly, the damages or debt. If the escape was from an arrest upon *execution*, the plaintiff's *character of creditor* is proved by a copy of the judgment; and if the action is brought in *debt*, the plaintiff, by the common law, is entitled to recover the amount of the judgment, at all events, and without deduction, or regard to the circumstances of the debtor.[1] But where

[2] [Harvey *v.* Foster, 64 Cal. 296.]

[3] Cator *v.* Stokes, 1 M. & S. 599. {The burden of proving that he has accounted for the money received by the levy of the execution is on the officer: Moseley *v.* Hamilton, 4 Baxt. (Tenn.) 434; Sanborn *v.* Baker, 1 Allen (Mass.) 526; Sheldon *v.* Payne, 7 N. Y. 453; and this, though the return is made by his deputy: ibid. An officer cannot be permitted to testify on the trial that he did not take all the property returned on the execution as taken; but he may be permitted to amend his return according to the facts: Johnson *v.* Stone, 40 N. H. 197.}

[4] *Supra*, § 582; Wilson *v.* Norman, 1 Esp. 154; McNeil *v.* Perchard, ib. 263. {When a sheriff sells at auction goods taken on attachment or execution, and allows the buyer to take the goods without paying for them, but upon a promise to pay, the sheriff is liable to the plaintiff on whose writ the goods were so taken, for the amount bid by the purchaser, deducting the costs and expenses of the sale: Disston *v.* Strauck, 42 N. J. L. 546;} [Meherin *v.* Saunders, 110 Cal. 463.]

[1] Brydges *v.* Walford, 6 M. & S. 42; 1 Stark. 389, n.

[2] Comm'rs *v.* Allen, 2 Rep. Const. Court (S. C.) 88.

[3] Twombly *v.* Hunnewell, 2 Greenl. 221. {Or he may show that prior executions in his hands, on the same property, have absorbed all the money received from the sale of that property: Hammen *v.* Minnick, 32 Gratt. (Va.) 249.}

[4] Longdill *v.* Jones, 1 Stark. 346.

[1] Hawkins *v.* Plomer, 2 W. Bl. 1048; Porter *v.* Sayward, 7 Mass. 277. The common law has been altered in this particular in some of the United States, by statutes

the action is brought in trespass on the case, as it must be where the arrest was upon *mesne process*, and it may be where the arrest was upon execution, the plaintiff must prove his debt, or cause of action, in the manner we have already stated, in actions for not serving process.[2] The *process* must be proved precisely as alleged, a material variance being fatal.[3] The *delivery* of the process to the officer will be proved by his return, if it has been returned; or by any other competent evidence, if it has not. The return of *cepi corpus* will be conclusive evidence of the *arrest;* and if there has been no return, the fact of arrest may be proved *aliunde*, and by parol.[4] The *escape* of the debtor is proved by any evidence, that he was seen at large after the arrest, for any time, however short, and even before the return of the writ.[5] The difficulty of defining the going at large, which constitutes an escape, has been felt and acknowledged by judges.[6] Mr. Justice Buller said, that wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape;[7] which he illustrated by the case of a prisoner permitted to go to a horse-race, attended by a bailiff. And where a coroner, having an execution against a deputy jailer, arrested him, and left him in the jail-house, neither the sheriff nor any other authorized person being there to receive him, it was held an escape in the sheriff; upon the principle, as laid down by Parsons, C. J., that every liberty given to a prisoner, not authorized by law, is an escape.[8] If the liberty was given through mistake, it seems it is still an escape;[9] but if he be taken from prison through necessity, and without his own agency, in case of sudden sickness, or go out for the preservation of life from danger by fire, and return as soon as he is able, it is not an escape.[10]

The damages in this case will hereafter be considered.

§ 590. **Same Subject.** The party escaping is a *competent witness* for either party, in an action for a voluntary escape, for he stands indifferent; but where the action is for a negligent escape, he is not a competent witness for the defendant, to disprove the escape, be-

which provide, that, in an action of debt for an escape, the plaintiff shall recover no more than such actual damage as he may prove that he has sustained. *Infra*, § 599.

[2] *Supra*, § 584.

[3] *Supra*, § 584, Vol. I. §§ 63, 64, 70, 73; Phillipson *v.* Mangles, 11 East 516; Bromfield *v.* Jones, 4 B. & C. 380.

[4] Fairlie *v.* Birch, 3 Camph. 397.

[5] Hawkins *v.* Plomer, 2 W. Bl. 1048; 3 Com. Dig. 642–646, tit. Escape, C. D.

[6] Per Eyre, C. J. 1 B. & P. 27.

[7] Benton *v.* Sutton, 1 B. & P. 24, 27.

[8] Colby *v.* Sampson, 5 Mass. 310, 312, per Parsons, C. J. {It is sufficient proof of an escape to show that the prisoner was only obliged to present himself every morning at the sheriff's office, and was then allowed to go at large for the rest of the day, although this conduct has subsequently been assented to by the plaintiff's attorney: Hopkinson *v.* Leeds, 78 Pa. St. 396.}

[9] Call *v.* Haggar, 8 Mass. 429.

[10] Baxter *v.* Taber, 4 Mass. 361 369; Cargill *v.* Taylor, 10 id. 207; 1 Roll Abr. 808, pl. 5, 6.

cause he is liable over to the sheriff.[1] But though the count is for voluntary escape, yet under it evidence of a negligent escape is admissible; for the substance of the issue is the escape, and not the manner.[2]

§ 591. **Defence.** In *defence* of the action for an escape, the sheriff will not be permitted to show that the process was irregularly issued; nor, that the judgment was erroneous; nor, that the plaintiff knew of the escape, yet proceeded in his action to judgment, and had not charged the debtor in execution, though he had returned to the prison;[1] nor, that the plaintiff had arrested the debtor upon a second writ, by another sheriff, and had discharged him without bail.[2] But under the general issue he may show that the court from which the process was issued had no jurisdiction of the matter, and that therefore the process was void.[3] He may also show, that before the expiration of the term in which the writ was returnable, but not afterwards, the debtor did put in and perfect bail, or that he had put in bail, and seasonably rendered himself in their discharge, though no bond was taken;[4] or that the prisoner, while going to jail on mesne process, was rescued; but not if he was taken in execution.[5] So he may show that the escape was by fraud and covin of the plaintiff in interest.[6] If he pleads that there was no escape, this is an admission of the arrest as alleged.[7]

§ 592. **False Return.** (5) As to the action for a *false return.* In the case of a false return to *mesne process,* the plaintiff must prove the cause of action,[1] the issuing of the process, and the delivery of it to the officer, in the same manner as has already been shown, in the action for not serving mesne process. If it was a writ of *execution,* he should produce a copy of the judgment, and prove the issuing of the execution; of which the clerk's certificate in the margin of the record is usually received as sufficient evidence. The officer's *return* must, in either case, be shown, and some evidence must be adduced of its falsity; but slight or *prima facie* evidence of its falsity will be sufficient to put the sheriff upon proof of the truth of his return; such, for example, as showing the execution debtor to be in possession of goods and chattels, without proving the property to be in him, when the sheriff is sued for falsely mak-

[1] See *ante,* Vol. I. §§ 394, 404; Cass *v.* Cameron, 1 Peake 124; Hunter *v.* King, 4 B. & Ald. 210; Sheriffs of Norwich *v.* Bradshaw, Cro. El. 53; Eyles *v.* Faikney, 1 Peake 143, n.

[2] Bovey's Case, 1 Ventr. 211, 217; Bonafous *v.* Walker, 2 T. R. 126.

[1] Bull. N. P. 66, 69.

[2] Woodman *v.* Gist, 2 Jur. 942.

[3] Bull. N. P. 65, 66.

[4] Pariente *v.* Plumtree, 2 B. & P. 35; Moses *v.* Norris, 4 M. & S. 397.

[5] May *v.* Proby, Cro. Jac. 419; 1 Stra. 435; Bull. N. P. 68.

[6] Hiscocks *v.* Jones, 1 M. & Malk. 269. See also Doe *v.* Trye, 5 Bing. N. C. 573.

[7] Bull. N. P. 67.

[1] See Parker *v.* Fenn, 2 Esp. 477, n.

ing a return of *nulla bona*.[2] If the sheriff has omitted to seize the goods, in consequence of receiving an indemnity, the controversy being upon the title of the debtor, the plaintiff must be prepared with evidence of the debtor's property. And if the process was against several, and the allegation is that they had goods which might have been seized, the allegation, being severable, will be supported by proof that any one of them had such goods.[3]

§ 593. **Defence.** In the *defence* of the action for a false return of *nulla bona* to a writ of execution, the sheriff may show that the plaintiff assented to the return, after being informed of all the circumstances;[1] or, where part of the money only was levied, that the plaintiff accepted that part with intent to waive all further remedy against the sheriff, and with full knowledge of the facts;[2] or, that the plaintiff has lost his priority, by ordering the levy of his execution to be stayed, another writ having been delivered to the sheriff;[3] or, that the first levy, for not returning which the action is brought, was fraudulently made, and so void;[4] or, that the plaintiff's judgment was entered up by a fraud and collusion with the debtor, the sheriff first proving that he represents another creditor of the same debtor, by showing a legal precept in his hands.[5] He may also show that the goods of the debtor were absorbed by a prior execution in his hands; and in such case the plaintiff may rebut this evidence, by proving that the prior execution was concocted in fraud, and that the sheriff had previous notice thereof, and was required by the plaintiff not to pay over the proceeds to the prior creditor.[6] He may also prove that the debtor had previously become bankrupt, for which purpose the petitioning creditor is a competent witness to

[2] Magne *v.* Seymour, 5 Wend. 309. And see Stubbs *v.* Lainson, 1 M. & W. 728. {The burden of proof in such a case is on the plaintiff, to show the falseness of the return, by showing that there were attachable goods of the defendant: Watson *v.* Brennan, 66 N. Y. 621;} [Conway *v.* Magill, 53 Neb. 370. But the burden is on the sheriff to show that goods in the debtor's possession were not subject to levy: Second N. B. *v.* Gilbert, 174 Ill. 485.] The judgment debtor is a competent witness against the sheriff in an action for a false return of *nulla bona:* Taylor *v.* Commonwealth, 7 Bibb 356.

[3] Jones *v.* Clayton, 4 M. & S. 349.

[1] Stuart *v.* Whitaker, 2 C. & P. 100.

[2] Beynon *v.* Garratt, 1 C. & P. 154. Here the officer levied a part, and returned *nulla bona* as to the residue, and the plaintiff accepted the part levied; which was held to be a waiver of all further claim on the sheriff, the plaintiff *having been previously advised that it would have that effect. Sed quære*, and see Holmes *v.* Clifton, 10 Ad. & El 673, where it was held that the mere receipt of the money levied will be no bar to the action.

[3] Smallcombe *v.* Cross, 1 Lord Raym. 251; Kempland *v.* Macauley, 1 Peake 65.

[4] Bradley *v.* Windham, 1 Wils. 44. {So, he may show that the judgment on which the execution issued has since been reversed: Inman *v.* McNeil, 57 How. (N. Y.) Pr. 151.} [Or is void: Belcher *v.* Sheehan, 51 N. E. 19, Mass., where the action was for failure to arrest.]

[5] Clark *v.* Foxcroft, 6 Greenl. 296; 7 id. 348. And see Turvil *v.* Tipper, Latch 222, admitted in Tyler *v.* Duke of Leeds, 2 Stark. 218, and in Harrod *v.* Benton, 8 B. & C. 217. See also Pierce *v.* Jackson, 6 Mass. 242; *supra*, § 585.

[6] Warmoll *v.* Young, 5 B. & C. 660.

prove his own debt, the commission being otherwise proved.[7] And if the assignees are the real defendants, the plaintiff may give in evidence the petitioning creditor's declarations in disparagement of his claim, though he has not been called as a witness by the defendant.[8]

§ 594. **Answer to Defence of Nulla Bona.** In answer to the defence of *nulla bona*, founded on an alleged sale and assignment of his goods, by the debtor, the plaintiff may prove that the assignment or sale was fraudulent.[1] So, if the sheriff defends his return, on the ground that the debtor was an ambassador's domestic servant, the plaintiff, in reply, may show that his appointment was colorable and illegal.[2] Questions of this sort, though extremely embarrassing to the sheriff, the common law ordinarily obliges him to determine at his peril; but where there are reasonable doubts as to the property of the debtor in the goods in his possession, or which the sheriff is directed to seize, or in regard to the lawfulness of an arrest, he may refuse to act until he is indemnified by the creditor.[3] By the common law, he might also apply to the court to enlarge the time for making his return until an indemnity was given.[4] Where he is entitled to an inquisition to ascertain whether the property in goods seized on execution is in the debtor or not, the finding is not conclusive for him; and in England it has been held inadmissible in his favor, unless upon an issue whether he has acted maliciously;[5] but in the United States it has been admitted in evidence, and held conclusive in his favor, in an action by the creditor for a false return of *nulla bona*, where he acted in good faith,[6] though it is no justification, but is only admissible in mitigation of damages in an action of trespass by the true owner of the goods for illegally taking them.[7]

[7] Wright *v.* Lainson, 2 M. & W. 739. And see Brydges *v.* Walford, 6 M. & S. 42.

[8] Dowden *v.* Fowle, 4 Campb. 38.

[1] Dewey *v.* Bayntum, 6 East 257.

[2] Dellvalle *v.* Plomer, 3 Campb. 47. {So if the officer takes effects of the debtor on execution, and then releases them, upon a claim by the debtor that they are not liable to execution, but are privileged by the homestead act, the officer makes this decision at his peril, and on a suit by the plaintiff on whose execution they were taken, it will be incumbent on the officer to prove them so exempt: Sage *v.* Dickinson, 33 Gratt. (Va.) 361; Terrell *v.* State, 66 Ind. 570; } [Kennedy *v.* Smith, 99 Ala. 83.]

[3] Bond *v.* Ward, 7 Mass. 123; Marsh *v.* Gold, 2 Pick. 285; Perley *v.* Foster, 9 Mass. 112, 114; Pierce *v.* Partridge, 3 Met. 44; King *v.* Bridges, 7 Taunt. 294; Shaw *v.* Turnbridge, 2 W. Bl. 1064; Emory *v.* Davis, 4 S. C. 23.

[4] Watson on Sheriffs, p. 195; Sewell on Sheriffs, p. 285. In England, by the interpleader act, 1 & 2 W. IV. c. 58, a summary mode is provided for the speedy determination of such questions. In some of the United States, there are statutory provisions for the like purpose, and for the sheriff's protection; but in others, where the court has no power to enlarge the time of return, it being fixed by statute, it is conceived that the refusal of the party to indemnify the sheriff, in a case of reasonable doubt in regard to the service of process, would afford him a good defence to the action, or at least would reduce the damages to a nominal sum.

[5] Latkow *v.* Eamer, 2 H. Bl. 437; Glossop *v.* Poole, 3 M. & S. 175; Farr *v.* Newman, 4 T. R. 633; Sewell on Sheriffs, p. 243; Watson on Sheriffs, p. 198.

[6] Bayley *v.* Bates, 8 Johns. 185.

[7] Townsend *v.* Phillips, 10 Johns. 98.

§ 595. **Refusing to take Bail.** Where the action is for *refusing to take bail*, it is sufficient for the plaintiff to prove the arrest, the offer of sufficient bail, and the commitment. And it is not for the sheriff to say that the plaintiff did not tender a bail-bond, for it was his own duty to prepare the bond, though the party arrested is liable to pay him for so doing.[1]

§ 596. **Extortion.** (6) The sheriff is also liable to an action for *extortion;* which consists in the unlawful taking, by color of his office, either in money or other valuable thing, of what is not due, or before it is due, or of more than is due. If the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part, which ought to have been paid over to the plaintiff, is an indirect receiving and taking from him.[1] In this action the principal points to be proved by the plaintiff are, (1) the process; and if it be an execution, he must prove the judgment also on which it issued, if it is stated, though unnecessarily, in the declaration;[2] (2) the connection between the officer and the sheriff who is sued; and (3) the act of extortion. The evidence to prove the two former of these points has already been considered.[3] The last is made out by any competent evidence of the amount paid, beyond the sum allowed by law.

§ 597. **Unauthorized taking of Goods.** (7) Where the action against the sheriff is for *taking the goods of the plaintiff*,[1] he being a stranger to the process, the controversy is usually upon the validity of the plaintiff's title as derived from the judgment debtor, which is impeached on the ground that the sale or assignment by the debtor to the plaintiff was fraudulent and void as against creditors.[2] Here, if the plaintiff has never had possession of the goods, so that the sale, whatever it was, is incomplete for want of delivery, the proof of this fact alone will suffice to defeat the action. But if the transaction was completed in all the forms of law, and is assailable only on the ground of fraud, the sheriff must first entitle

[1] Milne *v.* Wood, 5 C. & P. 587.

[1] Buckle *v.* Bewes, 3 B. & C. 688.

[2] Savage *v.* Smith, 2 W. Bl. 1101, explained in 5 T. R. 498.

[3] See *supra*, §§ 582, 584. {The extortion of money of a third party, by a sheriff from the defendant, in whose hands it is, gives such third party an action against the sheriff. Thus, where a constable, in a suit against A, attached property of B., a third party, knowing it not to be the property of A, in order to compel A to pay the debt, and A then paid over *money* which belonged to B, and the officer then released the attachment of the goods, but kept the money, it was held that B had a good cause of action against him: Kelley *v.* Swift, 127 Mass. 187.}

[1] [The liability is not affected by the subsequent disposition of the goods: Jefferis *v.* Wise, 7 U. S. App. 275.]

[2] {The proof in cases where the title of the plaintiff is not derived from the judgment debtor is similar. The plaintiff must show that he owns the goods. If the officer has taken the goods on attachment it is necessary to show an effectual taking of the goods into his possession, and the question whether such a taking into possession occurred is for the jury: Stearns *v.* Dean, 129 Mass. 139. Levying on property and putting in a "keeper" is such a taking into possession: Rider *v.* Edgar, 54 Cal. 127.}

himself to impeach it, by showing that he represents a prior creditor of the debtor, and this is done by any evidence which would establish this fact in an action by the creditor against the debtor himself, with the additional proof of the process in the sheriff's hands, in favor of that creditor, under which the goods were seized.[3] This evidence has already been considered, in treating of actions for not executing process, and for an escape.[4] It is only necessary here to add, that, when the sheriff justifies under final process, he need not show its return, unless some ulterior proceeding is requisite to complete the justification; for, being final, and executed, the creditor has had the effect of his judgment; but in the case of mesne process, as the object of the writ is to enforce the appearance of the party, and to lay the foundation of further proceedings, the officer will not be permitted to justify under it, after it is returnable, unless he shows that he has fully obeyed it in making a return.[5] The proofs in regard to fraud are considered as foreign to the design of this work.[6]

§ 598. **Competency of Witnesses.** In regard to the *competency of witnesses* for and against the sheriff, in addition to what has already been stated respecting his deputies and the execution creditor,[1] it may here further be observed, that, where the issue is upon a fraudulent conveyance by the judgment debtor, his declarations, made at the time of the conveyance, are admissible as part of the *res gestæ;* and that, where the question is wholly between his own vendee and the attaching creditor, his interest being balanced, he is a competent witness for either party;[2] but where a question remains between him and his vendee as to the title, he is not a competent witness for the sheriff to impeach it.[3] A surety is a competent wit-

[3] Truitt *v.* Revill, 4 Harringt. 71; Brown *v.* Bissett, 1 N. J. 46.

[4] *Supra*, §§ 584, 589. And see Martyn *v.* Podger, 5 Burr. 2631, 2633; Lake *v.* Billers, 1 Ld. Raym. 733; Ackworth *v.* Kempe, 1 Doug. 40; Damon *v.* Bryant, 2 Pick. 411; Glasier *v.* Eve, 1 Bing. 209. The recital of the writ, in the sheriff's warrant to his officer, is some evidence of the precept in his hands: Bessey *v.* Windham, 6 Ad. & El. N. S. 166.

[5] Rowland *v.* Veale, Cowp. 18; Cheasley *v.* Barnes, 10 East 93; Freeman *v.* Bluett, 1 Salk. 410; 1 Ld. Raym. 633, 634; Clark *v.* Foxcroft, 6 Greenl. 296; Russ *v.* Butterfield, 6 Cush. 243; Roberts *v.* Wentworth, 5 Id. 192. See Wilder *v.* Holden, 24 Pick. 8, 12. {"The general doctrine is well established, that, if a sheriff seizes goods under a writ which it is his duty to return, he has no justification unless he discharges that duty": Hoar, J., in Williams *v.* Babbitt, 14 Gray (Mass.), 141.} [In attachment proceedings the sheriff must show all the jurisdictional facts by the record: Sears *v.* Lydon, 49 P. 122, Idaho; Hakanson *v.* Brodke, 53 N. W. 1033, Neb.]

[6] See Roberts on Fraudulent Conveyances, pp. 542–590, 2 Kent Comm. 532–536, where this subject is fully treated. Where the goods were taken on execution, and were found in the possession of the judgment debtor and are replevied by a person claiming title as owner of them, the burden of proof is on the plaintiff in replevin to show his own title; but if they were taken out of the plaintiff's possession, the burden of proof is on the officer, to show that they were the property of the judgment debtor: Merritt *v.* Lyon, 3 Barb. S. C. 110.

[1] *Supra*, §§ 583, 593.

[2] *Ante*, Vol. I. §§ 397, 398.

[3] Bland *v.* Ansley, 2 New Rep. 331. In this case, the debtor had sold a house to

ness for the sheriff, in an action for taking insufficient sureties.[4] The owner of goods, who has forcibly rescued them out of the sheriff's hands, is also a competent witness for the sheriff, in an action for falsely returning *nulla bona* on an execution; for such return precludes the sheriff from maintaining an action against him for the rescue.[5]

§ 599. **Damages.** The *damages* to be recovered in an action against the sheriff will, in general, be commensurate with the extent of the injury.[1] But in debt, for an escape on execution, the measure of damages is the amount of the judgment, without abatement on account of the poverty of the debtor, or any other circumstances.[2] And where the sheriff has falsely returned bail, when he took none, and an action is brought against him for refusing to deliver over the bail-bond to the creditor, he is liable for the whole amount of the judgment, and cannot show, in mitigation of damages, that the debtor was unable to pay any part of the debt; for this would be no defence for the bail themselves, and the sheriff, by his false return, has placed himself in their situation.[3] But in other cases, though the judgment recovered by the plaintiff against the

the plaintiff, but whether he sold the goods in it also was a matter in dispute between them; and he was therefore held incompetent to testify in favor of his own claim.

[4] I Saund. 195 *f*, note by Williams.

[5] Thomas *v.* Pearse, 5 Price 547. {So the defendant, on whom the execution was levied, is competent as a witness in an action against the officer who levied the execution, for the money collected: Granstaff *v.* Ridgeley, 30 Gratt. (Va.) 1.}

[1] {So, in an action against him for neglect to levy on land, the measure of damages is the amount that would have come to the plaintiff on a sale of the land which ought to have been levied on: Harris *v.* Murfree, 54 Ala. 161.

And in an action for neglecting to return an execution, if it appears that there was little available property of the judgment debtor, a judgment for the whole amount of the execution is too large: Dolson *v.* Saxton, 18 N. Y. Supreme Ct. 565.

But in such cases, the burden of proof is on the officer to show that the loss is thus limited. The presumption is, unless the contrary appears in the course of the evidence, that the plaintiff suffered a loss equal to the whole amount of the execution: Moore *v.* Floyd, 4 Oreg. 101.

So in an action against an officer for taking a bad replevin bond, the plaintiff can recover only the damages which he has actually suffered by the insufficiency of the sureties: Robinson *v.* People, 8 Ill. App. 279.}

[2] Hawkins *v.* Plomer, 2 W. Bl. 1048; Alsept *v.* Eyles, 2 H. Bl. 108, 113; *supra*, § 589; Bernard *v.* Commonwealth, 4 Litt. 150; Johnson *v.* Lewis, 1 Dana 183; Shewell *v.* Fell, 3 Yeates 17; 4 id. 47. Interest, from the date of the writ, may also be computed: Whitehead *v.* Varnum, 14 Pick. 523. In some of the United States, the rule of the common law, that the whole sum must be given, has been altered by statutes abolishing the action of debt for an escape; and the rule is never applied, in any State, to an action of debt upon the sheriff's bond. {In New York, the Civil Code, § 158, provides in substance that in all cases where the debtor is committed on final process and escapes, the sheriff shall be answerable for the sum for which he was committed, and restricts evidence in mitigation of damages to cases where the prisoner was committed on mesne process: Dunford *v.* Weaver, 21 Hun (N. Y.) 349; Smith *v.* Knapp, 30 N. Y. 592; Ledyard *v.* Jones, 3 Seld. (N. Y.) 550.

This is probably the law generally, though in some cases the language of the court tends towards drawing a distinction between a negligent escape and a voluntary escape, and allowing the defendant in the former cases to show the insolvency of the debtor in mitigation of damages, and not in the latter: State *v.* Mullen, 50 Ind. 598; State *v.* Hamilton, 33 id. 502. Cf. Crane *v.* Stone, 15 Kan. 94.}

[3] Simmons *v.* Bradford, 15 Mass. 82.

debtor is *prima facie* evidence of the extent of the injury which the plaintiff has sustained by the officer's breach of duty in regard to the service and return of the process, yet it is competent for the officer to prove, in mitigation of the injury, any facts showing that the plaintiff has suffered nothing, or but little, by his *unintentional* default or breach of duty.[4] The jury may give more than the amount of the judgment, if they believe that the wrong was wilful on the part of the officer, by adding to it the incidental expenses of the plaintiff, and the costs not taxable. On the other hand, if it should be apparent that the wrong done by the officer was not the result of a design to injure, and that by it the plaintiff is not placed in a worse situation than he would have been in, had the officer done his duty, the jury will be at liberty, and it will be their duty, to see that a humane or mistaken officer is not made to pay greater damages than the party has actually suffered by his wrong.[5] In cases, therefore, of the latter description, the sheriff has been permitted to show, in mitigation of damages, that the debtor was poor, and unable to pay the debt;[6] or that he might still be arrested as easily as before, the sheriff having omitted to arrest him while sick and afflicted;[7] or that, for any other reason, the plaintiff has not been damnified.[8] If the action is for an escape on mesne process, and the sheriff afterwards had the debtor in custody, the plaintiff cannot maintain the action, without proof of actual damages.[9] In the action for taking insufficient sureties, the plaintiff can recover no more against the sheriff than he could have recovered against the sureties.[10]

[4] Evans *v.* Manero, 8 M. & W. 463, 473, per Lord Abinger, C. B.; Williams *v.* Mostyn, 4 M. & W. 145. And see Weld *v.* Bartlett, 10 Mass. 470; Gerrish *v.* Edson, 1 N. H. 82; Burrell *v.* Lithgow, 2 Mass. 526; Smith *v.* Hart, 2 Bay 395.

[5] Weld *v.* Bartlett, 10 Mass. 470, 473, per Parker, J.

[6] Brooks *v.* Hoyt, 6 Pick. 468.

[7] Weld *v.* Bartlett, 10 Mass. 470.

[8] Baker *v.* Green, 2 Bing. 317; Potter *v.* Lansing, 1 Johns. 215; Russell *v.* Turner, 7 Johns. 189; Young *v.* Hosmer, 11 Mass. 89; Nye *v.* Smith, ib. 188; Eaton *v.* Ogier, 2 Greenl. 46; [Lowenberg *v.* Jefferies, 74 F. 385; Frankhouser *v.* Neally, 54 Kan. 744;] {Shippen *v.* Curry, 3 Met. (Ky.) 184. But in Cassin *v.* Marshall, 18 Cal. 689, in an action against a sheriff for an illegal levy, although it appears that the plaintiff was himself about to have sold the goods levied on at public auction, it was held that evidence offered by the defendant to show that the property, when sold by himself at sheriff's sale, brought full and fair auction prices, and what those prices actually were, and that the sale was by a competent auctioneer, was properly rejected.} [Cf. Cambell *v.* Anderson, 107 Ala. 656; Isaacs *v.* McLean, 106 Mich. 79.]

[9] Planck *v.* Anderson, 5 T. R. 37, confirmed in Williams *v.* Mostyn, 4 M. & W. 145, 154, where Baker *v.* Green, 2 Bing. 317, is, as to this point, overruled. See also Bales *v.* Wingfield, 4 Ad. & El. N. S. 580.

[10] Evans *v.* Brander, 2 H. Bl. 547, confirmed in Baker *v.* Garratt, 3 Bing. 56.

TENDER.

§ 600. **Plea of Tender.** The plea of *tender* admits the existence and validity of the debt or duty, insisting only on the fact that there has been an offer to pay or perform it.[1] And though the contract be one which the Statute of Frauds requires to be in writing, yet the plea of tender dispenses with the necessity of proving it.[2] The general proposition maintained in the plea is, that the defendant has done all that was in the power of any debtor alone to do, towards the fulfilment of his obligation; leaving nothing to be done towards its completion but the act of acceptance on the part of the creditor. If the tender was of money, it is pleaded with an averment that the defendant was always and still is ready to pay it,[3] and the money is produced in court. But if the obligation was for the delivery of specific chattels, other than money, a plea of the tender alone, without an averment of subsequent readiness to perform, is sufficient; the rule requiring only the averment of an offer and readiness to do that which is a discharge of the obligation.[4]

§ 601. **Money.** To support the issue of a tender of *money*, it is necessary for the defendant to show that the precise sum,[1] or more, was actually produced in current money,[2] such as is made a legal tender by statute, and actually offered to the plaintiff.[3] But, if a

[1] {But it admits the debt only to the amount of the tender: Eaton *v.* Wells, 82 N. Y. 576. So it does in tort, if there be but one cause of action set out in the declaration: Bacon *v.* Charlton, 7 Cush. (Mass.) 581, 583. The admission binds the defendant, and the plaintiff has a right to have judgment entered for him to that amount, but not for costs. If the money has not been paid into court, the tender is invalid, yet the admissions of the plea still bind the defendant, and the plaintiff may have judgment for the amount of the tender and costs: Monroe *v.* Chaldeck, 78 Ill. 429; Pillsbury *v.* Willoughby, 61 Me. 274.}

[2] Middleton *v.* Brewer, 1 Peake 15.

[3] [As to what constitutes readiness, see Middle States, etc. Co. *v.* Hagerstown Co., 82 Md. 506; Cheney *v.* Bibby, 36 U. S. App. 720; McCalley *v.* Otey, 99 Ala. 584.]

[4] 2 Roll. Abr. 523; Tout temps prist, A. pl. 1, 3, 5; Carley *v.* Vance, 17 Mass. 392.

[1] A tender of part of an entire demand is inoperative: Dixon *v.* Clark, 5 M. G. & S. 365; 5 Dowl. & L. 155; Smith *v.* Anders, 21 Ala. 782; [San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588.]

[2] [Cady *v.* Case, 10 Wash. 140.]

[3] The current money of the United States, which is made a legal tender by statute, consists of all the gold and silver coins of the United States; together with Spanish milled dollars and their parts, at the rate of one hundred cents for a dollar, weighing not less than seventeen pennyweights and seven grains; the dollars of Mexico, Peru, Chili, and Central America, of not less weight than four hundred and fifteen grains each, at the same rate; those restamped in Brazil, of the light weight, of not less fineness than ten ounces and fifteen pennyweights of pure silver to the pound troy of twelve ounces of standard silver; and the five-franc pieces of France, of not less fineness than

tender is made in bank-notes, it is good, if the want of its being in current coins is waived;[4] and if the creditor places his refusal to receive the money on some other ground, or even if he makes no objection to the tender on the express ground that it is in bank-notes, it is held a waiver of this objection.[5] So if the tender is made in a bank-check,[6] which is refused because it is not drawn for so much as the creditor demands,[7] it is a good tender.[8]

§ 602. **Same Subject.** It must also appear, that the money, or other thing tendered, was *actually produced* to the creditor. It must be in sight, and capable of immediate delivery, to show, that if the creditor were willing to accept it, it was ready to be paid.[1] If it be in bags, held under the party's arm, and not laid on the table or otherwise actually offered to the creditor, it is not sufficient.[2] And if it be in the debtor's hand, and the sum is declared, and it is offered by way of tender, it is good, though it be in bank-notes, twisted in a roll, and not displayed to the creditor.[3] But if the sum is not declared,[4] or the party says he will pay so much, putting his hand in his pocket to take it, but before he can produce it the creditor leaves the room,[5] it is not a good tender. Great importance

ten ounces and sixteen pennyweights of pure silver to the like pound troy, and weighing not less than three hundred and eighty-four grains each, at ninety-three cents each. Stat. 1837, c. 3, §§ 9, 10; Stat. 1834, c. 71, § 1; Stat. 1806, c. 22, § 2. Foreign gold coins ceased to be a legal tender after November 1, 1819, by Stat. 1819, c. 507, § 1. Copper cents and half-cents are established as part of the currency, and by implication made a legal tender, by Stat. 1792, c. 39, § 2. A tender of the creditor's own promissory note, due to the debtor, is not good: Cary *v.* Bancroft, 14 Pick. 315; Hallowell and Augusta Bank *v.* Howard, 13 Mass. 235.

[4] {A contract may call for payment in any kind of currency, which the parties may agree on and indicate in the contract, and a tender of such currency is a valid tender; but when the contract has been broken and judgment is obtained on it, the judgment must be paid in legal tender: White *v.* Prigmore, 2 Ark. 208. Thus, when a rent was reserved by deed, payable in Spanish milled dollars, the deed being dated 1808, a tender of the rent in such dollars in 1890 was held good, even though the dollars had then depreciated very much in value: Johnson *v.* Ash, 142 Pa. St. 46. The fact that what is legal tender at the time the money is due under the contract was not legal tender at the time of the formation of the contract does not render the tender invalid: Black *v.* Lusk, 69 Ill. 70. So held of United States treasury notes: Longworth *v.* Mitchell, 26 Ohio St. 334.}

[5] Wright *v.* Reed, 3 T. R. 554; Snow *v.* Perry, 9 Pick. 542; Brown *v.* Saul, 4 Esp. 267; Polglase *v.* Oliver, 2 C. & J. 15; Warren *v.* Mains, 7 Johns. 476; Towson *v.* Havre de Grace Bank, 6 H. & J. 53; Coxe *v.* State Bank, 3 Halst. 72; Bank of the U. S. *v.* Bank of Georgia, 10 Wheat. 333; [Koehler *v.* Buhl, 94 Mich. 496.]

[6] [An order on a third person is not sufficient: Hall *v.* Appel, 67 Conn. 585.]

[7] [Or for any other reason: McGrath *v.* Gegner, 26 A. 502, Md.]

[8] Jones *v.* Arthur, 4 Jur. 859; s. c. 8 Dowl. P. C. 442. {The effect of a refusal by the creditor of the sum, if it is properly tendered, is to relieve the debtor from any subsequent interest and costs: Gracy *v.* Potts, 4 Baxt. (Tenn.) 395; King *v.* Finch, 60 Ind. 420; Hamlett *v.* Tallman, 30 Ark. 505.}

[1] Thomas *v.* Evans, 10 East 101; Glasscott *v.* Day, 5 Esp. 48; Dickinson *v.* Shee, 4 id. 68; Bakeman *v.* Pooler, 15 Wend. 637; Kraus *v.* Arnold, 7 Moore 59; Breed *v.* Hurd, 6 Pick. 356; Newton *v.* Galbraith, 5 Johns. 119.

[2] Bull. N. P. 155; Wade's Case, 5 Co. 115.

[3] Alexander *v.* Brown, 1 C. & P. 288.

[4] Ibid.

[5] Leatherdale *v.* Sweepstone, 3 C. & P. 342.

is attached to the production of the money, as the sight of it might tempt the creditor to yield, and accept it.[6]

§ 603. **Same Subject.** The *production* of the money is *dispensed with*, if the party is ready and willing to pay the sum, and is about to produce it, but is prevented by the creditor's declaring that he will not receive it.[1] But his bare refusal to receive the sum proposed, and demanding more, is not alone sufficient to excuse an actual tender.[2] The money or other things must be actually at hand, and ready to be produced immediately, if it should be accepted; as, for example, if it be in the next room, or upstairs; for if it be a mile off, or can be borrowed and produced in five minutes, or, being a bank-check, it be not yet actually drawn, it is not sufficient.[3] The question whether the production of the money has been dispensed with is a question for the jury; and if they find the facts specially, but do not find the fact of dispensation, the court will not infer it.[4]

§ 604. **Same Subject.** If the debtor *tendered a greater sum* than was due, it must appear that it was so made as that the creditor might take therefrom the sum that was actually due to him; as, if twenty dollars were tendered, when only fifteen were due; or else it must appear that the debtor remitted the excess.[1] And therefore it has been held, that, where the tender is to be made in bank-notes, a tender of a larger note than the sum due is bad.[2] But if the creditor does not object to it on that account, but only demands a larger sum, the tender will be good, though the debtor asked for change.[3]

[6] Finch *v.* Brook, 1 Bing. N. C. 253, per Vaughan, J.

[1] Black *v.* Smith, 1 Peake 88; Read *v.* Goldring, 2 M. & S. 86; Barker *v.* Packenhorn, 2 Wash. C. C. 142; Calhoun *v.* Vechio, 3 Wash. 165; Blight *v.* Ashley, 1 Pet. C. C. 15; Slingerland *v.* Morse, 8 Johns. 474; Bellinger *v.* Kitts, 6 Barb. S. C. 273; {Guthman *v.* Kearn, 3 Neb. 502; Hazard *v.* Loring, 10 Cush. (Mass.) 267, 269; Parker *v.* Perkins, 8 id. 319; Meserole *v.* Archer, 3 Bosworth (N. Y.) 376. See Brown *v.* Simons, 45 N. H. 211. An offer of part of the money due does not constitute tender; Strusguth *v.* Pollard, 62 Vt. 158.}

[2] Dunham *v.* Jackson, 6 Wend. 22.

[3] Harding *v.* Davies, 2 C. & P. 77; Dunham *v.* Jackson, 6 Wend. 22, 33, 34; Breed *v.* Hurd, 6 Pick. 356. And see Searight *v.* Calbraith, 4 Dall. 325, 327; Fuller *v.* Little, 7 N. H. 535; Brown *v.* Gilmore, 8 Greenl. 107. [In Smith *v.* Old Dominion Ass'n, 119 N. C. 257, the court held that a statement by the debtor that he has the money in the bank in the same building, and is ready to pay the amount due, is a good tender, where the creditor refuses to receive the money.]

[4] Finch *v.* Brook, 1 Bing. N. C. 253. {When a mortgagor, upon the mortgage becoming due, paid the interest and expressed his readiness to pay the principal, but had not the money all in cash, part being in the form of bank-checks which the mortgagee refused to accept in payment; and the mortgagor two days afterwards returned with the amount of the mortgage in legal tender, but the mortgagee refused to allow him to stop and pay it, and thrust him out of doors, and the mortgagor then deposited the money in the bank, it was held to constitute a sufficient tender of the amount of the mortgage to stop the running of interest subsequent thereto. In the note to this case the authorities on what is the question of a good tender are fully collected and examined: Sharp *v.* Todd, 38 N. J. Eq. 324.}

[1] Wade's Case, 5 Co. 115; Douglas *v.* Patrick, 3 T. R. 683; Hubbard *v.* Chenango Bank, 8 Cowen 88, 101; Dean *v.* James, 4 B. & Ad. 546; Bevan *v.* Rees, 7 Dowl. P. C. 510; Thorpe *v.* Burgess, 4 Jur. 799; 8 Dowl. P. C. 603.

[2] Betterbee *v.* Davis, 3 Campb. 70.

[3] Black *v.* Smith, 1 Peake 88; Saunders *v.* Graham, Gow 121; Cadman *v.* Lub-

§ 605. **Tender must be absolute.** It must also appear that the tender was *absolute:*[1] for if it be coupled with a condition, as, for example, if a larger sum than is due be offered, and the creditor be required to return the change;[2] or if the sum be offered in full of all demands;[3] or if it be on condition that the creditor will give a receipt or a release;[4] or if it be offered by way of boon, with a denial that any debt is due;[5] or if any other terms be added which the acceptance of the money would cause the other party to admit, — the tender is not good.[6] But if the creditor places his refusal to receive the money on some other ground than because it is coupled with a condition, this is evidence of a waiver of that objection, to be considered by the jury ;[7] whose province it is to decide whether a tender was made conditionally or not.[8] If there be several debts

bock, 5 D. & R. 289. [Where objection to the tender is made on other grounds, the amount cannot afterwards be questioned: Hill *v.* Carter, 101 Mich. 158.]

[1] [Jones *v.* Shuey, 40 P. 17, Cal.]

[2] Robinson *v.* Cook, 6 Taunt. 336; Betterbee *v.* Davis, 3 Campb. 70.

[3] Sutton *v.* Hawkins, 8 C. & P. 259; Mitchell *v.* King, 6 id. 237; Cheminant *v.* Thornton, 2 id. 50; Strong *v.* Harvey, 3 Bing. 304; Evans *v.* Judkins, 4 Campb. 156; Wood *v.* Hitchcock, 20 Wend. 47; Robinson *v.* Ferreday, 8 C. & P. 752; {Noyes *v.* Wyckoff, 114 N. Y. 204. Where the defendant offered to pay a promissory note if an action entirely unconnected with the note was discontinued, it was held bad: Rose *v.* Duncan, 49 Ind. 269.

It has been held to be a conditional tender where the defendant showed the plaintiff the money and told him he could have it for his claim: Tompkins *v.* Batie, 11 Neb. 147. A conditional tender, as it amounts to no tender, will not prevent the accruing of subsequent interest: Flake *v.* Nuse, 51 Tex. 98; [Chapin *v.* Chapin, 36 N. E. 746, Mass.]

So, if the amount due on a note is tendered on condition the note is surrendered: Storey *v.* Krewson, 55 Ind. 397. Where a tender is relied upon by a person to stop interest and prevent costs, it must be kept good by him and paid into court when he seeks affirmative relief; and while the tender must be unconditional in most respects, yet it may be accompanied by such conditions as are incident to the debt of which payment is tendered. Thus, a mortgagor, when he tenders payment of the mortgage debt, has a right to make it conditional upon the execution of the satisfaction of the mortgage by the mortgagee: Halpin *v.* Phenix Insurance Co., 118 N. Y. 165. And a tender of money in payment of any written instrument may be made conditional upon the surrender of the instrument: Bailey *v.* Buchanan County, 115 id. 297.}

[4] Ryder *v.* Ld. Townsend, 7 D. & R. 119, per Bayley, J.; Laing *v.* Meader, 1 C. & P. 257; Griffith *v.* Hodges, ib. 419; Thayer *v.* Brackett, 12 Mass. 450; Glasscott *v.* Day, 5 Esp. 48; Loring *v.* Cook, 3 Pick. 48; Hepburn *v.* Auld, 1 Cranch 321; Higham *v.* Baddely, Gow 213. But see Richardson *v.* Jackson, 8 M. & W. 298; Finch *v.* Miller, 5 M. G. & S. 428; Richardson *v.* Boston Chem. Lab., 9 Met. 42; [Chapin *v.* Chapin, 36 N. E. 746, Mass.; Moore *v.* Norman, 52 Minn. 83; Doty *v.* Crawford, 39 S. C. 1.]

[5] Simmons *v.* Wilmott, 3 Esp. 94, per Ld. Eldon. [But a tender under protest without conditions is good: Greenwood *v.* Sutcliffe, 1892, 1 Ch. 1.]

[6] Hastings *v.* Thorley, 8 C. & P. 573, per Ld. Abinger; Huxham *v.* Smith, 2 Campb. 21; Jennings *v.* Major, 8 C. & P. 61; Brown *v.* Gilmore, 8 Greenl. 187. But, if the condition be that the creditor shall do an act which he is bound by law to do upon payment of the money, it is a good tender: Saunders *v.* Frost, 5 Pick. 259, 270. A tender made "under protest" is absolute, and a good tender: Manning *v.* Lunn, 2 C. & K. 13. So, if a tender is made as the whole that is due, it is sufficient: Henwood *v.* Oliver, 1 Ad. & El. N. S. 409; Ball *v.* Parker, 2 Dowl. N. S. 345; Bowen *v.* Owen, 11 Jur. 972; 11 Ad. & El. N. S. 130.

[7] *Supra*, §§ 601, 604; Richardson *v.* Jackson, 8 M. & W. 298; s. c. 9 Dowl. P. C. 715; Eckstein *v.* Reynolds, 7 Ad. & El. 80; Cole *v.* Blake, 1 Peake 179.

[8] Marsden *v.* Goode, 2 C. & K. 133; Eckstein *v.* Reynolds, 7 Ad. & El. 80.

due from divers persons to the same creditor, and a gross sum be tendered for all the debts, this is not a good tender for any one of them.[9] But if there be several creditors, who are all present, and the debtor tenders a gross sum to them all, sufficient to satisfy all their demands, which they all refuse, insisting that more is due, it is a good tender to each one.[10]

§ 606. **To whom Tender to be made.** The tender must be *made to the creditor* himself,[1] or to his *agent, clerk, attorney,* or *servant,* who has authority to receive the money.[2] A tender to the attorney at law, to whom the demand has been intrusted for collection, or to his clerk, or other person having charge of his office and business in his absence, is good, unless the attorney disclaims his authority at the time.[3] And generally, if a tender be made to a person whom the creditor permits to occupy his place of business, in the apparent character of his clerk or agent, it is a good tender to the creditor.[4] So, if it is sent by the debtor's house servant, who delivers it to a servant in the creditor's house, by whom it is taken in, and an answer returned as from the master, this is admissible evidence to the jury in proof of a tender.[5]

§ 607. **Time of Tender.** As to the *time of tender,* it must, in all cases, by the common law, be made at the time the money became due ;[1] a tender made after the party has broken his contract being too late, and therefore not pleadable in bar of the action ;[2] though it stops the interest, and, by leave of court, the money may be brought in upon the common rule.[3] But where the defendant is

[9] Strong *v.* Harvey, 3 Bing. 304.

[10] Black *v.* Smith, 1 Peake 88.

[1] [Tender to one of two joint creditors is good : Flanigan *v.* Seelye, 53 Minn. 23.]

[2] Goodland *v.* Blewith, 1 Campb. 477. If the clerk or servant is directed not to receive the money, because his master has left the demand with an attorney for collection, still the tender to him is a good tender to the principal: Moffat *v.* Parsons, 5 Taunt. 307.

[3] Wilmot *v.* Smith, 3 C. & P. 453 ; Crozer *v.* Pilling, 4 B. & C. 29 ; Bingham *v.* Allport, 1 Nev. & Man. 398 ; [Salter *v.* Shove, 60 Minn. 483.] It is not necessary to tender also the amount of the attorney's charge for a letter to the debtor, demanding payment : Kirton *v.* Braithwaite, 1 M. & W. 310. {Notwithstanding the disclaimer, if he be in fact the attorney of the creditor at the time, it is a good tender : McIniffe *v.* Wheelock, 1 Gray (Mass.) 600, 604. A tender of the amount due, and the cost of the writ, if a writ has been made, is sufficient, although the writ has been sent away for service, if there is a reasonable time to recall it before it is served: Call *v.* Lothrop, 39 Me. 434.}

[4] Barrett *v.* Deere, 1 M. & M. 200.

[5] Anon., 1 Esp. 349.

[1] [A tender before that time is bad : Moore *v.* Kime, 43 Neb. 517.]

[2] Hume *v.* Peploe, 8 East 168, 170 ; City Bank *v.* Cutter, 3 Pick. 414, 418 ; Suffolk Bank *v.* Worcester Bank, 5 id. 108 ; Dewey *v.* Humphrey, ib. 187 ; Giles *v.* Harris, 1 Ld. Raym. 254 ; Savery *v.* Goe, 3 Wash. 140 ; Gould *v.* Banks, 8 Wend. 562. *Aliter* in Connecticut : Tracy *v.* Strong, 2 Conn. 659. In several of the United States provision has been made by statute for a tender of the debt and costs, even after action brought : Rev. Stat. Massachusetts, c. 100, §§ 14, 15 ; Rev. Stat. Maine, p. 767. And see Hay *v.* Ousterout, 3 Ham. (Ohio) 585.

[3] {The strict rules of the common law in regard to a tender *ad diem* do not apply at the present day to the offer of payment under a contract necessary to save the rights of action : Duchemin *v.* Kendall, 149 Mass. 174. The costs of the plaintiff, if

not *in mora*, as, for example, if no day of payment was agreed upon, and the money has not been demanded, or if amends are to be offered for an involuntary trespass, proof of a tender, made at any time before the suit is commenced, is sufficient to support the plea of tender.[4] In the case of damage-feasant, a tender is good, if made at any time before the beasts are impounded, though it be after they were distrained.[5]

§ 608. **Subsequent Demand and Refusal.** The plaintiff may avoid the plea of a tender of money, by replying a *subsequent demand and refusal;* the burden of proving which, if traversed, lies upon him. And he must show that the demand was made of the precise sum mentioned in the replication, a variance herein being fatal.[1] He must also prove that the demand was made either by himself in person, or by some one authorized to receive the money and give a discharge for it.[2] A demand made by letter, to which an answer promising payment was returned, was in one case held sufficient;[3] but this has since been doubted, on the ground that the demand ought to be so made as to afford the debtor an opportunity of immediate compliance with it.[4] If there be two joint debtors, proof of a demand made upon one of them will support the allegation of a demand upon both.[5]

§ 609. **Tender of Specific Articles.** *Specific articles* are to be

the tender is made after some costs have been incurred by him in prosecuting his claim, should also be offered by the defendant: Eaton *v.* Wells, 22 Hun (N. Y.) 123. Where the tender is made with a view to barring costs and interest, the amount tendered need not be as large as the amount claimed by the plaintiff. It is only necessary that it should be as large as the sum which the plaintiff ultimately recovers, *including* the costs. If it is smaller than this, it will not be effectual: Wright *v.* Behrens, 39 N. J. L. 413.

The plea of tender must be accompanied with a *profert in curia:* [Felker *v.* Hazelton, 38 A. 1051, N. H.;] but the failure to pay money into court under a plea of tender is not a traversable part of the plea, to be tried as a question of fact to the jury. It is an irregularity of practice: Storer *v.* McGaw, 11 Allen (Mass.) 527. The money should regularly be brought into court not later than the time of filing the plea: Gilkeson *v.* Smith, 15 W. Va. 44; Pillsbury *v.* Willoughby, 61 Me. 274; [Neldon *v.* Roof, 38 A. 429, N. J. Eq.] The plaintiff has a right to have the money at any time; and if he demands it and it is refused, proof of this will defeat the plea of tender: Carr *v.* Miner, 92 Ill. 604. A tender in order to be good must be accompanied by payment in the court on the first day of the term, by the statutes of the State of Maine: Gilpatrick *v.* Ricker, 82 Me. 185. The rule that when the entire sum secured by a mortgage is due, the tender of the amount unpaid at any time before a sale in foreclosure extinguishes the lien, though leaving the debt unaffected, and that it is not necessary to keep the tender good or to pay the money into court, in order to keep the lien extinguished, is stated in the case of Werner *v.* Tuch, 127 N. Y. 222. See, also, Cass *v.* Higenbotam, 100 N. Y. 248.] [*Profert in curia* is not necessary on filing a bill; an offer to bring in the money when the court directs is sufficient: Cheney *v.* Bilby, 36 U. S. App. 720.]

[4] Watts *v.* Baker, Cro. Car. 264.

[5] Pilkington *v.* Hastings, Cro. El. 813; The Six Carpenters' Case, 8 Co. 147.

[1] Rivers *v.* Griffiths, 5 B. & Ald. 630; Spybey *v.* Hide, 1 Campb. 181; Coore *v.* Callaway, 1 Esp. 115.

[2] Coles *v.* Bell, 1 Campb. 478, n.; Coore *v.* Callaway, 1 Esp. 115; *supra*, § 606.

[3] Hayward *v.* Hague, 4 Esp. 93.

[4] Edwards *v.* Yeates, Ry. & M. 360.

[5] Peirse *v.* Bowles, 1 Stark. 323.

delivered at some particular *place*, and not, like money, to the person of the creditor wherever found. If no place is expressly mentioned in the contract, the place is to be ascertained by the intent of the parties, to be collected from the nature of the case, and its circumstances.[1] If the contract is for the delivery of goods, from the vendor to the vendee on demand, the vendor being the manufacturer of the goods, or a dealer in them, and no place being expressly named, the manufactory or store of the vendor will be understood to be the place intended, and a tender there will be good. And if the specific articles are at another place at the time of sale, the place where they are at that time is generally to be taken as the place of delivery.[2] But where the contract is for the payment of a debt in specific articles, which are *portable*, such as cattle, and the like, at a time certain, but without any designation of the place, in the absence of other circumstances from which the intent of the parties can be collected, the creditor's place of abode at the date of the obligation will be understood as the place of payment.[3] And on the same principle of intention, a note given by a farmer, payable in "*farm produce*," without any designation of time or place, is payable at the debtor's farm. Indeed the same rule governs, in the case of a similar obligation to pay or deliver any other portable specific articles on demand; for the obligation being to be performed on demand, this implies that the creditor must go to the debtor to make the demand, before the latter can be in default.[4] But wherever specific articles are tendered, if they are part of a larger quantity, they should be so designated and set apart as that the creditor may see and know what is offered to be his own.[5]

§ 610. **Same Subject.** If the goods are *cumbrous*, and the place of delivery is not designated, nor to be inferred from collateral circumstances, the presumed intention is that they were to be delivered at any place which the creditor might reasonably appoint; and accordingly it is the duty of the debtor to call upon the creditor, if he is within the State, and request him to appoint a place for the delivery of the goods. If the creditor refuses, or, which is the same in effect, names an unreasonable place, or avoids, in order to prevent the notice, the right of election is given to the debtor; whose duty it is to deliver the articles at a reasonable and convenient place, giving previous notice thereof to the creditor if practicable. And if the creditor refuses to accept the goods when properly tendered, or

[1] 2 Kent Comm. 505, 506; Poth. Obl. No. 512; Goodwin *v.* Holbrook, 4 Wend. 377; Howard *v.* Miner, 2 Applet. 325.

[2] Ibid.

[3] Ibid.; Chipman on Contracts, pp. 24–26; Goodwin *v.* Holbrook, 4 Wend. 377, 380.

[4] 2 Kent Comm. 508; Chipman on Contracts, pp. 28–30, 49; Lobdell *v.* Hopkins, 5 Cowen 516; Goodwin *v.* Holbrook, 4 Wend. 380.

[5] Veazey *v.* Harmony, 7 Greenl. 91.

is absent at the time, the property, nevertheless, passes to him, and the debtor is forever absolved from the obligation.[1]

§ 611. **Change of Domicile.** By the Roman law, where the house or shop of the creditor was designated or ascertained as the intended place of payment, and the creditor afterwards and before payment changed his domicile or place of business to another town or place, less convenient to the debtor, the creditor was permitted to require payment at his new domicile or place, making compensation to the debtor for the increased expense and trouble thereby caused to him. But by the law of France, the debtor may in such case require the creditor to nominate another place, equally convenient to the debtor; and, on his neglecting so to do, he may himself appoint one; according to the rule, that *nemo, alterius facto, prægravari debet.*[1] Whether, in the case of articles not portable, but cumbrous, such removal of domicile may, at common law, be considered as a waiver of the place, at the election of the debtor, does not appear to have been expressly decided.[2]

§ 611 *a*. **Mode of Tender of Goods.** In regard to the *manner of tender of goods*, it is well settled that a tender of goods does not mean an offer of packages containing them; but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called upon to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained.[1]

[1] 2 Kent Comm. 507–509; Co. Lit. 210 *b*; Aldrich *v.* Albee, 1 Greenl. 120; Howard *v.* Miner, 2 Applet. 325; Chipman on Contracts, pp. 51–56; Lamb *v.* Lathrop, 13 Wend. 95. Whether, if the creditor is out of the State, no place of delivery having been agreed upon, this circumstance gives to the debtor the right of appointing the place, *quære;* and see Bixby *v.* Whitney, 5 Greenl. 192; in which, however, the reporter's marginal note seems to state the doctrine a little broader than the decision requires, it not being necessary for the plaintiff, in that case, to aver any readiness to receive the goods, at any place, as the contract was for the payment of a sum of money, in specific articles, on or before a day certain.

[1] Poth. on Oblig. Nos. 238, 239, 513.

[2] See Howard *v.* Miner, 2 Applet. 325, 330. {Where a person designedly absents himself from home for the fraudulent purpose of avoiding a tender, he is estopped from objecting that no tender was made: Southworth *v.* Smith, 7 Cush. (Mass.) 393; Gilmore *v.* Holt, 4 Pick. (Mass.) 258. And where the person whose duty it is to make the tender uses due diligence, but is unable to find the person to whom the tender should be made, or any person authorized to act in his behalf, he accomplishes all the law requires: Southworth *v.* Smith, *ubi supra.* [See Slesinger *v.* Bressler, 110 Mich. 198; Crawford *v.* Osnum, 94 id. 533; Cheney *v.* Bilby, 36 U. S. App. 720.] And where the obligee, in a bond, was to "tender a conveyance" within a specified time, and within that time went to the house of the obligor with such conveyance duly executed, but did not tender the same, because the wife of the obligor informed him that the obligor was out of the State, and he in fact was out of the State, it was held that such absence excused the obligee from further performance of his part; that he was not bound to inquire if the obligor had left any agent to act for him in his absence; it being the duty of the obligor to appoint an agent to act for him in his absence, and to notify the obligee thereof: Tasker *v.* Bartlett, 5 Cush. (Mass.) 359–363. See also Stone *v.* Sprague, 20 Barb. (N. Y.) 509; Holmes *v.* Holmes, 12 id. 137; Hewry *v.* Raiman, 25 Pa. St. 354.}

[1] Isherwood *v.* Whitmore, 11 M. & W. 347, 350. And see s. c. 10 M. & W. 757.

TRESPASS.

§ 612. **Trespass to Property.** The evidence in actions of trespass against the person having already been considered, under the head of Assault and Battery, it remains in this place to treat of the evidence applicable to actions of trespass upon property, whether real or personal.

§ 613. **Gist of Action Injury to Possession.** Though the right of *property* may and often does come in controversy in this action, yet the *gist* of the action is the injury done to the plaintiff's *possession*.[1] The substance of the declaration therefore is, that the defendant has forcibly and wrongfully injured the property in the possession of the plaintiff; and under the general issue the plaintiff must prove, (1) that the property was in his possession at the time of the injury, and this rightfully, as against the defendant; and (2) that the injury was committed by the defendant with force.

§ 614. **Possession.** (1) The *possession* of the plaintiff may be actual or constructive.[1] And it is *constructive* when the property is either in the actual custody and occupation of no one, but rightfully belongs to the plaintiff, or when it is in the care and custody of his servant, agent,[2] or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or title to the beneficial use and enjoyment of the property, but, on the contrary, the owner may take it into his own

[1] [High *v.* Pancake, 42 W. Va. 602; Hersey *v.* Chapin, 162 Mass. 176; Wilson *v.* Haley, etc. Co., 153 U. S. 39. Possession is not necessary under the Colorado Code: Evans *v.* Durango Land Co., 80 F. 433, U. S. App.] {To constitute a trespass there must be a disturbance of the plaintiff's possession, which in the case of personal property may be done by an actual taking, a physical seizing, or taking hold of the goods, removing them from their owner, or by exercising a control or authority over them inconsistent with their owner's possession: Holmes *v.* Doane, 3 Gray (Mass.) 329, 330; Coffin *v.* Field, 7 Cush. (Mass.) 355; Codman *v.* Freeman, 3 id. 306. The question who is actually in possession of the land or chattels is one of fact for the jury: Berkey *v.* Auman, 91 Pa. St. 481. If the plaintiff relies on a paper title to land without possession, anything which shows that he has no title will defeat his action, which is based solely on ownership. Thus, a tax title, which is *prima facie* a paramount title, will disprove a title which is not supported by possession: Tolles *v.* Duncombe, 34 Mich. 101; Padgett *v.* Baker, 1 Tenn. Ch. 222; *ante*, § 303, n. So, when the plaintiff relied on a landlord's lien on chattels and a distress warrant, but the jury found that there was no actual possession, a tax lien will be sufficient defence for the defendant: Dunning *v.* Fitch, 66 Ill. 51.}

[1] [Wilson *v.* Phœnix, etc. Co., 40 W. Va. 413; Irwin *v.* Patchen, 164 Pa. 51. As to what is sufficient possession, see Ryan *v.* Sun Sing, 164 Ill. 259; Garrett *v.* Sewell, 108 Ala. 521.]

[2] [Field *v.* Lang, 89 Me. 454.]

hands, at his pleasure. Where this is the case, the general owner may sue in trespass, as for an injury to his own actual possession, and this proof will maintain the averment.[3] The general property draws to it the possession, where there is no intervening adverse right of enjoyment.[4] And this action may also be maintained by the actual possessor, upon proof of his possession *de facto*, and an authority coupled with an interest in the thing, as carrier, factor, pawnee, or sheriff.[5] A tenant at will, and one entitled to the mere profits of the soil, or *vestura terræ*, with the right of culture, may also sue in trespass, for an injury to the emblements to which he is entitled.[6]

§ 615. **Same Subject.** The general owner has also a *constructive possession*, as *against* his *bailee* or *tenant*, who, having a special property, has violated his trust by destroying that which was confided to him. Thus, if the bailee of a beast kill it, or if a joint-tenant or tenant in common of a chattel destroy it, or if a tenant at will cuts down trees, the interest of the wrong-doer is thereby determined, and the possession, by legal intendment, immediately reverts to the owner or co-tenant, and proof of the wrongful act will maintain the allegation that the thing injured was in his possession.[1] So, if one

[3] 1 Chitty on Plead. 188, 195 (7th ed.); Lotan *v.* Cross, 2 Campb. 464; Bertie *v.* Beaumont, 16 East 33; Aikin *v.* Buck, 1 Wend. 466; Putnam *v.* Wyley, 8 Johns. 432; Thorp *v.* Burling, 11 id. 285; Hubbell *v.* Rochester, 8 Cowen 115; Root *v.* Chandler, 10 Wend. 110; Oser *v.* Storms, 9 Cowen 687; Wickham *v.* Freeman, 12 Johns. 183; Smith *v.* Milles, 4 T. R. 480; Corfield *v.* Coryell, 4 Wash. 387; Hingham *v.* Sprague, 15 Pick. 102; Starr *v.* Jackson, 11 Mass. 519; Walcott *v.* Pomeroy, 2 Pick. 121; {Warren *v.* Cockran, 30 N. H. 379; Heath *v.* West, 8 id. 101; Schloss *v.* Cooper, 27 Vt. 623; Foster *v.* Pettibone, 20 Barb. (N. Y.) 350; Bailey *v.* Massey, 2 Swan (Tenn.) 167; Browning *v.* Skillman, 4 Zabr. (N. J.) 351; Thomas *v.* Snyder, 23 Pa. St. 515. But if there is an adverse possession, it destroys the constructive possession. By a legal fiction, possession follows the title in the absence of an actual possession by any one, and this constructive possession is sufficient to enable the owner to maintain trespass against a wrong-doer. But there can be no constructive possession of lands, of which third parties are in actual adverse possession: Ruggles *v.* Sands, 40 Mich. 559; Davis *v.* White, 27 Vt. 751. Thus, where the officers of a school district had been for several years in actual, entire, and undisturbed possession of land which was not owned by them, and they had erected a school-house on it and subsequently took it off the land and moved it away, it was held that the true owner of the land could not bring trespass against them, because he had no possession: Carpenter *v.* Smith, 40 Mich. 639. The same rule governs the extent of constructive possession in actions of trespass to the realty as in real actions. Thus, if one enters wrongfully on unoccupied land, his possession extends constructively over the whole tract, but if another then enters on the same land under a colorable title, his possession intercepts and ends the possession of him who entered tortiously, except as far as the *possessio pedis* of the trespasser extends: Earl *v.* Griffith, 52 Vt. 415.}

[4] [O'Neal *v.* Simarton, 109 Ala. 167.]

[5] Wilbraham *v.* Snow, 2 Saund. 47; ib. 47 *a*, *b*, n. (1), by Williams; Colwill *v.* Reeves, 2 Campb. 575. See also Leisherness *v.* Berry, 38 Me. 80.

[6] Co. Litt. 4 *b*; Wilson *v.* Mackreth, 3 Burr. 1824; Crosby *v.* Wadsworth, 6 East 602; Stammers *v.* Dixon, 7 id. 200; Stewart *v.* Doughty, 9 Johns. 108; Stultz *v.* Dickey, 5 Binn. 285; Austin *v.* Sawyer, 9 Cowen 39; {Morrison *v.* Mitchell, 4 Houst. (Del.) 324; Kellenberger *v.* Sturtevant, 7 Cush. (Mass.) 467.}

[1] Co. Litt. 57 *a*; ib. 200 *a*, *b*; Countess of Salop *v.* Crompton, Cro. El. 777, 784; s. c. 5 Co. 13; Phillips *v.* Covert, 7 Johns. 1; Erwin *v.* Olmstead, 7 Cowen 229; Campbell *v.* Proctor, 6 Greenl. 12; Daniels *v.* Pond, 21 Pick. 367; Allen *v.* Carter, 8 id. 175; Keay *v.* Goodwin, 16 Mass. 1. Trespass will lie by one tenant in common against another, for any act of permanent injury to the inheritance, such as making pits in the

enters upon land, and cuts timber under a parol agreement for the purchase of the land, which he afterwards repudiates as void under the Statute of Frauds, his right of possession also is thereby avoided *ab initio*, and is held to have remained in the owner, who may maintain trespass for cutting the trees.[2] And generally, where a right of entry, or other right of possession, is given by law, and is afterwards abused by any act of unlawful force, the party is a trespasser *ab initio;*[3] but if the wrong consists merely in the detention of chattels, beyond the time when they ought to have been returned, the remedy is another form of action.[4]

§ 616. **Same Subject.** But where the general owner has conveyed to another the exclusive right of present possession and enjoyment, retaining to himself only a *reversionary interest*, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property; the remedy of the general owner or reversioner being by an action upon the case.[1] Thus a tenant for years may have an action of trespass for cutting down trees;[2] and a tenant at will may sue in this form for throwing down the fences erected by himself, and destroying the grass;[3] or the lessee of a chattel, for taking and carrying it away during the term;[4] the lessor or general owner never being permitted to maintain this action for an injury done to the property while it was in the possession of the lessee or of a bailee entitled to the exclusive enjoyment.[5]

common, digging turfs, and the like, when not done in the lawful exercise of a right of common: Wilkinson *v.* Haggarth, 11 Jur. 104. A tenant at will, by refusing to quit the premises, becomes a trespasser: Ellis *v.* Paige, 1 Pick. 43; Rising *v.* Stannard, 17 Mass. 282.

[2] Suffern *v.* Townsend, 9 Johns. 35.

[3] The Six Carpenters' Case, 8 Co. 145; Adams *v.* Freeman, 12 Johns. 408; Malcom *v.* Spoor, 12 Met. 279; Tubbs *v.* Tukey, 3 Cush. 438.

[4] Gardiner *v.* Campbell, 15 Johns. 401.

[1] 1 Chitty on Plead. 195, 196 (7th ed.); Lienow *v.* Ritchie, 8 Pick. 235; [Russell *v.* Meyer, 7 N. D. 335.] {Trespass will not lie by one tenant in common of a chattel against the others for breaking and entering the close and taking crops: Owen *v.* Foster, 13 Vt. 263; Badger *v.* Holmes, 6 Gray (Mass.) 118; Silloway *v.* Brown, 12 Allen (Mass.) 30. But it will for an actual ouster: Erwin *v.* Olmstead, 7 Cow. (N. Y.) 129; McGill *v.* Ash, 7 Pa. St. 397; Thompson *v.* Gerrish, 57 N. H. 85. As the reason of this is that the plaintiff has not an *exclusive* right of possession, evidence of an informal partition which has been carried out by the tenants in fact, is admissible, as a parol partition followed by possession is sufficient to sever the possession so as to give to each tenant the right to the exclusive possession of his property: Grimes *v.* Butts, 65 Ill. 347; Tomlin *v.* Hilyard, 43 id. 300.}

[2] Evans *v.* Evans, 2 Campb. 491; Blackett *v.* Lowes, 2 M. & S. 499.

[3] Little *v.* Palister, 3 Greenl. 6.

[4] Corfield *v.* Coryell, 4 Wash. 371, 387; Ward *v.* Macauley, 4 T. R. 489; Gordon *v.* Harper, 7 id. 9.

[5] Ibid.; Campbell *v.* Arnold, 1 Johns. 511; Tobey *v.* Webster, 3 id. 468; [Lawry *v.* Lawry, 88 Me. 482.] But the owner of the subsoil may maintain trespass against one who has the exclusive right to the possession of the surface, as, for example, to cut the grass, if the latter should make holes in the earth of such a depth as to penetrate into the subsoil, and so interfere with the rights of the owner: Cox *v.* Glue, 12 Jur. 185; 5 M. G. & S. 533. If the injury merely affects the surface, and not the subsoil, as, by riding over it, the remedy belongs only to the owner of the surface: Ibid.; Lyford *v.* Toothaker, 39 Me. 28. {So, when there is evidence in the case tending to

But the existence of a mere easement in land will not impair or affect the possession of the owner of the soil. Thus, for example, the existence of a public way over the plaintiff's land will not prevent him from maintaining an action of trespass against a stranger, who digs up the soil, or erects a building within the limits of the highway;[6] and proof of the plaintiff's possession of the land adjoining the highway is presumptive evidence of his possession of the soil *ab medium filum viæ*.[7]

show that a tenant has actually taken possession of the land in question under a lease from the plaintiff, the court should submit the question of who was in possession at the time of the trespass complained of, to the jury, and if it is found that the tenant is in possession, the plaintiff cannot maintain his action unless there is some injury to the reversion: Gould *v.* Sternberg, 4 Ill. App. 439.

There is much conflict in the cases in deciding what is the true relation of the owner and the occupant of lands when the *crops* are to be divided between them in shares or proportions from time to time as they are gathered. A full statement of the results derived from these cases, and a number of the authorities, will be found in Taylor, Landl. & Ten. § 24 and notes. See also Taylor *v.* Bradley, 39 N. Y. 129, Woodruff, J. In general, such agreements should be interpreted by the ordinary rule of construction, according to the intention of the parties. Where they take the usual form of lease with a return of rent in kind, they should be so construed; where they are manifestly contracts for work and labor, and a share of the profits is given for the labor, they should be so interpreted: N. J. Midland Ry. Co. *v.* Van Syckle, 37 N. J. L. 496. [See McKeeby *v.* Webster, 170 Pa. 624.]

In Russell *v.* Scott, 9 Cow. (N. Y.) 279, where the plaintiff, an old man, lived with his sons, who worked the farm and took care of him and his wife, the title remaining in the father, and there being no contract which vested the exclusive right of possession in the sons, it was held that the father still had possession. So in Norton *v.* Craig, 68 Me. 275, where a man lived on a farm owned by his wife, and carried it on as if it were his own, the possession was held to be still in her.

A mortgagee, not in possession, may maintain trespass against one who, under authority from the mortgagor, removes a building erected on the land by the mortgagor after the execution of the mortgage: Cole *v.* Stewart, 11 Cush. (Mass.) 181; and against the mortgagor for cutting and carrying to market timber trees standing on the premises: Page *v.* Robinson, 10 id. 99, 103. See also White *v.* Livingston, ib. 259; Northampton Paper Mills, etc. *v.* Ames, 8 Met. (Mass.) 1; Perry *v.* Chandler, 2 Cush. (Mass.) 237. The administrator of a mortgagee of real estate, who has obtained judgment and possession for foreclosure, can maintain trespass against an heir-at-law of the mortgagee, for cutting and carrying away wood and timber from the mortgaged premises, the possession during the time necessary to foreclose the mortgage being wholly the possession of the administrator: Palmer *v.* Stevens, 11 id. 147, 150. See also Wentworth *v.* Blanchard, 37 Me. 14; Bigelow *v.* Hillman, ib. 52; Blaisdell *v.* Roberts, ib. 239. If the bailee of a chattel, who has no right, as against the bailor, to retain or dispose of it, mortgage it as security for his own debt, and the mortgagee take possession under the mortgage, the bailor may maintain trespass against the mortgagee without a previous demand: Stanley *v.* Gaylord, 1 Cush. (Mass.) 536.]

[6] Cortelyou *v.* Van Brundt, 2 Johns. 357, 363; Gidney *v.* Earl, 12 Wend. 98; Grose *v.* West, 7 Taunt. 39; Stevens *v.* Whistler, 11 East 51; Robbins *v.* Borman, 1 Pick. 122; Adams *v.* Emerson, 6 id. 57; Perley *v.* Chandler, 6 Mass. 454; [Hunt *v.* Rich, 38 Me. 195. A railroad corporation has a right to cut the trees growing in the strip of land which they have taken for their road, whether such trees are for shade, ornament, or fruit, and whether such cutting be at the time of laying out their track, or afterwards; and the burden of proof does not rest on the corporation to show that the trees were cut for the purposes of the road: Brainard *v.* Clapp, 10 Cush. (Mass.) 6, 11. One person had a right of way over another's land. The owner of the soil, and the possessor of the easement, joined in erecting a gate across such way, the owner of the soil promising that it should remain. He subsequently, without the consent of the owner of the right of way, removed the gate, and the latter brought trespass against him, and it was held that it would not lie: Dietrich *v.* Berk, 24 Pa. St. 470.]

[7] Cook *v.* Green, 11 Price 736; Headlam *v.* Headley, Holt Cas. 463; Grose *v.*

§ 617. **Same Subject.** Where the subject of the action is a *partition fence* between the lands of two adjoining proprietors, it is presumed to be the common property of both, unless the contrary is shown.[1] If it is proved to have been originally built upon the land of one of them, it is his; but if it were built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land.[2] If the boundary is a *hedge*, and *one ditch*, it is presumed to belong to him on whose side the hedge is; it being presumed that he who dug the ditch threw the earth upon his own land, which alone was lawful for him to do, and that the hedge was planted, as is usual, on the top of the bank thus raised.[3] But if there is a *ditch on each side* of the hedge, or no ditch at all, the hedge is presumed to be the common property of both proprietors.[4] If a *tree* grows so near the boundary line, that the roots extend into the soil of each proprietor, yet the property in the tree belongs to the owner of the land in which the tree was originally sown or planted.[5] But if the tree stands directly upon the line between adjoining owners, so that the line passes through it, it is the common property of both, whether it be marked as a boundary or not; and trespass will lie, if one cuts it down without the consent of the other.[6]

§ 618. **Mere Possession good against Stranger.** It may further be observed, that proof of an actual and exclusive *possession* by the plaintiff, even though it be *by wrong*, is sufficient to support this action *against a mere stranger* or wrong-doer, who has neither title to the possession in himself, nor authority from the legal owner.[1] And

West, 7 Taunt. 39. {A railroad corporation, building and maintaining as part of their road a bridge across a river, in such manner as to obstruct the passage of the water, are liable to an action of tort by the owner of the land thereby flowed, unless they show that they have taken reasonable precautions to prevent unnecessary damage to his land. In such cases it is for the defendants to show that their acts are strictly within the powers conferred by their charter: Mellen *v.* Western R. R. Corp., 4 Gray (Mass.) 301; Hazen *v.* Boston, etc. R. R., 2 id. 574. See also Brainard *v.* Clapp, 10 Cush. (Mass.) 6. And such a corporation is liable as a trespasser, for entering upon land for the purpose of constructing its road, if the written location does not cover the land so entered upon: Hazen *v.* Boston, etc. R. R., 2 Gray (Mass.) 574, 581.}

[1] Wiltshire *v.* Sidford, 8 B. & C. 259, n. *a*; Cubitt *v.* Porter, ib. 257. [And its removal by either is a trespass without other entry: Garrett *v.* Sewell, 108 Ala. 521.]

[2] Matts *v.* Hawkins, 5 Taunt. 20.

[3] Vowles *v.* Miller, 3 Taunt. 138, per Lawrence, J

[4] Archbold's N. P. 328.

[5] Holder *v.* Coates, 1 M. & Malk. 112; Masters *v.* Pollie, 2 Roll. Rep. 141. See also Dig. lib. xlvii. tit. 7, l. 6, § 2, with which agrees the Instit. lib. ii. tit. 1, § 31, *as expounded* by Prof. Cooper. See Cooper's Justinian, p. 80.

[6] Griffin *v.* Bixby, 12 N. H. 454. [Where boughs overhang they may be cut off, but there can be no entry on the land where the tree grows for that purpose: Lemmon *v.* Webb, 1894, 3 Ch. 1; Toledo, etc. R. *v.* Loop, 139 Ind. 542.]

[1] Graham *v.* Peat, 1 East 244; Harker *v.* Birkbeck, 3 Burr. 1556, 1563; Catteris *v.* Cowper, 4 Taunt. 547; Revett *v.* Brown, 5 Bing. 9; Townsend *v.* Kerns, 2 Watts 180; Barnstable *v.* Thacher, 3 Met. 239; Shrewsbury *v.* Smith, 14 Pick. 297; Fiske *v.* Small, 12 Shepl. 453; Brown *v.* Ware, ib. 411; {Sweetland *v.* Stetson, 115 Mass. 49; Clancey *v.* Houdlette, 39 Me. 451; Tyson *v.* Shueey, 5 Md. 540; Linard *v.* Crossland, 10 Tex. 462; Hubbard *v.* Little, 9 Cush. (Mass.) 476; Bowley *v.* Walker,

where both parties rely on a title by mere possession, without any evidence of a legal title, a contract by one of them, to purchase the land from the true owner, is admissible in evidence to show the character of his possession.[2] So the possession of her bedroom by a female servant in the house, it seems will be sufficient to entitle her to maintain this action against the wrong-doer, who forces himself into it while she is in bed there.[3] The finder of goods also, and the prior occupant of land, or its produce, has a sufficient possession to maintain this action against any person except the true owner.[4] And the owner of the seashore has the possession of wrecked property, *ratione soli*, against a stranger.[5] The wrongful possessor, however, though he be tenant by sufferance, has no such remedy against the rightful owner, who resumes the possession;[6] though this resumption of possession will not defeat the prior possessor's action of trespass against a stranger.[7]

8 Allen (Mass.) 21; *post*, § 637; Kilborn *v.* Rewee, 8 Gray 415; [Fowler *v.* Owen, 39 A. 329, N. H.; Frisbee *v.* Marshall, 122 N. C. 760; Langdon *v.* Templeton, 66 Vt. 173; Marks *v.* Sullivan, 32 P. 668, Utah. But see Northern Pacific R. *v.* Lewis, 162 U. S. 366.] So, as against a wrong-doer, a plaintiff may rely upon a possession of the land described in the writ, by virtue of an oral license from the owner of the premises. But in such a case, if the defendant offers to justify under a writ of possession founded on a deed given by the owner to a third party prior to the oral license to the plaintiff, the defendant will be successful, and the plaintiff cannot object to the introduction of the deed: Woodside *v.* Howard, 69 Me. 160. And if the plaintiff has possession, and the defendants, without showing any title in themselves or former possession of theirs, offer admissions of the plaintiff's vendor that the goods were fraudulently sold to him, these admissions will not be received: Wustland *v.* Potterfield, 9 W. Va. 438.{

2 Moore *v.* Moore, 8 Shepl. 350.

3 Lewis *v.* Ponsford, 8 C. & P. 687. [As to entry of rooms, see Milner *v.* Milner, 101 Ala. 599; Richmond *v.* Fisk, 160 Mass. 34.] {In those States where a married woman is by law capable of holding property in her own right, she has such possession under deeds from her husband and herself jointly to her son, and from her son to herself, in her own right, as will support an action of trespass against one who does not attempt to show title in himself, although the transfer may have been fraudulently made to get the property out of reach of the husband's creditors: Chicago *v.* McGraw, 75 Ill. 566.}

4 2 Saund. 47 *b*, *c*, *d*, note by Williams; Rackham *v.* Jessup, 3 Wils. 332. {Neither party showing a paper title, the whole case must turn on the question of the date and nature of the several possessions, set up by the parties respectively: Illinois, etc. Ry. Co. *v.* Cobb, 82 Ill. 183.}

5 Barker *v.* Bates, 13 Pick. 255. But where a roll of bank-notes was dropped and lost in a shop, by a transient stranger, and afterwards found and picked up by another customer, it was held that the latter was entitled to the custody of them, against the shop-keeper, who claimed them *ratione soli*: the *place* where a lost article is found constituting no exception to the general rule, that the finder is entitled to the custody, against all but the true owner: Bridges *v.* Hawkesworth, 15 Jur. 1079.

6 Taunton *v.* Costar, 7 T. R. 431; Turner *v.* Meymott, 1 Bing. 158; Sampson *v.* Henry, 13 Pick. 36. {Where there is proof that, by family arrangement, one of a family occupied and cultivated land belonging to another, and took the care and support of such owner upon himself, and that the owner afterwards terminated the arrangement and gave the possessor notice to quit, this is not proof that the tenancy was terminated so as to charge the possessor as trespasser, until the crops which he has planted have been harvested: Berkey *v.* Auman, 91 Pa. St. 481.}

7 Cutts *v.* Spring, 15 Mass. 135. In trespass *quare clausum fregit*, if title to the freehold is asserted by each party, the burden of proof is on the defendant to make out that the title is in himself. If each party shows a title precisely equal to the other, the defendant fails: Heath *v.* Williams, 12 Shepl. 209. {One who has only a

§ 618 *a*. **Description of Close.** In trespass *quare clausum fregit*, if the close is particularly described by its boundaries, it will be necessary to prove them as laid; for if one may be rejected, they all may be disregarded, and the identity lost; but it will not be necessary to prove a title to the entire close.[1] The identity, thus necessary to be established, may be proved by the testimony of any competent witness who is acquainted with the lines and monuments of the tract.[2]

§ 619. **Mere Right of Entry no Possession.** But though such proof of possession, actual or constructive, will maintain the averment of the plaintiff's possession, yet a mere *right of entry* on lands is not sufficient.[1] Hence a disseisee, though he may maintain trespass for the original act of disseisin, cannot have this action for any subsequent injury, until he has acquired the possession by re-entry; which will relate back to the original disseisin, and entitle him to sue in trespass for any intermediate wrong to the freehold.[2] Hence, also, a deed of mere release and quitclaim, without proof of possession at the time by the grantor, or of an entry by the grantee, though admissible in evidence, is not sufficient to prove a possession.[3]

§ 620. **Animals Feræ Naturæ.** If the animals *feræ naturæ* are the subject of this action, the plaintiff must show, either that they were already captured, or domesticated, and of some value; or, that they were dead; or, that the defendant killed or took them on the plaintiff's ground; or, that the game was started there, and killed or captured elsewhere, the plaintiff asserting his local possession and property by joining in the pursuit.[1] But pursuit alone gives no right

right of way over the *locus in quo* cannot maintain trespass; it should be brought by the owner of the fee: Morgan *v.* Boyes, 65 Me. 124.}

[1] See *ante*, Vol. I. § 62; Wheeler *v.* Rowell, 7 N. H. 515; Tyson *v.* Shueey, 5 Md. 540.

[2] Leadbetter *v.* Fitzgerald, 1 Pike 448.

[1] [Johnson *v.* Chicago Sand Co., 86 F. 269, U. S. App.]

[2] Liford's Case, 11 Co. 51; 3 Bl. Comm. 210; Bigelow *v.* Jones, 10 Pick. 161; Blood *v.* Wood, 1 Met. 528; Kennebec Prop'rs *v.* Call, 2 Mass. 486. And see Taylor *v.* Townsend, 8 Mass. 411, 415; Tyler *v.* Smith, 8 Met. 599; King *v.* Baker, 25 Pa. St. 186. But the disseisor does not, by the disseisin, acquire any right to the rents and profits, nor to trees severed by him or by another from the freehold; but the owner may take them: Brown *v.* Ware, 12 Shepl. 411. {But if one lawfully entitled to possession can make peaceable entry, even while another is in occupation, the entry, in contemplation of law, restores him to complete possession, and it is not unlawful for him to resort to such means, short of the employment of force, as will render further occupation by the other impracticable: Cooley, Torts, p. 323; Stearns *v.* Sampson, 59 Me. 568; Illinois, etc. Ry. Co. *v.* Cobb, 94 Ill. 55.

Where one who has a good paper title conveyed to him by a disseised grantor enters upon the land, and gets possession against the disseisor, he is liable for such entry in an action of trespass, though his wrongful entry, combined with his paper title, will prevent the disseisor from bringing a writ of entry: Rawson *v.* Putnam, 128 Mass. 552.}

[3] Marr *v.* Boothby, 1 Applet. 150.

[1] Ireland *v.* Higgins, Cro. El. 125; Grymes *v.* Shack, Cro. Jac. 262; Churchward *v.* Studdy, 14 East 249; 6 Com. Dig. 386, Trespass, A (1); Sutton *v.* Moody, 2 Salk. 556; Pierson *v.* Post, 3 Caines 175.

of property. Therefore where one was hunting a fox, and another, in sight of the pursuer, killed and carried him off, it was held that trespass could not be maintained against him.[2] So, where the parties were owners of several boats employed in fishing, and the plaintiff's boat cast a seine round a shoal of mackerel, except a small opening which the seine did not quite fill up, but through which, in the opinion of experienced persons, the fish could not have escaped; and the defendant's boat came through the opening and took the fish; it was held that the plaintiff's possession was not complete, and that therefore he could not maintain trespass for the taking.[3]

§ 621. **Force.** (2) The plaintiff must, in the next place, prove that the injury was *committed by the defendant*, with force. And the defendant will be chargeable, if it appear that the act was done by his direction or command, or by his *servant* in the course of his master's business, or while executing his orders with ordinary care; or if it be done by his domestic or reclaimed animals.[1] So, if the defendant participated with others in the act, though it were but slightly; or, if he procured the act to be done by inciting others.[2] But it seems that persons entering a dwelling-house in good faith, to assist an officer in the service of legal process, are not trespassers, though he entered unlawfully, they not knowing how he entered.[3] So, if the defendant unlawfully exercised an authority over the goods, in defiance or exclusion of the true owner, as where, being a constable,

[2] Pierson *v.* Post, 3 Caines 175. {But when a wild animal has been captured, it becomes the property of its captor: Ulery *v.* Jones, 81 Ill. 403.

A dog is the property of his owner in such a sense that he may recover damages from one who wrongfully kills the dog, and the value of the dog is for the jury, on evidence to that point: Spray *v.* Ammerman, 66 Ill. 309; Heisrodt *v.* Hackett, 34 Mich. 283.} [As to property in dogs, see Sentell *v.* New Orleans, etc. R., 166 U. S. 698.]

[3] Young *v.* Hichens, 1 Dav. & Meriv. 592; s. c. 6 Ad. & El. N. S. 606; *post*, Vol. III. § 163.

[1] Gregory *v.* Piper, 9 B. & C. 591; Broughton *v.* Whallon, 8 Wend. 474; 6 Com. Dig. 392, Trespass, C (1); Root *v.* Chandler, 10 Wend. 110; [Northern Trust Co. *v.* Palmer, 171 Ill. 383.] Where the allegation was, that the defendant struck the plaintiff's cow several blows, whereof she died, and the evidence was, that, after the beating, which was unmerciful, the plaintiff killed the cow to shorten her miseries, it was held no variance: Hancock *v.* Southall, 4 D. & R. 202. {An attorney who directs a constable as to the manner of making a levy is answerable in trespass if the levy is unlawful. So if he adopts and ratifies the acts of the constable; as if, with full knowledge that the levy is unlawful, he takes the proceeds of the sale from the officer, and refuses to allow him to pay them to the true owner: Ferriman *v.* Fields, 3 Ill. App. 252. The same is true of the creditor who directs the levy or ratifies it by taking the proceeds with full knowledge. But this order or ratification must be proved; there is no presumption that the constable was under the orders of either the attorney or creditor: Buchanan *v.* Goenig, ib. 635.}

[2] Flewster *v.* Royle, 1 Campb. 187; Stonehouse *v.* Elliott, 6 T. R. 315; Parsons *v.* Lloyd, 3 Wils. 341; Barker *v.* Braham, ib. 368. Evidence of the conduct of the parties before the trespass is receivable, if it had reference to the trespass; but evidence of the conduct of one of several trespassers, long after the trespass, is not receivable against the others: Newton *v.* Wilson, 1 C. & K. 537. {Those who volunteer to assist a person in a trespass cannot be heard to say that they did it in good faith, not knowing it to be a trespass: Wallard *v.* Worthman, 84 Ill. 446.}

[3] Oystead *v.* Shed, 13 Mass. 520, 524.

he levied an execution on the plaintiff's goods in the hands of the execution debtor, who was a stranger, taking an inventory of them, and saying he would take them away unless security were given; though he did not actually touch the goods, he is a trespasser.[4] So, if the defendant were one of several *partners in trade*, and the act were done by one of the firm, provided it were of the nature of a taking, available to the partnership, and they all either joined in ordering it, or afterwards knowingly participated in the benefit of the act, this is evidence of a trespass by all.[5] But if a servant were ordered to take the goods of another, instead of which he took the goods of the defendant, the master will not be liable; unless in the case of a sheriff's deputy, which the law, on grounds of public policy, has made an exception.[6]

§ 622. **Wrongful Intent.** It will not be necessary for the plaintiff to prove that the act was done with any *wrongful intent;* it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally, or by mistake.[1] And though the original entry or act of possession were by authority of law, yet if a subsequent act of force be unlawfully committed, such as would have made the party a trespasser if no authority or right existed, he is a trespasser *ab initio*.[2] If the authority were a license in fact, the remedy is not in trespass, but in an action upon the case.[3] Nor is it neces-

[4] Wintringham *v.* Lafoy, 7 Cowen 735; Miller *v.* Baker, 1 Met. 27; Gibbs *v.* Chase, 10 Mass. 125; Robinson *v.* Mansfield, 13 Pick. 139; Phillips *v.* Hall, 8 Wend. 610. And see Boynton *v.* Willard, 10 Pick. 166; Raud *v.* Sargeant, 10 Shepl. 326. {If the evidence shows that an officer went outside his precept, as if, when commanded to attach the goods of A, he takes the goods of B, he is a trespasser; but if he takes the identical goods described in the writ, though they have been previously attached, if they are still to all appearances in the possession of the defendant named in his writ, he is not liable in trespass: Osgood *v.* Carver, 43 Conn. 24.}

[5] Petrie *v.* Lamont, 1 Car. & Marsh. 93.

[6] McManus *v.* Crickett, 1 East 106; Germantown Railroad Co. *v.* Wilt, 4 Whart. 143; Fox *v.* Northern Liberties, 3 Watts & Serg. 123; Saunderson *v.* Baker, 3 Wils. 312; Ackworth *v.* Kempe, 1 Doug. 49; Grinnell *v.* Phillips, 1 Mass. 630.

[1] 1 Chitty on Plead. 192 (7th ed.); Covell *v.* Laming, 1 Campb. 497; Colwill *v.* Reeves, 2 id. 575; Baseley *v.* Clarkson, 3 Lev. 37; Higginson *v.* York, 5 Mass. 341; Hayden *v.* Shed, 11 id. 500, per Jackson, J.; ib. 507; [Judd *v.* Ballard, 66 Vt. 668; Huling *v.* Henderson, 161 Pa. 553; Davison *v.* Shanahan, 93 Mich. 486.] See Guile *v.* Swan, 19 Johns. 381, where the owner of a balloon, which accidentally descended into the plaintiff's garden, was held liable in trespass. {The authorities seem to be well settled that the element of wilfulness or intent need not enter into the transaction, in order to render the defendant liable; it is sufficient if the act done is without a justification and is a trespass: Hazleton *v.* Week, 49 Wis. 661; Dexter *v.* Cole, 6 id. 319; Hobart *v.* Haggett, 12 Me. 67. And it is no defence to trespass for cutting timber on the plaintiff's land, that the plaintiff by mistake led the defendant to believe that the timber was on his (the defendant's) land: Pearson *v.* Inlow, 20 Miss. 322. See also Langdon *v.* Bruce, 27 Vt. 657; Pfeiffer *v.* Grossman, 15 Ill. 53.}

[2] The Six Carpenters' Case, 8 Co. 145; Shorland *v.* Govett, 5 B. & C. 485; *supra*, § 615; Dye *v.* Leatherdale, 3 Wils. 20. [So if a duty is omitted after lawful entry: Wyke *v.* Wilson, 173 Pa. 12.]

[3] Ibid.; Cushing *v.* Adams, 18 Pick. 110. Trespass does not lie against a tenant by sufferance, until after entry upon him by the lessor: Rising *v.* Stannard, 17 Mass. 282; Dorrell *v.* Johnson, 17 Pick. 263. Whether the landlord may expel him by force, and thereby acquire a lawful possession to himself, *quære;* and see Newton *v.* Harland, 1 Man. & Grang. 644, that he may not. But see, *contra*, Harvey *v.* Lady Brydges, 9 Jur. 759; 14 M. & W. 437.

sary, in an action of trespass *quare clausum fregit*, to prove that the defendant *actually entered* upon the land; for evidence that he stood elsewhere and shot game on the plaintiff's land, will support the averment of an entry.[4] And after a wrongful entry and the erection of a building, for which the owner has already recovered damages, the *continuance* of the building, after notice to remove it, is a new trespass, for which this action may be maintained.[5]

§ 623. **Force must be directly applied.** It is essential to this form of remedy, that the act be proved to have been done with *force directly applied*, this being the criterion of trespass; but the degree of force is not material.[1] While the original force or *vis impressa* continues, so as to become the proximate cause of the injury, the effect is immediate, and the remedy may be in trespass; but where the original force had ceased before the injury commenced, trespass cannot be maintained, and the only remedy is by an action on the case.[2]

§ 624. **Time.** The allegation of the *time* when the trespass was committed is not ordinarily material to be proved; the plaintiff being at liberty to prove a trespass at any time before the commencement of the action, whether before or after the day laid in the declaration. But in trespass with a *continuando*, the plaintiff ought to confine himself to the time in the declaration; yet he may waive the *continuando*, and prove a trespass on any day before the action brought; or, he may give in evidence only part of the time in the *continuando*.[1] So, where a trespass is alleged to have been done between a certain day and the day of the commencement of the action, the plaintiff may prove either one trespass before the certain day mentioned, or as many as he can within the period of time stated in the declaration; but he cannot do both, and must waive one or the other.[2] And in

[4] Anon., cited per Lord Ellenborough in Pickering *v.* Rud, 1 Stark. 56, 58. But see Keble *v.* Hickringill, 11 Mod. 74, 130.

[5] Holmes *v.* Wilson, 10 Ad. & El. 503.

[1] Harvey *v.* Brydges, 14 M. & W. 437; State *v.* Armfield, 5 Ired. 207.

[2] 1 Chitty on Plead. 140, 141, 199 (7th ed.); Smith *v.* Rutherford, 2 S. & R. 358. {In Fallon *v.* O'Brien, 12 R. I. 518, where the action was for an injury received by being kicked by the defendant's horse, which was at the time straying on the street, the court says: "The defendant makes the point that the proper remedy for the injury complained of by the plaintiff, is case, not trespass. The case is not formally before us on this point, but it may save unnecessary expense for us to express our opinion in regard to it. We think it is clear that, unless the defendant intentionally permitted his horse to be at large in the street, trespass does not lie; for otherwise the injury, if it resulted from the defendant's negligence, was a consequential result of it, for which case is the proper remedy: 1 Chitty, Pleading, 140. Cf. Brennan *v.* Carpenter, 1 R. I. 474."} [And see Canadian Pacific R. *v.* Clark, 38 U. S. App. 573.]

[1] Co. Lit. 283 *b*; Bull. N. P. 86; Web *v.* Turner, 2 Stra. 1095; Hume *v.* Oldacre, 1 Stark. 351; Joralmion *v.* Pierpont, Anth. 42.

[2] 2 Selw. N. P. 1341, per Gould, J.; Pierce *v.* Pickens, 16 Mass. 470, 472. In this case, the law on this subject was thus stated by Jackson, J.: "Originally every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission, from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a

trespass against several, the plaintiff, having proved a joint trespass by all, will not be permitted to waive that, and give evidence of another trespass by one only;[3] nor will he be permitted, where the declaration contains but one count, after proof of one trespass, to waive that and prove another.[4] So, where the action is against three, for example, and the plaintiff proves a joint trespass by two only, he will not be allowed to give evidence of another trespass by all the three, even as against those two alone.[5]

§ 625. **Defences.** In the *defence* of this action, the general issue is *not guilty;* under which the defendant may give evidence of any facts tending to disprove either of the propositions which, as we have seen, the plaintiff is obliged to make out in order to maintain the action. Every defence which admits the defendant to have been,

distinct writ, or count, for every different act, the plaintiff is permitted to declare, as is done in this case, for a trespass, on divers days and times between one day and another; and in that case, he may give evidence of any number of trespasses within the time specified. Such a declaration is considered as if it contained a distinct count for every different trespass. This is for the advantage and ease of the plaintiff; but he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass. When it is considered in that light, the time becomes immaterial, and he may prove a trespass at any time before the commencement of the action, and within the time prescribed by the statute of limitations.

"But it would be giving an undue advantage to the plaintiff if he could avail himself of the declaration in both of these modes, and would frequently operate as a surprise on the defendant. He is, therefore, bound to make his election before he begins to introduce his evidence. He must waive the advantage of this peculiar form of declaration, before he can be permitted to offer evidence of a trespass at any other time. The rule, therefore, on this subject was mistaken on the trial. It is not that the plaintiff shall not *recover* for any trespass within the time specified, and also for a trespass at another time; but he shall not *give evidence* of one or more trespasses within the time, and of another at another time." {In Massachusetts the rule under the practice act is similar to that of the common law, and when a trespass is alleged to have been committed one day, and thence either continuously or at divers days and times to another day, the plaintiff, if he relies on a single trespass, is not confined to any day, but may prove it to have been committed even before the first day alleged, but if he relies on continuous or repeated trespasses, he is limited to the period alleged in the declaration: Kendall *v.* Bay State Brick Co., 125 Mass. 532; Powell *v.* Bagg, 15 Gray 507; and to the same effect under the common law: McDiarmid *v.* Caruthers, 34 Mich. 49.}

[3] Tait *v.* Harris, 1 M. & Rob. 282. See also Wynne *v.* Anderson, 3 C. & P. 596.

[4] Stante *v.* Pricket, 1 Campb. 573. {Unless the plaintiff alleges that the defendant trespassed continuously, or that he trespassed on divers days and times (as the facts of the case may require), he will be confined to proof of a single act of trespass, and if he alleges that the trespass was continuous, he cannot prove two or more distinct and independent trespasses; he should insert other counts for the other trespasses: Kendall *v.* Bay State Brick Co., 125 Mass. 532. Where two are sued jointly for a trespass upon land, and the declaration alleges joint trespasses on certain days, there may be a verdict against both jointly, and a joint assessment of damages, for trespasses in which they united; but there cannot be a verdict against both jointly, and a separate assessment of damages against each for any trespasses committed by them separately at different times: Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392.}

[5] Hitchen *v.* Teale, 2 M. & Rob. 30; Sedley *v.* Sutherland, 3 Esp. 202; {Prichard *v.* Campbell, 5 Ind. 494. See also Gardner *v.* Field, 1 Gray (Mass.) 151; Wilderman *v.* Sandusky, 15 Ill. 59; Grusing *v.* Shannon, 2 Ill. App. 325. But it is different on the question of damages. If the action is against several jointly, for a trespass, if the plaintiff makes out a case for *exemplary* damages against some and not others, he may dismiss as to the latter and have his recovery for exemplary damages against the former: Pardridge *v.* Brady, 7 id. 639.}

prima facie, a trespasser, must be specially pleaded; but any matters which go to show that he never did the acts complained of may be given in evidence under the general issue. Thus, for example, under this issue may be proved that the plaintiff has no property in the goods;[1] or, that the defendant did not take them; or, that he did not enter the plaintiff's close. So the defendant may show, under this issue, that the freehold and immediate right of possession is in himself, or in one under whom he claims title; thus disproving the plaintiff's allegation that the right of possession is in him.[2] But if he acted by license, even from the plaintiff, without claiming title in himself;[3] or, if he would justify under a custom to enter;[4] or, under a right of way;[5] or, if the injury was occasioned by the plaintiff's own negligence, or was done by the defendant from any other cause, short of such extraneous force as deprived him of all agency in the act, — it cannot be shown under this issue, but must be specially pleaded.[6] So, a *distress* for rent, when made on the demised premises, may be shown under this issue; but if it were made elsewhere, or for any other cause, it must be justified under a special plea.[7] Matters in *discharge* of the action must be specially pleaded; but matters in *mitigation* of the wrong and damages, which cannot be so pleaded, may be given in evidence under the general issue.[8] And it seems that a *variance* in the description of the *locus in quo* is available to the defendant under this issue, as the allegation of place, in

[1] [Alliance Trust Co. *v.* Nettleton, 74 Miss. 584.]

[2] 1 Chitty on Plead. 437; Dodd *v.* Kyffin, 7 T. R. 354; Argent *v.* Durrant, 8 id. 403; [Storr *v.* James, 84 Md. 282.] See also Monumoi *v.* Rogers, 1 Mass. 159; Anthony *v.* Gilbert, 4 Blackf. 348; Rawson *v.* Morse, 4 Pick. 127; Strong *v.* Hobbs, 12 Met. 185. But where the plaintiff is in the actual possession and occupation of the close, the defendant will not be permitted, under the general issue, to prove title in a stranger, under whom he does not justify: Philpot *v.* Holmes, 1 Peake 67; Carter *v.* Johnson, 2 M. & Rob. 263. Nor to give evidence of an easement, nor of a title by prescription: Ferris *v.* Brown, 3 Barb. S. C. 105; Fuller *v.* Rounceville, 9 Foster (N. H.) 554.

[3] Milman *v.* Dolwell, 2 Campb. 378; Philpot *v.* Holmes, 1 Peake 67; Ruggles *v.* Lesure, 24 Pick. 187; Hill *v.* Morey, 26 Vt. 178; [Williams *v.* Hathaway, 40 A. 418, R. I. This evidence is admissible under the general issue in mitigation of damages: ibid.]

[4] Waters *v.* Lilley, 4 Pick. 145.

[5] Strout *v.* Berry, 7 Mass. 385.

[6] 1 Chitty on Plead. 437, 438, *supra*, § 94; Knapp *v.* Salsbury, 2 Campb. 500; {Senecal *v.* Labadie, 42 Mich. 126;} [Lambert *v.* Robinson, 162 Mass. 34.]

[7] 1 Chitty on Plead. 439. {In Illinois, and some of the Western States, where there are large tracts of unenclosed lands of little value, the English rules as to distress of cattle damage-feasant do not apply, but it is held that cattle may run at large, and that an owner of land, to be able to recover for trespasses committed by the cattle of others, must show that he had enclosed his land with a lawful fence. He cannot take them damage-feasant unless he has such a fence: Oil *v.* Rowley, 69 Ill. 469; Illinois, etc. Ry. Co. *v.* Arnold, 47 id. 173.

In Michigan, however, the common-law rule obtains: Hamlin *v.* Mack, 33 Mich. 103.}

[8] 1 Chitty on Plead. pp. 441, 442; {Briggs *v.* Mason, 31 Vt. 433; Collins *v.* Perkins, ib. 624; Linford *v.* Lake, 3 H. & N. 276.} But where the defendant pleaded the general issue, to an action for taking the plaintiff's goods, it was recently held that he could not be permitted, under this issue, to show in mitigation of damages a repayment *after action brought*, of the money produced by the sale of the goods: Rundle *v.* Little, 6 Ad. & El. N. S. 174.

an action of trespass *quare clausum fregit*, is essentially descriptive of the particular trespass complained of.[9] But the variance, to be fatal, must be in some essential part of the description; and even the abuttals will not be construed very strictly. Thus, if the close be described as bounded on the east by another close, and the proof be, that the other close lies on the north, with a point or two towards the east; or if it be on the north-east, or south-east;[10] or if it be described as abutting on a windmill, and the proof be that a highway lies between it and the windmill,[11] — it will be sufficient.

§ 626. **Plea of Liberum Tenementum.** The plea of *liberum tenementum* admits the fact that the plaintiff was in possession of the close described in the declaration; and that the defendant did the acts complained of; raising only the question whether the close described was the defendant's freehold or not.[1] And his title must be proved either by deed or other documentary evidence, or by an actual, adverse, and exclusive possession for twenty years; inasmuch as, under this issue, he undertakes to show a title in himself, which shall do away the presumption arising from the plaintiff's possession.[2] Proof of a tenancy in common with the plaintiff is not admissible under this issue.[3] If the defendant succeeds in establishing a title to that part of the close on which the trespass was committed, he is entitled to recover, though he does not prove a title to the whole close; the words "the close in which," etc., constituting a divisible allegation.[4]

§ 627. **License in Fact.** The plea of *license* may be supported by proof of a license in law as well as in fact; and it is immaterial whether it be expressed or implied from circumstances. Thus, an entry to execute legal process, or to distrain for rent, or for damage-feasant; or an entry by a remainder-man, or a reversioner, to see whether waste has been done, or repairs made; or by a commoner, to view his cattle; or by a traveller, into an inn; or by a landlord, to take possession, after the expiration of the tenant's lease; or an entry into another's house at usual and reasonable hours, and in the customary manner, for any of the ordinary purposes of life, — may

[9] 3 Stephens N. P. 2642; Webber *v.* Richards, 10 Law Journ. 293; 1 Salk. 452, per Holt, C. J.; Taylor *v.* Hooman, 1 Moore 161; Harris *v.* Cook, 8 Taunt. 539.

[10] Mildmay *v.* Dean, 2 Roll. Abr. 678; Roberts *v.* Karr, 1 Taunt. 495, 501, per Heath, J.

[11] Norwell *v.* Sands, 2 Roll. Abr. 677, 678. And see Doe *v.* Salter, 13 East 9; Brownlow *v.* Tomlinson, 1 M. & G. 484; Walford *v.* Anthony, 8 Bing. 75; Lethbridge *v.* Winter, 2 id. 49; Doe *v.* Harris, 5 M. & S. 326.

[1] Cocker *v.* Crompton, 1 B. & C. 489; Lempriere *v.* Humphrey, 3 Ad. & El. 181; Caruth *v.* Allen, 2 McCord 126; Doe *v.* Wright, 10 Ad. & El. 763; Ryan *v.* Clarke, 13 Jur. 100. {If the defendant claims title under the same person through whom the plaintiff claims, the plaintiff need not prove title in such person, as the defendant, by relying on him, admits that he had the title: McBurney *v.* Cutler, 18 Barb. 203.}

[2] Brest *v.* Lever, 7 M. & W. 593.

[3] Voyce *v.* Voyce, Gow 201; Roberts *v.* Dame, 11 N. H. 226. [But proof that the defendant is tenant in common with a third person is admissible: Sullings *v.* Carter, 105 Mich. 392.]

[4] Smith *v.* Royston, 8 M. & W. 381; Richards *v.* Peake, 2 B. & C. 918.

be given in evidence under this plea.[1] So, an entry after a forfeiture by non-performance of covenants, the lease containing a clause that upon such non-performance the landlord may enter and expel the tenant, may also be shown in the like manner.[2] Evidence of a familiar intimacy in the family may also be given in support of this plea.[3] So, if the plaintiff's goods, being left in the defendant's building, were an incumbrance, and he removed them to the plaintiff's close; or if the plaintiff unlawfully took the defendant's goods, and conveyed them within the plaintiff's close, and the defendant thereupon, making fresh pursuit, entered and retook them, — the facts in either case furnish, by implication, evidence of a license to enter.[4]

[1] 5 Com. Dig. 806, tit. Pleader, 3 M. 35; Ditcham *v.* Bond, 3 Campb. 524; Feltham *v.* Cartwright, 5 Bing. N. C. 569.

A traveller on a highway which is made impassable by a sudden and recent obstruction may pass over the adjoining fields, so far as it is necessary to avoid the obstruction, and doing no unnecessary damage, without being guilty of a trespass: Campbell *v.* Race, 7 Cush. 408, 410; Taylor *v.* Whitehead, 2 Doug. 475; 3 Dane Abr. 258; Holmes *v.* Seeley, 19 Wend. 507; Nowkirk *v.* Sabler, 9 Barb. 652. {"A license from a mother to a son to open the family tomb to desposit therein the corpse of a deceased son will be implied from the relationship of the parties, the exigencies of the case, and the well-established usages of a civilized and Christian community:" Lakin *v.* Ames, 10 Cush. 198, 221. A person who holds himself out to the public as a wharfinger and warehouseman thereby licenses all persons to enter his premises who have occasion to do so in connection with his business. But his business being a merely private one, he may terminate the general license, by giving any person notice not to come on his premises; and if the person so notified enters on his premises, trespass will lie against him: Bogert *v.* Haight, 20 Barb. 251.

So one who is rafting logs upon a stream may go upon the banks for the purpose of doing such acts as may be necessary to the successful floating of the logs to their destination, and detaining them there, as to attach a boom: Weise *v.* Smith, 3 Or. 445. Not, however, if the stream be available for floating logs only in the time of freshets: Hubbard *v.* Bell, 54 Ill. 110. And a person driving cattle along a highway, without negligence, is not a trespasser by entering upon an adjoining unfenced patch to drive back cattle which have escaped from the highway: Hartford *v.* Brady, 114 Mass. 466.}

[2] Kavanagh *v.* Gudge, 7 Man. & Gr. 316; 7 Scott N. R. 1025.

[3] Adams *v.* Freeman, 12 Johns. 408.

[4] R. *v.* Sheward, 2 M. & W. 424; Patrick *v.* Colerick, 3 id. 483. {In regard to the property in wrecks and goods driven ashore by the sea, and the implied license to enter upon land to save such articles, the following opinion of Gray, J., in Proctor *v.* Adams, 113 Mass. 376, gives the law very concisely: "The boat, having been cast ashore by the sea, was a wreck in the strictest legal sense: 3 Black. Comm. 106; Chase *v.* Corcoran, 106 Mass. 286, 288. Neither the finders of the boat, nor the owners of the beach, nor the Commonwealth, had any title to the boat, as against the former owner: Body of Liberties, art. 90; Ancient Chart. 211; 2 Mass. Col. Rec. 143; Stats. 1814, c. 170; Rev. Sts. c. 57; Gen. Stats. c. 81; 3 Dane's Abridg. 134, 136, 138, 144; 2 Kent Comm. 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him: Sutton *v.* Buck, 2 Taunt. 302, 312. If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them: Barker *v.* Bates, 13 Pick. 255; Dunwich *v.* Sterry, 1 B. & Ad. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and returning it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law, that an entry upon land to save goods that are in danger of being lost or destroyed by water, fire, or any like danger, is not a trespass: 21 Hen. VII. 27, 28, p. 5; Bro. Abr. Trespass, 213;

The mere circumstance that the defendant's goods were upon the plaintiff's close, and therefore he entered and took them, is not alone sufficient to justify the entry.[5] But if the owner of the land had sold the goods there to the defendant, a license to enter and take them is implied in the contract.[6] The evidence must cover all the trespasses proved, or it will not sustain the justification.[7] So, if a license to erect and maintain a wall be pleaded, and the evidence be of a license to erect only, the plea is not supported.[8] Evidence of a verbal agreement for the sale of the land by the plaintiff to the defendant is admissible under a plea of license to enter, and may suffice to support the plea as to the entry only; but it is not sufficient to maintain the plea, in respect to any acts which a tenant at will may not lawfully do.[9] Nor will such license avail to justify acts done after it has been revoked.[10]

§ 628. **License in Law.** Under the plea of a *license in law*, the plaintiff cannot give in evidence a subsequent act of the defendant, which rendered him a trespasser *ab initio;* but it must be specially replied.[1] So, if the defendant justifies as preventing a tortious act of the plaintiff, and the plaintiff relies on a license to do the act, he cannot give the license in evidence under the general replication of *de injuria*, but must allege it in a special replication.[2]

§ 629. **Justification.**[1] Where the trespass is justified, under *civil or criminal process*, whether it be specially pleaded, or given in evi-

Vin. Abr. Trespass (H. a. 4), pl. 24, *ad fin.* (K. a.), pl. 3. In Dunwich *v.* Sterry, 1 B. & Ad. 831, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own, and to put the plaintiffs to proof of their title."

Hunting. — In England, by an almost universal custom, or by the insertion of special clauses allowing it in the lease of land, hunting over certain tracts of land is not a trespass. The view that is taken of this subject in the United States may be gathered from the language of Sibley, J., in Glenn *v.* Kays, 1 Ill. App. 479. The defence set up was, that the hunters, who kept a pack of hounds, at the time of committing the trespasses complained of, were hunting wolves, and therefore had a right to pursue the game with their dogs into and through the plaintiff's enclosures, against his objections. The judge says: "Whenever the law shall be so construed as to permit parties to trespass with impunity on the enclosures of their neighbors under such a plea, the fundamental principles upon which it is based should be changed so as to read that every man shall be protected in the enjoyment of his property except in cases where hunters with their hounds may desire to make use of it in the pursuit of game that is considered dangerous."]

[5] Anthony *v.* Harreys, 8 Bing. 186; Williams *v.* Morris, 8 M. & W. 488; [Agnew *v.* Jones, 74 Miss. 347.]

[6] Wood *v.* Manley, 11 Ad. & El. 34; Nettleton *v.* Sikes, 8 Met. 34.

[7] Barnes *v.* Hunt, 11 East 451; Symons *v.* Hearson, 12 Price 369, 390, per Hullock, B.

[8] Alexander *v.* Bonnin, 4 Bing. N. C. 799, 813.

[9] Carrington *v.* Roots, 2 M. & W. 248; Cooper *v.* Stower, 9 Johns. 331; Suffern *v.* Townsend, ib. 35.

[10] Cheever *v.* Pearson, 16 Pick. 266; Taplin *v.* Florence, 3 Eng. Law & Eq. 520.

[1] Aitkenhead *v.* Blades, 5 Taunt. 198. And see Taylor *v.* Cole, 3 T. R. 292, 296, per Buller, J.; Six Carpenters' Case, 8 Co. 146.

[2] Taylor *v.* Smith, 7 Taunt. 157. See *post*, §§ 632, 633.

[1] [Matters pleaded in justification cannot be shown in mitigation of damages: Jenks *v.* Lansing, etc. Co., 97 Iowa 342.]

dence under a brief statement, filed with the general issue, the party must prove every material fact of the authority under which he justifies. If the action is by the person against whom the process issued, it is sufficient for the officer who served it to prove the process itself, if it appear to have issued from a court of competent jurisdiction, under its seal, and to be tested by the chief justice, or other magistrate, whose attestation it should bear, and be signed by the clerk or other proper officer. And if it is mesne process, and is returnable, he should in ordinary cases show that it is returned; unless he is a mere bailiff or servant, who is not bound to make a return.[2] But in trespass against the plaintiff in a former action, or against a stranger, or where the action is brought by a stranger whose goods have been wrongfully taken by the sheriff, under an execution issued against another person, the sheriff or his officers justifying under the process, will be held also to prove the judgment upon which it issued.[3] If the defendant in fact had the process in his hands at the time, he may justify under it, though he then declared that he entered the premises for another cause.[4]

§ 630. **Defence of one's own.** If the defendant justifies the destruction of the plaintiff's property, by the *defence of his own*, he must aver and prove that he could not otherwise preserve his own property.[1] If, however, the plaintiff's dog were killed in the act of pursuing the defendant's deer in his park, or rabbits in his warren, or poultry within his own grounds, this will justify the killing without proof of any higher necessity.[2]

[2] Britton *v.* Cole, 1 Salk. 408; 1 Ld. Raym. 305; Barker *v.* Miller, 6 Johns. 195; Blackley *v.* Sheldon, 7 id. 32; Crowther *v.* Ramsbottom, 7 T. R. 654; Cheasley *v.* Barnes, 10 East 73; Middleton *v.* Price, 1 Wils. 17; Rowland *v.* Veale, Cowp. 20; {Twitchell *v.* Shaw, 10 Cush. (Mass.) 46; Fisher *v.* McGirr, 1 Gray (Mass.) 1; Kennedy *v.* Duncklee, ib. 72; Ross *v.* Philbrick, 39 Me. 29; Keniston *v.* Little, 30 N. H. 318; Edmonds *v.* Buel, 23 Conn. 242; Billings *v.* Russell, 23 Pa. St. 189. A process being void, the party who sets it in motion, and all persons aiding and assisting him, are *prima facie* trespassers for seizing property under it; and acts which an officer might justify under process actually void, but regular, and apparently valid on its face, will be trespasses as against the party: Kerr *v.* Mount, 28 N. Y. 659. But it is not necessary for the officer's, or creditor's, or attorney's justification under process of law, that he should show the subsequent proceedings in the suit to have been regularly carried out. Thus, the plaintiff in an attachment suit may justify a taking of defendant's goods under a valid attachment, although the subsequent judgment and sale on execution are invalid because the attachment defendant was not properly served: Grafton *v.* Carmichael, 48 Wis. 660; Stoughton *v.* Mott, 25 Vt. 668; Eaton *v.* Cooper, 29 id. 444.}

[3] Martyn *v.* Podger, 5 Burr. 2631; Lake *v.* Billers, 1 Ld. Raym. 733; Britton *v.* Cole, 1 Salk. 408, 409. {If the officer has wrongfully sold goods on execution, and justifies under that execution, he will be held to have waived the defence that he might have had by virtue of the writ of attachment under which he originally took the goods, and cannot give evidence of it: Clarkson *v.* Crummell, 37 N. J. L. 541; Philips *v.* Biron, 1 Stra. 509; Addis. Torts, 658.}

[4] Crowther *v.* Ramsbottom, 7 T. R. 654.

[1] Wright *v.* Ramscott, 1 Saund. 84; Vere *v.* Cawdor, 11 East 568; Janson *v.* Brown, 1 Campb. 41.

[2] Barrington *v.* Turner, 3 Lev. 28; Wadhurst *v.* Damme, Cro. Jac. 45; Janson *v.* Brown, 1 Campb. 41; Vere *v.* Cawdor, 11 East 568, 569. {The evidence must show that there was an apparent necessity for the defence, honestly believed to be real, and

§ 631. **Right of Way.** Where the issue is upon a *right of way*, the defendant must prove either a deed of grant to him, or those under whom he claims, or an exclusive and uninterrupted enjoyment for at least twenty years.[1] If the issue is upon *a right to dig and take gravel* or other material necessary for *repairs*, the defendant must allege and prove that the repairs were necessary, and that the materials were used or in the process of being used for that purpose.[2]

§ 632. **Same Subject; Easement.** If a *right of way*, or any other *easement*, is pleaded in justification of a trespass on lands, whether it be in the defendant himself, or in another under whose command he acted, the plaintiff cannot controvert this right by evidence under the general replication of *de injuria sua*, but must *specifically traverse* the right as claimed.[1] And where a right of way is claimed under a non-existing grant from a person who was seised in fee, and the plaintiff traverses the grant, he cannot, under this issue, dispute the seisin in fee for the purpose of rebutting the presumption of a grant, for it is impliedly admitted by the replication.[2]

§ 633. **Reply to Justification.** Wherever the defendant pleads matter of fact in justification, as distinguished from mere matter of record, title, or authority, it may be traversed by the plaintiff, by the general replication *de injuria sua absque tali causa*.[1] This replication being a traverse of the whole plea, the plaintiff is at liberty under it to adduce any evidence disproving the facts alleged in the plea. But he cannot go into any evidence of new matter which shows that the defendant's allegation, though true, does not justify the trespass. Thus, in an action for trespass and false imprisonment, if the defendant justifies the commitment as a magistrate, for an offence which is bailable, to which the plaintiff replies *de injuria*, he cannot, under this replication, avoid the justification by evidence of a tender and refusal of bail.[2] So, if the defendant justifies an assault and battery by the plea of *son assault demesne*, and the plaintiff replies *de injuria*, he will not be permitted to show that the defendant, having entered the plaintiff's house, misbehaved there.[3] Thus also,

then the acts of defence must be in themselves reasonable. The consequences of the proposed act to the aggressor should be considered in connection with the consequences of non-action to the party defending, whether the defence be made in favor of person or property: and in case of defence of domestic animals from the attacks of other animals, the relative value of the animals may be a proper circumstance for the jury to consider in arriving at a conclusion whether the defence was a reasonable one under the circumstances. Anderson *v.* Smith, 7 Ill. App. 354; Cooley on Torts, § 346.]

[1] Hewlins *v.* Shippam, 5 B. & B. 221; Cocker *v.* Cowper, 1 Cr. M. & R. 418. See *supra*, tit. Prescription, §§ 537–546.

[2] Peppin *v.* Shakespeare, 6 T. R. 748.

[1] Cogate's Case, 8 Co. 66. And see Lowe *v.* Govett, 3 B. & Ad. 863.

[2] Cowlishaw *v.* Cheslyn, 1 Cr. & J. 48.

[1] See Gould on Pleading, ch. vii. §§ 26–30.

[2] Sayre *v.* E. of Rochford, 2 W. Bl. 1165, 1169, per De Grey, C. J.

[3] King *v.* Phippard, Carth. 280.

in trespass by a tenant, against his landlord, for turning him out of possession, where the defendant pleaded a fact by which the lease was forfeited, to which the plaintiff replied *de injuria*, it was held, after proof of the fact of forfeiture, that the plaintiff under this replication could not prove the acceptance of rent by the defendant as a waiver of the forfeiture, for he should have replied it specially, in avoidance of the plea.[4] The general rule is, that all matters which confess and avoid, whether alleged by the plaintiff or defendant, must be specially pleaded; otherwise, the proof of them is not admissible.[5]

§ 634. **Same Subject.** The same principle applies to all cases where the defendant justifies the trespass by a plea answering the gist of the action, and the plaintiff would avoid the plea by proving that the defendant exceeded the authority under which he acted, and thus became a trespasser *ab initio*. In such cases the plaintiff cannot show the *excess*, under a general replication; but must distinctly allege it in a special replication, in the nature of a *new assignment*.[1] Thus, in trespass for taking and impounding the plaintiff's cattle, where the defendant justifies for that he took them *damage-feasant*, the plaintiff will not be permitted, under a general replication, to prove that the defendant abused one of the beasts, so that it died, whereby he became a trespasser *ab initio;* for he should have specially replied the excess.[2] So, in trespass for breaking and entering the plaintiff's house, and expelling him from it, where the defendant justified the breaking and entering, under a writ of *fieri facias*, which, it was held, covered the expulsion, it was held, that the plaintiff could not be permitted to rely on the expulsion as an excess, without specially replying it.[3] The replication of excess admits the justification as alleged, and precludes the plaintiff from offering any evidence to disprove it.[4]

§ 635. **New Assignment.** If a justification is pleaded, and thereupon the plaintiff makes a *new assignment*, to which the defendant pleads not guilty, if the plaintiff proves only one trespass, he must also clearly show that the trespass proved is a different one from that mentioned in the plea; for if the circumstances are alike, the jury will be instructed to presume it to be the same.[1]

[4] Warrall *v.* Clare, 2 Campb. 628.

[5] 2 Stark. Ev. 825; Hetfield *v.* Central Railw., 5 Dutch. 571.

[1] Gould on Pleading, ch. vi. part 2, § 110; 1 Chitty on Pleading, pp. 512, 513, 542–552; Monprivatt *v.* Smith, 2 Campb. 175; Warrall *v.* Clare, ib. 629. {This, of course, does not apply to cases where the officer has levied on the property of a stranger: Lincoln *v.* McLaughlin, 74 Ill. 11. The courts in the United States seem to consider it proper to make a new assignment, as stated in the text, even where the common-law rules of pleading have become much relaxed, unless it is agreed by the parties to dispense with such plea: Lincoln *v.* McLaughlin, *supra;* Camp *v.* Ganley, 6 Ill. App. 499.}

[2] Gates *v.* Bayley, 2 Wils. 313; Gargrave *v.* Smith, 1 Salk. 221; Bull. N. P. 81; Moore *v.* Taylor, 5 Taunt. 69.

[3] Taylor *v.* Cole, 3 T. R. 292, 296.

[4] Pickering *v.* Rudd, 1 Stark. 56; 4 Campb. 219.

[1] Darby *v.* Smith, 2 M. & Rob. 184.

§ 635 *a*. **Damages.** The *rule of damages* in this action has already been discussed in treating the subject of Damages;[1] where we have seen that the declaration involves not only the principal transaction, but all its attendant circumstances, and its natural and injurious results; all of which are put in issue by the plea of not guilty. Upon this principle it has been held, in trespass *quare clausum fregit*, where the defendant's sheep trespassed on the plaintiff's close, and commingled with his own, that evidence of a deadly disease, communicated by the defendant's flock to the plaintiff's, was admissible, as showing part of the damages which the plaintiff was entitled to recover. And the knowledge of the defendant was held immaterial to be proved, unless to increase the damages.[2] And generally, where the plaintiff has been deprived of the use of his property for a time, by the act complained of, the value of the use, during such period, is to be taken into the estimation of damages;[3] the return of the property to the owner's possession, and his acceptance of it, being available to the wrong-doer only in mitigation of damages, but not in bar of the action.[4] So, if the value of the property has been lawfully applied to the owner's use, this, as has been seen in another place, may be shown to reduce the damages.[5]

[1] See *supra*, §§ 254, 256, 266, 268. {It is not necessary that damages which naturally and necessarily result from the injury complained of, should be specially averred, in order to allow the introduction of evidence of them; *e. g.*, when timber has been cut off land, and the action is trespass *quare clausum*, the measure of damages is the difference between the value of the land before it was deprived of the timber, and its value afterwards; and evidence may be given of these values: Argotsinger *v.* Vines, 82 N. Y. 308; Jutte *v.* Hughes, 67 id. 267.} [So where coal is mined: Warrior Coal Co. *v.* Mabel Mining Co., 112 Ala. 624.]

[2] Barnum *v.* Vandusen, 16 Conn. 200.

[3] Warfield *v.* Walter, 11 G. & J. 80; Hammatt *v.* Russ, 4 Shepl. 171; [McArthurs *v.* Cornwall, 1892, A. C. 75.]

[4] Hanmer *v.* Wilsey, 17 Wend. 91; Coffin *v.* Field, 7 Cush. 360; [Stephenson *v.* Wright, 111 Ala. 579.]

[5] See *supra*, §§ 272, 276. It is agreed, that, where the property has gone to the plaintiff's use, by his consent, either express or implied, this will avail to reduce his damages. But several of the cases seem to turn on the question, whether the property was so applied by the wrong-doer himself, or by a mere stranger. And upon this distinction it has been held, where property was taken upon an *illegal* process against the owner, for which taking an action of trespass was commenced against the creditor who directed it, and afterwards a *legal* process was sued out, under which the same property, which had not gone back into the owner's possession, was seized and sold for his debt, that the defendant was not at liberty to prove this fact in mitigation of damages, it being a mere act of his own: Hanmer *v.* Wilsey, 17 Wend. 91. The like point, upon the same distinction, was again decided in Otis *v.* Jones, 21 id. 394. So, where one wrongfully took goods under a belief of right so to do, and they were afterwards taken out of his hands by distress for rent due from the owner to his landlord, it was held, in an action of trespass brought by the owner against the tortfeasor, that the latter might show this fact in mitigation of damages, *because* of his belief of his right to take the goods: Higgins *v.* Whitney, 24 id. 379. And, still later, in an action against a sheriff for an unauthorized seizure of goods under a *fieri facias*, he was permitted to show, in mitigation of damages, that the goods were afterwards taken from his custody, and lawfully sold on a distress warrant issued against the plaintiff in favor of a third person; the sale being independent of any agency of the defendant: Sherry *v.* Schuyler, 2 Hill (N. Y.) 204.

Other courts, however, have held, that, *wherever* the property has been applied to

the plaintiff's use, this may be shown in mitigation of damages. See Irish *v.* Cloyes, 8 Vt. 30, 33.

But this rule will generally be found to have been applied only in cases of illegal seizures or sales of goods by officers, who have subsequently either regularly sold the goods, or applied the proceeds of the irregular sale in satisfaction of final process against the owner. Such were, in substance, the cases of Farrar *v.* Barton, 5 Mass. 395; Prescott *v.* Wright, 6 id. 20; Pierce *v.* Benjamin, 14 Pick. 356; Daggett *v.* Adams, 1 Greenl. 198; Board *v.* Head, 3 Dana 489, 494; Stewart *v.* Martin, 16 Vt. 397. Even where the defendant was a mere trespasser without pretence of title, he has been permitted to show, in mitigation of damages, that the goods had been duly taken out of his hands and sold by an officer, by virtue of a legal precept against the plaintiff: Squire *v.* Hollenbeck, 9 Pick. 551; Kaley *v.* Shed, 10 Met. 317.

Perhaps, the true principle will be found to be this: that, where the appropriation of the goods or their value to the plaintiff's use was by his consent, expressed or implied, it goes in reduction of the damages; it being in the nature of a return and acceptance of the goods; and that such consent may always be implied where the goods have been legally seized and sold under process against him. If the appropriation was made in any other manner, his consent may be shown by any evidence of a subsequent ratification; such as claiming the benefit of it, if it were delivered in payment to his own creditor, or the like.

In trespass *de bonis asportatis*, if the jury find for the plaintiff, the goods being still out of his possession, they must award him the value of the goods; they cannot award damages for the taking alone, on the ground that the goods are still the property of the plaintiff: Woolley *v.* Carter, 2 Halst. 85. But if the plaintiff has received the goods again, it is otherwise: Merrill *v.* How, 11 Shepl. 196. {In trespass for assault and battery, if the person commit violence at a time when he is smarting under immediate provocation, this may be proved in mitigation of damages: Tyson *v.* Booth, 100 Mass. 260; Sedgwick, Dam. 563. And where the acts done or words spoken some time previous to the assault, are part of a series of provocations, repeated and continued up to the time of the assault, they may all be received as part of the *res gestæ*: Stetlar *v.* Nellis, 60 Barb. (N. Y.) 524; Davis *v.* Franke, 33 Gratt. (Va.) 413.

It seems that punitive damages are allowed in trespass, where the act is malicious or reckless: Becker *v.* Dupree, 75 Ill. 167; Huftalin *v.* Misner, 70 id. 55.

In mitigation of such damages, acts of the plaintiff which tend to provoke such trespasses may be given in evidence: Weston *v.* Gravlin, 49 Vt. 507; Prentiss *v.* Smith, 58 Me. 427; Wilson *v.* Young, 31 Wis. 574.}

TROVER.

§ 636. **Nature of the Action.** This action, the form of which is fictitious, is in substance a remedy to recover the value of personal chattels,[1] wrongfully converted by another to his own use. To entitle the plaintiff to recover, two points are essential to be proved: (1) property in the plaintiff,[2] and a right of possession at the time

[1] {As this action is for the damage to personal property, it will not lie in general for chattels attached to the realty in such a manner as to form part of it, or for fixtures; and the question is often very close whether chattels have become portion of the realty by being attached to it. Thus, where the evidence showed that an engine was affixed by large iron bolts running down into solid masonry foundations and secured by melted brimstone, and the boiler was set on brick masonry and surrounded most of the way up by brickwork, so that it could not be removed without tearing down some portion of the permanent building, it was held that these things were not mere chattels, and that trover would not lie for taking them away: Raddin *v.* Arnold, 116 Mass. 270.

So, where one sued for the conversion of a number of railroad ties, and the evidence was that the ties had come into the possession of the defendants, already placed in the bed of the roadway and ballasted, it was held that the evidence would not support the action: Detroit, etc. R. R. Co. *v.* Busch, 43 Mich. 571; Woodruff *v.* Adams, 37 Conn. 233.

So, where it was proved that one bought a water-mill with the water-wheels attached to the building, and the flume was built up around them in such a way as to prevent their being removed without material injury to the building, the evidence was considered insufficient to support an action of trover: Knowlton *v.* Johnson, 37 Mich. 47. And to the general effect that trover will not lie for fixtures which are part of the realty are, Morrison *v.* Berry, 42 id. 389; Pierce *v.* Goddard, 22 Pick. (Mass.) 559; Fryatt *v.* Sullivan Company, 5 Hill (N. Y.) 116. [Sand or gravel in its original bed is not subject to conversion: Glencoe Sand Co. *v.* Hudson, 138 Mo. 439; nor ores: Lehigh Zinc Co. *v.* New Jersey Zinc Co., 26 A. 920, N. J. L.]

When, however, the evidence offered shows that real property has been severed from the realty, — *e. g.* crops which have been reaped, — it will support an action of trover: Freeman *v.* Underwood, 66 Me. 229; Forsyth *v.* Wells, 41 Pa. St. 291. So, trover will lie against the *bona fide* purchaser of loads of earth wrongfully taken from the plaintiff's land, and without any demand and refusal, although the defendant was ignorant of the trespass when he converted the earth to his own use: Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11. [And see Hartford Iron Co. *v.* Cambria, etc. Co., 93 Mich. 90.]

A question of some difficulty arises when buildings or fixtures are treated by the owner as personalty. Thus, if A erects buildings on land of B, and A and B agree together that the buildings shall not become part of the realty, but remain the personal property of A, these buildings are personalty as to all buyers who have notice of this agreement, but realty as to *bona fide* purchasers who have not had such notice: Hunt *v.* Bay State Iron Co., 97 Mass. 279; Hartwell *v.* Kelly, 117 id. 235. If, then, the owner of the land sells the land to such an innocent purchaser, the buildings will pass by that sale, and the owner of the land will be liable to the owner of the buildings in trover for conversion: Dolliver *v.* Ela, 128 id. 557.}

[2] Per Ld. Mansfield, 1 T. R. 56. See also 2 Saund. 47 *a* to 47 *k*, note (1). {The plaintiff need not set out his title with more definiteness than that he "was lawfully possessed of" the goods, and he may offer evidence of any kind of title, general or special, under this declaration. Thus, Cooley, J., in Harvey *v.* McAdams, 32 Mich. 472, says, "The objection to the admission in evidence of the chattel mortgage under

of the conversion; and (2) a conversion of the thing by the defendant to his own use. Whether the defendant originally came to the possession of the thing by right or by wrong is not material. The plaintiff should also be prepared to prove the value of the goods at the time and place of the conversion; though this is not essential to the maintenance of the action.

§ 637. **Plaintiff's Interest.** (1) The *property* in the plaintiff may be either general and absolute, or only special; the latter of these interests being sufficient for the purpose.[1] And where the plaintiff has a special property, he may maintain this action against even the general owner, if he wrongfully deprives him of the possession.[2] Special property, in a strict sense, may be said to consist in the lawful custody of the goods, with a right of detention against the general owner;[3] but a lower degree of interest will sometimes suffice, against

which the plaintiffs claimed the property, has no force. The ground of it was that the declaration counted on a conversion of the plaintiff's property, without setting out the nature of their interest. But no *declaration* in trover undertakes to notify the defendant of the precise nature of the plaintiff's title or what are evidences of it." But if he chooses to limit himself to one method of acquiring title to the goods, and states his title to be a special one, *e. g.* a lien for repairs furnished a domestic vessel, he will be held by this self-imposed limitation and will be obliged to prove his title just as it is stated: Gregory Point Marine Ry. Co. *v.* Selleck, 43 Conn. 320.]

[1] Webb *v.* Fox, 7 T. R. 398, per Lawrence, J.; [McKeen *v.* Converse, 39 A. 435, N. H.; Kane *v.* Hutchinson, 93 Mich. 488. As to the application and limitations of this rule, see Northern Pacific R. *v.* Lewis, 162 U. S. 366.]

[2] Roberts *v.* Wyatt, 2 Taunt. 268; Spoor *v.* Holland, 8 Wend. 445.

[3] The nature of special property is thus discussed by Mr. Justice Story. "What is meant by a special property in a thing? Does it mean a qualified right or interest in the thing, a *jus in re*, or a right annexed to the thing? Or does it mean merely a lawful right of custody or possession of the thing, which constitutes a sufficient title to maintain that possession against wrong-doers by action or otherwise? If the latter be its true signification, it is little more than a dispute about terms; as all persons will now admit, that every bailee, even under a naked bailment from the owner, and every rightful possessor by act or operation of law, has in this sense a special property in the thing. But this certainly is not the sense in which the phrase is ordinarily understood. When we speak of a person's having property in a thing, we mean that he has some fixed interest in it (*jus in re*), or some fixed right attached to it, either equitable or legal; and when we speak of a special property in a thing, we mean some special fixed interest or right therein, distinct from and subordinate to, the absolute property or interest of the general owner. Thus, for example, if goods are pledged for a debt, we say that the pledgee has a special property therein; for he has a qualified interest in the thing, coextensive with his debt, as owner *pro tanto*. So we say, that artificers and workmen, who work on or repair a chattel, and warehousemen, and wharfingers, and factors, and carriers, have a special property in the chattel confided to them for hire, for the particular purpose of their vocation, because they have a lien thereon for the amount of the hire due to them, and a rightful possession in virtue of that lien, even against the general owner, which he cannot displace without discharging the lien. So the sheriff, who has lawfully seized goods on an execution, may in this sense be said without, perhaps, straining the propriety of language, to have a special property in the goods, although, more correctly speaking, the goods should be deemed to be in the custody of the law, and his possession a lawful possession, binding the property for the purposes of the execution against the general owner, as well as against wrong-doers. But it seems a confusion of all distinction to say that a naked bailee, such as a depositary, has a special property when he has no more than the lawful custody or possession of the thing, without any vested interest therein, for which he can detain the property, even for a moment, against the lawful owner. It might, with far more propriety, be stated, that a gratuitous borrower has a special property in the thing bailed to him, because, during the time of the bailment, he has a right to the use of the

a stranger; for a mere wrong-doer is not permitted to question the title of a person in the actual possession and custody of the goods,

thing, and seems thus clothed with a temporary ownership for the purposes of the loan. Yet this has sometimes been a matter denied or doubted.

"Mr. Justice Blackstone has defined an absolute property to be, 'Where a man has solely and exclusively the right, and also the occupation, of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default;' and qualified, limited, or special property to be such 'as is not in its nature permanent, but may sometimes subsist, and at other times not subsist.' And after illustrating this doctrine by cases of qualified property in animals *ferœ naturæ*, and in the elements of fire, light, air, and water, he then proceeds: 'These kinds of qualifications in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership: as in case of bailment, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or bailee, the person delivering, or him to whom it is delivered; for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both, and each of them is entitled to an action, in case the goods be damaged or taken away; the bailee, on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also. So also in case of goods pledged or pawned, upon condition, either to repay money or otherwise both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them; the pledgor's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so, too, is that of the pledgee, which depends upon its non-performance. The same may be said of goods distrained for rent, or other cause of distress; which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainor, or the party distrained upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession, either absolute or qualified, but only a mere charge or oversight.' The cases here put by the learned Commentator, of qualified property, are clearly cases where the bailee has an interest or lien *in rem*. Mr. Justice Lawrence, on one occasion said: 'Absolute property is, where one, having the possession of chattels, has also an exclusive right to enjoy them, and which can only be defeated by some act of his own. Special property is where he who has the possession holds them subject to the claims of other persons. There may be special property in various instances. There may be special property without possession: or there may be special property, arising simply out of a lawful possession, and which ceases when the true owner appears. Such was the case of Armory *v.* Delamirie.'

"Now, with reference to the case in judgment, the language of the learned judge may be strictly correct; for it is by no means clear that the bankrupt had not an absolute property in the chattels, good against all the world, until his assignees asserted some title to it. The case cited of Armory *v.* Delamirie, was the case of goods coming to the party's possession by finding, where he might justly be said to be entitled to it, as well as possessed of it, as absolute owner, against all the world, until the rightful owner appeared and claimed it; and if it was never claimed, his title as finder remained absolute. The case of a naked depositary, does not seem to have been here presented to the mind of the learned judge. Indeed, there is no small refinement and subtilty in suggesting that a person, lawfully in possession of a thing, has, at the same time, a special property therein against strangers, and no property at all against the true owner. What sort of special property is that which has no existence against the owner of the thing, and yet, at the same time, has an existence against other persons? Can there be property and no property at the same time? If the language were, that, when a party has a right of possession, that right cannot lawfully be violated by mere wrong-doers; but, if violated, it may be redressed by an action of trespass or trover, it would be intelligible. If the language were, that a person may have a present temporary or defeasible property in a thing, subject to be devested by the subsequent claim of the rightful owner under his paramount title (such as in the case of the finder of chattels), or a temporary property not special, which is to become absolute, or extinguished, by future events (such as the possession of an abstract of the title of the

whose possession he has wrongfully invaded. The naked possession of goods, with claim of right, is sufficient evidence of title against one who shows no better right.[4] Hence the sheriff, who has attached goods, may maintain this action against one who takes them from his possession, or from that of his bailee for mere custody.[5]

§ 638. **Title by Purchase.** Where the plaintiff claims title to goods under a *sale*, and a question is made as to the time when the property passed, it will be material for him to prove that everything that the seller had to do was already done, and that nothing remained to be done on his own part but to take away the specific goods. They must have been weighed or measured, and specifically designated and set apart by the vendor subject to his control; the vendor remaining, at most, but a mere bailee.[1] If they were sold at auction, the prop-

vendor by the vendee, under a contract for a sale and conveyance of real estate), there would be little difficulty in comprehending the nature and quality of the right as a *jus in re*. It would be a present fixed right of property, subject to be devested or destroyed by matters *in futuro*. In short, it would be a defeasible but vested interest *in rem*. But in the face of a naked deposit, by the very theory of the contract, the bailor never means to part for a moment with his right of property, either generally or specially, but solely with his present possession of it; and the undertaking of the bailee is not to restore any right of property, but the mere possession, to the bailor. It is this change of possession which constitutes the known distinction between the custody of a bailee and that of a mere domestic servant; for, in the latter case, there is no change whatever of possession of the goods, but the possession remains in the master, and the servant has but a charge, or oversight; whereas, in the case of a bailee, there is a positive change of possession. The true description of the right conferred on a naked bailee is that which Mr. Justice Blackstone, in the passage before cited, calls a 'possessory interest,' or right of possession, in contradistinction to a general or special property." See Story on Bailments, § 93 *g*, *h*, *i*.

[4] Sutton *v.* Buck, 2 Taunt. 302; Amory *v.* Delamirie, 1 Str. 505; Burton *v.* Hughes, 2 Bing. 173; Giles *v.* Grover, 6 Bligh 277; Story on Bailments, § 93, *d*, *e*, *f*; Duncan *v.* Spear, 11 Wend. 54; Faulkner *v.* Brown, 13 id. 63; {Derby *v.* Gallup, 5 Minn. 119; Burke *v.* Savage, 13 Allen (Mass.) 408. See also *ante*, § 561.}

[5] Wilbraham *v.* Snow, 2 Saund. 47; Story on Bailments, § 93, *e*, *f*; §§ 132–135; Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, ib. 389; Lathrop *v.* Blake, 23 N. H. 46. Whether the sheriff's bailee for safe-keeping can maintain trover, is a point upon which the decisions are not uniform. See Story on Bailments, § 133; Ludden *v.* Leavitt, 9 Mass. 104; Poole *v.* Symonds, 1 N. H. 289; Odiorne *v.* Colley, 2 id. 66. {The consignee of goods who is ready to pay freight on having the goods delivered to him may maintain trover against the carriers or their agents, who, having no claim on the goods for anything besides the freight, refuse to deliver them unless a further sum is first paid; the consignee in such case is not bound to make any tender to those in possession of the goods, and their refusal to deliver the goods is evidence of a conversion; for the payment of freight, for the carriage of the goods, being an act which need not be performed until the delivery of the goods, the two acts should be concurrent, and the refusal of one party to perform one makes it unnecessary for the other party to offer to perform the other: Adams *v.* Clark, 9 Cush. (Mass.) 215. The lessee of a horse may, in trover, recover of the owner damages for the loss of the use of the horse by the act of the owner, during a portion of the time of the bailment: Hickok *v.* Buck, 22 Vt. 149.

A father put certain property into the possession of his son to enable him to earn a livelihood, without any stipulation as to the length of time that the son should keep the property, and reserving the right to take it away and sell it, whenever he should be put to any expense about it. A portion of the property, after it had been for some time in the possession and use of the son, was attached as property of the son, and it was held that the father could maintain trover against the attaching officer: Morgan *v.* Ide, 8 Cush. (Mass.) 423. See also Bryant *v.* Clifford, 13 Met. (Mass.) 138.}

[1] Tarling *v.* Baxter, 6 B. & C. 360; Bloxam *v.* Saunders, 4 id. 948; Simmons *v.* Swift, 5 id. 857.

erty passes to the vendee, although the goods were not to be delivered to him until the auctioneer had paid the duties to the government; or although they were to be kept by the auctioneer as a warehouseman for a stipulated time.[2] If, before the terms of sale are complied with, the vendor's servant delivers them to the vendee by mistake, no property passes.[3] Nor does any property pass by a verbal contract of sale, which the Statute of Frauds requires to be in writing.[4] If a specific article, such as a ship, for example, is to be built, and the price is to be paid by instalments as the work advances, the payment of the instalments, as they fall due, vests the property of the ship in the vendee; but if the contract is general, without instalments, it is otherwise.[5] But though the property thus passes, by the contract of sale, in the manner above stated, yet by rescinding the contract the property of the vendee is devested, and the vendor is remitted to his former right.[6] If the sale is fraudulent, or illegal, or if the goods were obtained by false pretences, or were stolen and sold by the thief to an innocent purchaser, no property passes.[7]

§ 639. **Title to Bill of Exchange, etc.** Where the plaintiff claims title as the holder of a *bank-note, bill of exchange, promissory note,*

[2] Hind *v.* Whitehouse, 7 East 558, 571; Philimore *v.* Barry 1 Campb. 513; Simmons *v.* Anderson, 7 Rich. (S. C.) 67.

[3] Bishop *v.* Shillito, 2 B. & Ald. 329, n. (*a*), per Bayley, J. And see Brandt *v.* Bowlby, 2 B. & Ad. 932.

[4] Bloxsome *v.* Williams, 3 B. & C. 234.

[5] Woods *v.* Russell. 5 B. & Ald. 942; Clarke *v.* Spence, 4 Ad. & El. 448; Goss *r.* Quinton, 3 M. & G. 825; Bishop *v.* Crawshay, 8 B. & C. 419; Mucklow *v.* Mangles, 1 Taunt. 318; Angier *v.* Taunton, etc. Co., 1 Gray 621.

[6] Pattison *v.* Robinson, 5 M. & S. 105; *supra*, § 615.

[7] Wilkinson *v.* King, 2 Campb. 335; Noble *v.* Adams, 7 Taunt. 59; Packer *r.* Gillies, 2 Campb. 336, *n.*; Peer *v.* Humphrey, 2 Ad. & El. 495; {Decker *v.* Matthews, 2 Kernan (N. Y.) 313; Ladd *v.* Moore, 3 Sandf. Sup. Ct. 589; and see *post*, § 642. If an illegal and void contract of sale is so fully carried out that a demand connected with it is capable of being enforced at law *without aid from the illegal* transaction, the claim will be sustained: Tenant *r.* Elliott, 1 Bos. & P. 3; Merritt *v.* Millard, 4 Keyes 208; Woodworth *v.* Bennett, 43 N. Y. 273; Chitty, Cont. 657. And if the plaintiff in trover can make out his right to possession without introducing evidence relating to the illegal contract, he can recover; but if he relies on a constructive possession of the goods, he must fail, since a constructive possession depends upon the legal title under which he claims, and this legal title is based on the illegal transaction, so that in introducing his evidence of title he would be obliged to touch upon the illegal transaction: Clements *v.* Yturria, 81 N. Y. 285. A mortgagee having the right of immediate possession of the mortgaged goods was induced by the fraudulent representations of the mortgagor to permit the property to remain in the mortgagor's possession for a certain period. During this period, the mortgagor, with intent to defraud the mortgagee, sent the goods to an auctioneer, who sold them, and delivered the proceeds of the sale to the mortgagor; and it was held that the mortgagee could maintain trover against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and did not in fact know of the existence of the mortgage: Coles *v.* Clark, 3 Cush. (Mass.) 399. See also Flanders *v.* Colby, 28 N. H. 34; Moody *v.* Whitney, 34 Me. 563; Cartland *v.* Morrison, 32 id. 190; Cobb *v.* Dows, 9 Barb. (N. Y.) 230. Trover will not lie against a *bona fide* purchaser, without notice, of a fixture wrongfully severed from the freehold: Cope *v.* Romeyne, 4 McLean C. C. 384; nor for fixtures which a tenant has left annexed to the freehold, with the leave of the landlord, after he has quit the possession: Ruffey *v.* Henderson, 8 Eng. Law & Eq. 205.}

exchequer bill,[1] government bond made payable to the holder,[2] or other *negotiable security*, whether payable to bearer or to order, and indorsed in blank; it is sufficient for him to show that he took it *bona fide* and for a valuable consideration; for this vests the title in him, without regard to the title or want of title in the person from whom he received it. It was formerly held that if the latter came to the possession by felony, or fraud, or other *mala fides*, it was incumbent on the plaintiff to show that he had used due and reasonable caution in taking it; but though gross negligence in the transferee may still be shown, as evidence of fraud, though not equivalent to it, yet his title is now held to depend, not on the degree of caution which he used, but on his good faith in the transaction.[3] If the security was lost by the plaintiff, and has been found and converted by the defendant, who has paid part of the proceeds to the plaintiff, the acceptance of such part is no waiver of the tort, but trover still lies for the security.[4]

§ 640. **Possession.** There must also be shown in the plaintiff a right to the *present possession* of the goods. If he has only a special property, there must ordinarily be evidence of actual possession;[1] but the general property has possession annexed to it by construction of law.[2] If, however, there is an intermediate right of possession in another person as lessee, the general owner cannot maintain this action. Therefore, a lessor of chattels cannot have an action of trover against one who has taken them from the possession of his lessee, so long as the right of the lessee remains in force.[3] But if

[1] Wookey *v.* Poole, 4 B. & Ald. 1.

[2] Gorgier *v.* Mieville, 3 B. & C. 45.

[3] Story on Bills, §§ 415, 416; Story on Promissory Notes, 193–197, 382; Bayley on Bills, pp. 138, 139, 535–539 (6th ed.); Chitty & Hulme on Bills, pp. 254–257; Goodman *v.* Harvey, 4 Ad. & El. 870; Uther *v.* Rich, 10 id. 784. See *ante*, § 172. {Where in an action of trover, it was proved that the State treasurer took drafts payable to his order in payment of taxes, though he was authorized only to take money, and the drafts were indorsed by his clerk and put in a bank for collection, it was held that the State could recover against the bank in an action for the conversion of the drafts, its possession being sufficient as against the bank: People *v.* Bank of North America, 75 N. Y. 547.}

[4] Burn *v.* Morris, 4 Tyrw. 485.

[1] Coxe *v.* Harden, 4 East 211; Hotchkiss *v.* McVickar, 12 Johns. 407; Sheldon *v.* Soper, 14 id. 352; Dennie *v.* Harris, 9 Pick. 364; {Clark *v.* Draper, 19 N. H. 419.} A factor to whom goods have been consigned, but which have not yet come to hand, may maintain trover for them; and this is said to contradict, or at least to form an exception to, the rule stated in the text. See Fowler *v.* Brown, 1 B. & P. 47, per Eyre, C. J. But the possession of the carrier being the possession of the factor, whose servant he is for this purpose, the case would seem on this ground to be reconcilable with the rule: Bull. N. P. 36; Dutton *v.* Solomonson, 3 B. & P. 584; Dawes *v.* Peck, 8 T. R. 330; Chitty on Contr. (11th Am. ed.) p. 316; Story on Contr. (5th ed.) §§ 436, 509. {Where one had raked the manure scattered in a public street into heaps, preparatory to its removal, he may maintain trover against one who, twenty-four hours after it is gathered, carts it off: Haslem *v.* Lockwood, 37 Conn. 500.}

[2] Gordon *v.* Harper, 7 T. R. 12, per Grose, J.; 2 Saund. 47 *a*, n. (1); Ayer *v.* Bartlett, 9 Pick. 156; Foster *v.* Gorton, 5 Pick. 185; [White *v.* Yawkey, 108 Ala. 270.]

[3] Ibid.; Smith *v.* Plomer, 15 East 607; Wheeler *v.* Train, 3 Pick. 255; Pain *v.* Whittaker, Ry. & M. 99; Fairbank *v.* Phelps, 22 Pick. 535; *supra*, § 616. And see

the interest of the tenant or possessor is determined, whether by forfeiture or otherwise, the general owner may sue. Thus, if the tenant has unlawfully sold the machinery demised with a mill;[4] or, if a stranger cuts down and removes a tree, during a term,[5] — the general owner may maintain this action against the purchaser or stranger. Upon the same general principle of right to the immediate possession, the purchaser of goods not sold on credit has no right to this form of remedy, until he has paid or tendered the price;[6] even though he has the key of the apartment where the goods are stored, if the vendor still retains the general control of the premises.[7] So, if the purchaser of lands, being permitted to occupy until default of payment, the title remaining in the vendor for his security, cuts down and sells timber without leave from the vendor, the latter may have trover against the purchaser.[8] And if the bailee of goods for a special purpose transfers them to another in contravention of that purpose, the remedy is the same.[9] The bailee of materials to be

Farrant *v.* Thompson, 5 B. & A. 826. But an intervening right by way of lien, such as that of a carrier, will not deprive the general owner of this remedy, against a wrong-doer: Gordon *v.* Harper, 7 T. R. 12; Nichols *v.* Bastard, 2 C. M. & R. 659; Rugg *v.* Barnes, 2 Cush. 591; Harvey *v.* Epes, 12 Gratt. 153. {The same difficulty arises as to the right of possession to crops where the farm is worked on *shares*, which was indicated in the title *Trespass, ante*, § 616. In Lehr *v.* Taylor, 90 Pa. St. 381, the evidence was that the plaintiff worked the defendant's farm on shares under a lease. By the terms of the lease he was to have half the grain, but the *right of possession thereof* in the fields or in the barn was to be in the defendant until divided, and his share delivered to him, under the terms of the lease. The plaintiff planted crops and then moved off the farm. The defendant harvested and sold the wheat crop, but refused to deliver the plaintiff his share thereof, on the ground that the plaintiff had fraudulently kept back part of the crops of the preceding year. It was held that under the terms of the agreement the right of possession was in the defendant, and that the evidence would not support an action of trover. Cf. Koob *v.* Amman, 6 Ill. App. 160.

Where the owner of a chattel leases it, and then mortgages it, the mortgagee cannot maintain trover against the lessee until the lease has expired: Forth *v.* Pursley, 82 Ill. 152. Where the plaintiff consigned goods to a third party to be paid for as they were sold by him, the legal possession of them is in the consignee (Fairbank *v.* Phelps, 22 Pick. (Mass.) 535), and the plaintiff cannot maintain trover for the goods (Hardy *v.* Munroe, 127 Mass. 64).}

[4] Farrant *v.* Thompson, 5 B. & A. 826. See also Ashmead *v.* Kellogg, 23 Conn. 70.

[5] Berry *v.* Heard, Cro. Car. 242; Palm. 327; 7 T. R. 13; Blaker *v.* Anscombe, 1 New Rep. 25.

[6] Bloxam *v.* Saunders, 4 B. & C. 941; Miles *v.* Gorton, 4 Tyrw. 295.

[7] Milgate *v.* Kebble, 3 Man. & Gr. 100.

[8] Moores *v.* Wait, 3 Wend. 104.

[9] Wilkinson *v.* King, 2 Camph. 335; Loeschman *v.* Machin, 2 Stark. 311. But if a consignee of goods for sale, at a price not less than a certain sum, sells them for a less sum, it is not a conversion, but the remedy is by a special action on the case: Serjeant *v.* Blunt, 16 Johns. 74. {A consignee, having authority to sell property for the owner, sold it as the property of a person other than the owner, and such sale was held a conversion: Covell *v.* Hill, 2 Selden (N. Y.) 374. So, where the evidence in an action of trover was that a bailee of the goods to hold them for a certain time, shipped them by express, he was held liable for conversion: Edwards *v.* Frank, 40 Mich. 616. So, if the owner of a chattel parts with the possession of it upon an agreement of lease or bailment, and one of the terms of the bailment is violated in a manner which tends to show the assumption by the bailee of dominion over and ownership of the chattel, this is evidence of a conversion to his own use, and the jury

manufactured may also have this action against a stranger, though the goods were taken by the defendant from the possession of a third person, whom the plaintiff had hired to perform the work.[10] So, a shipowner may maintain trover for the goods shipped, against the sheriff who attaches them, without payment or tender of the freight due.[11]

§ 641. **Title as Executor, etc.** An *executor* or *administrator* has the property of the goods of his testator or intestate vested in him before his actual possession; and therefore may have trover or trespass against one who has previously taken them. And though he does not prove the will, or receive letters of administration, for a long time after the death of the testator or intestate, yet the property will be adjudged to have been in him, by relation, immediately upon the decease.[1] If he relies on his constructive possession, and a conversion after the death of the testator or intestate, he must produce and prove at the trial his letters testamentary, or of administration.[2]

§ 642. **Conversion.** (2) The plaintiff must, in the next place, show that the defendant has *converted* the goods to his own use. A *conversion*, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff, under a claim of title, inconsistent with his own.[1] It may therefore be either direct or constructive;

should find, as a question of fact, whether he did so convert it: Goell *v.* Smith, 128 Mass. 238; Harvey *v.* Epes, 12 Gratt. (Va.) 153. Where, however, one delivers goods to another to *hypothecate*, he thereby impliedly authorizes a sale if the loan is not paid when it becomes due: Duffield *v.* Miller, 92 Pa. St. 286.]

[10] Eaton *v.* Lynde, 15 Mass. 242; Bryant *v.* Clifford, 13 Met. 138.

[11] DeWolf *v.* Dearborn, 4 Pick. 466. [A person to whom a letter sent by mail is addressed may maintain an action of trover in a State court, against the postmaster who unlawfully refuses to deliver: Teal *v.* Felton, 12 How. (U. S.) 284.]

[1] 1 Com. Dig. 341, tit. Administration, B. 10; id. 425, tit. Action upon the Case upon Trover, B.; R. *v.* Horsley, 8 East 410, per Ld. Ellenborough; Doe *v.* Porter, 3 T. R. 13, 16; Long *v.* Hebb, Sty. 341; Locksmith *v.* Creswell, 2 Roll. Abr. 399, pl. 1; Anon., Comb. 451, per Holt, C. J.; 2 Selw. N. P. 777 (10th ed.); Patten *v.* Patten, 1 Alcock & Napier 493, 504; Wilson *v.* Shearer, 9 Met. 504. In Woolley *v.* Clark, 5 B. & Ald. 744, it was said, that, as to the administrator, his title being derived wholly from the Ecclesiastical Court, no right vested in him until the grant of letters of administration; but the resolution of this point was not essential to the decision in that case, as the defendant, who sold the goods as administrator, sold them after notice of the existence of the will, by which the plaintiff was appointed executrix.

[2] Robinson *v.* M'Donald, 2 Kelly 119. [A *receiver* appointed by the court in the exercise of its equity jurisdiction has no legal title in the assets which he is appointed to collect, and without authority of the court he cannot maintain trover when they have been wrongfully converted previously to his possession: Yeager *v.* Wallace, 44 Pa. St. 294. But where the goods have actually come into his possession, he may maintain trover against one who wrongfully invades such possession, and converts the goods: Singerly *v.* Fox, 75 id. 112.]

[1] Fouldes *v.* Willoughby, 8 M & W. 546–551; Keyworth *v.* Hill, 3 B. & Ald. 685; Bristol *v.* Burt, 7 Johns. 254; Murray *v.* Burling, 10 id. 172; Hare *v.* Pearson, 4 Ired. 76; Page *v.* Hatchett, 10 Jur. 634; Harris *v.* Saunders, 2 Strobh. Eq. 370; Clark *v.* Whitaker, 19 Conn. 319; Heald *v.* Carey, 9 Eng. Law & Eq. 429; [Bray *v.* Bates, 9 Met. (Mass.) 237; Salisbury *v.* Gourgas, 10 id. 462; Fernald *v.* Chase, 37 Me. 289; Fuller *v.* Tabor, 39 id. 519.] But the mere cutting down of trees without

and of course is proved either directly or by inference. Every *unlawful taking*, with intent to apply the goods to the use of the taker, or of some other person than the owner, or having the effect of destroying or altering their nature, is a conversion.[2] But if it does not interfere with the owner's dominion over the property, nor alter its condition, it is not.[3] Upon these principles it has been held that if a ferryman wrongfully put the horses of a passenger out of the boat, without further intent concerning them, it may be a trespass, but it is not a conversion; but if he makes any further disposition of them, inconsistent with the owner's rights, it is a conversion.[4] So the taking possession of the bankrupt's goods, by his assignees, is conversion, as against him, for which he may maintain trover, to try the validity of the commission, without making a demand.[5] So, *using* a thing without license of the owner is a conversion; as is also the *misuse* or *detention* of a thing, by the finder, or other bailee.[6]

taking them away is not a conversion: Mires *v.* Solebay, 2 Mod. 245. {Proof that the defendant did some positive wrongful act is necessary to support an action of trover: Bromley *v.* Coxwell, 2 Bos. & Pul. 438; Ross *v.* Johnson, 5 Burr. 2825; Severin *v.* Keppell, 4 Esp. 156. A sale of personal property by a mortgagee before foreclosure is a conversion for which the mortgagor may maintain an action: Spaulding *v.* Barnes, 4 Gray (Mass.) 330. To constitute a joint conversion of personal property, the acts of the several defendants need not be contemporaneous, if their acts and purposes all tend to the same result: Cram *v.* Thissell, 35 Me. 86. Trover will lie to recover the value of coal dug by the owner of land, through a mistake of boundaries, out of adjoining land: Forsyth *v.* Wells, 41 Pa. St. 291.}

[2] Bull. N. P. 44; 2 Saund. 47 *g*, by Williams; Prescott *v.* Wright, 6 Mass. 20; Pierce *v.* Benjamin, 14 Pick. 356; Thurston *v.* Blanchard, 22 id. 18. But if a tortious taking has been subsequently assented to by the owner, the remedy in trover is gone: Hewes *v.* Parkman, 20 id. 90; Rotch *v.* Hawes, 12 id. 136; Clarke *v.* Clarke, 6 Esp. 61; Brewer *v.* Sparrow, 7 B. & C. 310. Taking the plaintiff's goods by mistake, supposing them to be defendant's own, and a subsequent promise to restore them, the performance of which was neglected, have been held sufficient evidence of a conversion: Durrell *v.* Mosher, 8 Johns. 445. See further, Harrington *v.* Payne, 15 id. 431. {If one wrongfully leaves his goods on the land of another after being notified to take them away, and the goods are destroyed by the owner of the land in the reasonable use of his own property, trover will not lie against him, but it will if he uses the goods or wilfully destroys them: Ascherman *v.* Best Brewing Co., 45 Wis. 262.

It is said in Smith *v.* Colby, 67 Me. 169, that a person acting under the direction of another as servant or bailee might not be guilty of conversion by merely carrying goods from place to place, without any knowledge of wrong-doing, supposing the articles to belong to or to be rightfully in the possession of the person from whom the same are received: Burditt *v.* Hunt, 25 id. 419; Fifield *v.* Maine Central R. R. Co., 62 id. 77, 82.}

[3] {So, if one levies on goods which have been previously mortgaged, if he levies merely upon the mortgagor's right of redemption, he does not so interfere with the mortgagee's rights as to be liable for conversion. But, if the mortgagor has not an interest which can be levied on by law, and the officer levies on the goods, he will be liable: Woodside *v.* Adams, 40 N. J. L. 417. Whether a mortgagor of chattels has an interest which can be attached at common law, depends on the law of the State. In New Jersey it is held that he has: Woodside *v.* Adams, *supra*. In New York and Massachusetts, that he has not: Manning *v.* Monaghan, 28 N. Y. 585; Ring *v.* Neale, 114 Mass. 111.}

[4] Foulds *v.* Willoughby, 8 M. & W. 540.

[5] Somersett *v.* Jarvis, 3 Brod. & Bing. 2.

[6] Mulgrave *v.* Ogden, Cro. El. 219; Ld. Peter *v.* Heneage, 12 Mod. 519; Wheelock *v.* Wheelwright, 5 Mass. 104; Story on Bailm. §§ 188, 233, 241, 260, 369; Portland Bank *v.* Stubbs, 6 Mass. 422, 427; Ripley *v.* Dolbier, 6 Shepl. 382; Woodman *v.* Hubbard, 5 Foster (N. H.) 67. [But see Doolittle *v.* Shaw, 92 Ia. 348.]

So, the *adulteration* of wine or other liquor, by putting water into it, is a conversion of the whole quantity; but the taking away of part is not so, if the residue remains in the same state as before, and is not withheld from the owner.[7] And though a factor, entrusted with goods for sale, may, in many cases, lawfully deliver them over to another for the same purpose; yet if a bailee of goods deliver them over to another, in violation of the orders of the bailor, it is a conversion.[8] A *misdelivery* of goods, also, by a wharfinger, carrier, or other bailee, is a conversion;[9] but the accidental loss of them, by the mere omission of the carrier, is not.[10] A *wrongful sale* of another's goods is also a conversion of them;[11] and though the custody of the goods remains unaltered, yet the delivery of the documentary evidence of title, and the receipt of the value, completes the act of conversion;[12] but a mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them, against the lawful owner, until his title has been made known and resisted.[13]

[7] Richardson *v.* Atkinson, 1 Stra. 586; Philpott *v.* Kelley, 3 Ad. & El. 306; Dench *v.* Walker, 14 Mass. 500; Young *v.* Mason, 8 Pick. 551. The mere fact of a bailee's bottling a cask of wine is not evidence of a conversion: ibid. {The fact that the plaintiff has allowed a bailee of his property to mix it up with other property, so that its identity is lost, does not prevent an action of trover against one to whom the bailee wrongfully sold all the property, and who refuses to give the plaintiff his share. Thus, when A stored grain in a grain warehouse, allowing it to be mingled with grain of the same grade, and the owner of the warehouse sold the warehouse with its contents to a bank, which took possession and refused to allow plaintiff to take away his grain, it was held that the bank was liable: German National Bank *v.* Meadowcroft, 95 Ill. 124; Jackson *v.* Anderson, 4 Taunt. 24.

If one to whom goods are delivered mixes them with his own, so that it is impossible to identify them, he is liable for a conversion: Hesseltine *v.* Stockwell, 30 Me. 237; Bryant *v.* Ware, ib. 295.}

[8] Bromley *v.* Coxwell, 2 B. & P. 438; Seyds *v.* Hay, 4 T. R. 260. {If the owner of an article of personal property delivers it to another to sell, the bailee has no right to deliver it to his creditor in payment of his own pre-existing debt: Rodick *v.* Coburn, 68 Me. 170; Holton *v.* Smith, 7 N. H. 446. And in such case, no demand or refusal is necessary against the bailee: Rodick *v.* Coburn, *supra;* Hunt *v.* Holton, 13 Pick. (Mass.) 216. So if a mortgagee of personal property in possession sells before foreclosure: Spaulding *v.* Barnes, 4 Gray (Mass.) 330.}

[9] Devereux *v.* Barclay, 2 B. & Ald. 702; Youl *v.* Harbottle, 1 Peake 49; Stevenson *v.* Hart, 4 Bing. 483; Story on Bailm. §§ 450, 451, 545 *b.*

[10] Ross *v.* Johnson, 5 Burr. 2825; Kirkman *v.* Hargreaves, 1 Selw. N. P. 425; Dwight *v.* Brewster, 1 Pick. 50, 53; Owen *v.* Lewyn, 1 Ventr. 223; Anon., 2 Salk. 655; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586. There are two cases seeming to the contrary of this; but in one of them (Greenfield Bank *v.* Leavitt, 17 Pick. 1) this point was not raised, but the defendant's liability for a loss was assumed, the case turning wholly on the question of damages; and in the other (La Place *v.* Aupoix, 1 Johns. Cas. 406) the case sufficiently shows that there was an actual conversion.

[11] Edwards *v.* Hooper, 11 M. & W. 363; Featherstonhaugh *v.* Johnston, 8 Taunt. 237; Lowell *v.* Martin, 4 id. 799; Alsager *v.* Close, 10 M. & W. 576; Robinson *v.* Rolls, 1 M. & Rob. 239; Everett *v.* Coffin, 6 Wend. 603; Kyle *v.* Gray, 11 Ala. 233. But if the sale was by defendant's agent without his knowledge, *quære;* and see Machell *v.* Ellis, 1 C. & K. 682.

[12] Jackson *v.* Anderson, 4 Taunt. 24.

[13] McCombie *v.* Davies, 6 East 538; Baldwin *v.* Cole, 6 Mod. 212. {"And not only are there decisions that 'a mere purchase' of property, without taking possession of it, is not a conversion of it, but also decisions that a purchaser receiving a pledge or other bailment, etc., of property from one who had no right to dispose of it, and taking possession thereof without any further act of dominion over it, does not

Nor is the averment of a conversion supported by evidence of nonfeasance alone; as if a factor, employed to sell goods, neglects to sell them, or sells them without taking the requisite security.[14]

§ 643. **Same Subject.** On the other hand, though there has been an actual use or disposition of the goods of another, yet if it was done under the pressure of moral *necessity*, a *license* will sometimes be presumed, and it will not be a conversion. Such is the case, where a shipmaster throws goods into the sea, to save the ship from sinking.[1] So it is, if the thing was taken to do a work of *charity*, or to do a *kindness* to the owners, and without any intention of injury to it, or of converting it to his own use.[2]

§ 644. **Demand and Refusal.** Where the circumstances do not, of themselves, amount to an actual conversion, it will be incumbent on the plaintiff to give evidence of a *demand and refusal*, at any day prior to the commencement of the action, the time not being material,

always constitute a conversion of it." Metcalf, J., Gilmore *v.* Newton, 9 Allen (Mass.) 172. In this case it was held that purchasing a horse in good faith from one who had no right to sell him, and subsequently exercising dominion over him by letting him to another person, will amount to a conversion; and no demand by the owner is necessary before commencing an action therefor. This severe rule of law will not be applied when the act of appropriation can be justified as having been in any manner authorized by the owner. Thus when, upon a conditional sale, the property is delivered, and time is given for compliance with the condition, one who purchases and resells the property before the right to perfect the title by such compliance has been terminated is not liable for a conversion to the general owner, who subsequently resumes his right to its possession: Vincent *v.* Cornell, 13 Pick. (Mass.) 294. A warehouseman had on storage two lots of flour, one belonging to A, the other and more valuable to B. A baker ordered ten barrels from C, which C, to fill the order, bought from A, taking from him an order on the warehouseman. The warehouseman, by mistake, delivered on the order the flour of B, instead of that of A, which the baker took and used, supposing it was from A, and deriving no benefit therefrom. Held, no conversion by the baker, as between him and the warehouseman: Hills *v.* Snell, 104 Mass. 173. Where one buys goods stolen from the plaintiff, the buyer acquires no title to the goods, and if he has taken possession of them, actually or constructively, though he did it in ignorance of the plaintiff's title, and sells them, he is liable for a conversion, although there has been no demand and refusal: Hollins *v.* Fowler, 33 L. T. N. S. 73; Pease *v.* Smith, 61 N. Y. 477. And if he refuses to give them up on demand, he is also liable: German National Bank *v.* Meadowcroft, *supra*; Welsh *v.* Sage, 47 N. Y. 143; Gillett *v.* Roberts, 57 id. 28. But it has been held that a person who exchanges stolen coupons for money in good faith and without gross negligence, for another, without any interest therein or benefit therefrom, is not guilty of a conversion: Spooner *v.* Holmes, 102 Mass. 504. Nor is the purchase, under like circumstances, of stolen negotiable bonds: Welsh *v.* Sage, 47 N. Y. 143; Gillett *v.* Roberts, 57 id. 28. It has been recently held in England, that where a person, however innocently, comes into possession of the goods of another, who has been fraudulently dispossessed thereof, and disposes of them for his own benefit, or for that of any third person, he is liable for a conversion: Hollins *v.* Fowler, 33 L. T. N. S. 73; } [Consolidated Co. *v.* Curtis, 1892, 1 Q. B. 495; Robinson *v.* Bird, 158 Mass. 357.]

[14] Bromley *v.* Coxwell, 2 B. & P. 438; Cairns *v.* Bleecker, 12 Johns. 300; Jenner *v.* Joliffe, 6 id. 9.

[1] Bird *v.* Astock, 2 Bulstr. 280. See also Clarke *v.* Clarke, 6 Esp. 81.

[2] Drake *v.* Shorter, 4 Esp. 195. And see Sparks *v.* Purdy, 11 Mo 219. {Omitting seasonably to deliver goods will not sustain trover against a carrier without a demand: Robinson *v.* Austin, 2 Gray (Mass.) 564; Bowlin *v.* Nye, 10 Cush. (Mass.) 416. See *ante*, §§ 218, 219.

Nor does the forcibly interposing obstacles to prevent the owner from obtaining possession of the property, by one who has not the possession thereof, actual or constructive, amount to a conversion: Boobier *v.* Boobier, 39 Me. 406.}

and also to show that the defendant, at the time of the demand, had it in his power to give up the goods.[1] But the demand and refusal are only *evidence of a prior conversion*,[2] not in itself conclusive, but liable to be explained and rebutted by evidence to the contrary.[3] The refusal, moreover, must be absolute, amounting to a denial of the plaintiff's title to the possession; and not a mere excuse or apology for not delivering the goods at present;[4] but it need not be expressed; it may be inferred from non-compliance with a proper demand.[5] If, however, the refusal is qualified by a condition which the party had no right to impose, it is evidence of a conversion.[6] And so it is, if it is grounded on a claim of right by a third party.[7] If the demand was made by an agent, the plaintiff must also prove his authority to make it; otherwise the refusal will be no evidence of a conversion.[8] And if the demand is made upon a bailee of goods, entrusted to him to keep on the joint account of several owners, a demand by one alone, without the authority of the others, is not sufficient.[9] So also,

[1] Bull. N. P. 44; Vincent *v.* Cornell, 13 Pick. 294; Nixon *v.* Jenkins, 2 H. Bl. 135; Edwards *v.* Hooper, 11 M. & W. 366, per Parke, B.; Smith *v.* Young, 1 Campb. 441. See Kinder *v.* Shaw, 2 Mass. 398; Chamberlain *v.* Shaw, 18 Pick. 278; Leonard *v.* Tidd, 2 Met. 6; Jones *v.* Fort, 9 B. & C. 764; Anon., 2 Salk. 655; Kelsey *v.* Griswold, 6 Barb. S. C. 436.

[2] [And therefore need not be shown when the conversion is otherwise proved: Adams *v.* Castle, 64 Minn. 505; Richardson *v.* Ashby, 132 Mo. 238.]

[3] 2 Saund. 47 *e*, by Williams; Wilton *v.* Girdleston, 5 B. & Ald. 847, per Cur.; Thompson *v.* Rose, 16 Conn. 71; {Howitt *v.* Estelle, 92 Ill. 218; Folsom *v.* Manchester, 11 Cush. (Mass.) 334, 337; Magee *v.* Scott, 9 id. 148; Platt *v.* Tuttle, 23 Conn. 233; Beckman *v.* McKay, 14 Cal. 250;} [McDonald *v.* Mackinnon, 62 N. W. 560, Neb.] Ordinarily the jury are instructed to find a conversion, upon evidence of a demand and refusal; but it will not be inferred by the court as a deduction of law: Mires *v.* Solebay, 2 Mod. 244; 10 Co. 56, 57; 2 Roll. Abr. 693; Jacoby *v.* Laussat, 6 S. & R. 300. [The question is for the jury: Scollard *v.* Brooks, 49 N. E. 741, Mass.] {A cow, going at large in the highway without a keeper, joined a drove of cattle without the knowledge of the driver, and was driven with them to a distant town, and there depastured with the others during the summer. After the driver's return, the owner of the cow called on him to make inquiries, and demanded his cow; and, on the return of the drove in the autumn, the driver delivered the cow to the owner, who received her. In an action of trover against the driver, it was held that his omission to deliver the cow on demand was not a proof of conversion: Wellington *v.* Wentworth, 8 Met. (Mass.) 548. See also Burroughes *v.* Bayne, 5 H. & N. 296. Where one demands his chattels and there is such a withholding of them as amounts to a conversion, a right of action accrues which will not be devested by a subsequent offer to return the goods, or a notice to the plaintiff to come and take them away: [Colby *v.* Kimball, 99 Ia. 321]; but this tender may be shown in reduction of the damages: Whitaker *v.* Houghton, 86 Pa. St. 48. But if the goods equal or exceed in value the claim of the plaintiff, *quære*. Cf. Robinson *v.* Sprague, 125 Mass. 582. A demand for goods alleged to have been converted is not of itself a waiver of a previous demand for the same goods, with which the wrong-doer refused to comply, but it may go to the jury as evidence of a waiver of the previous demand: Winterbottom *v.* Morehouse, 4 Gray (Mass.) 332.}

[4] Severin *v.* Keppell, 4 Esp. 156. And see Addison *v.* Round, 7 C. & P. 285; Philpott *v.* Kelley, 3 Ad. & El. 106; Pattison *v.* Robinson, 5 M. & S. 105; Caunce *v.* Spanton, 7 M. & G. 903.

[5] Watkins *v.* Woolley, 1 Gow 69; Golightly *v.* Ryn, Lofft 88; Davies *v.* Nicholas, 7 C. & P. 339. A demand in writing, left at the defendant's house, is sufficient: ibid.; Logan *v.* Houlditch, 1 Esp. 22; Wilde *v.* Waters, 32 Eng. Law & Eq. 422.

[6] Davies *v.* Vernon, 6 Ad. & El. N. S. 443.

[7] Caunce *v.* Spanton, 7 M. & G. 903; Zachary *v.* Pace, 4 Eng. 212.

[8] Gunton *v.* Nurse, 2 Brod. & Bing. 447; Robertson *v.* Crane, 27 Miss. 362.

[9] May *v.* Harvey, 13 East 197. {Where goods intrusted to a bailee come into

if the goods are bailed to two, a demand on one alone is not sufficient to charge the other in trover, though it may suffice to charge him in an action *ex contractu*.[10]

§ 645. **Same Subject.** Even an absolute refusal is not always evidence of a conversion. Thus, where the plaintiff's goods were attached in the hands of his bailee, who on that account refused to deliver them, it was held no conversion.[1] So it is where the possessor of goods refuses to deliver them up, until some ownership is shown in the claimant;[2] or until some other condition lawfully imposed by him is complied with;[3] as where a servant, having the custody of goods apparently his master's, refuses to deliver them without an order from his master.[4] So, if the bailee of goods asks time to return them to the person from whom he received them, that the owner may claim them from the latter, rather than from himself;[5] or if the owner has coupled his demand with a claim that the goods shall be returned in a certain plight, in the way of repairs, which the other party denies his liability to make;[6] this is not evidence of a conversion. So where the principal refers the claimant to his agent, in whose hands the goods actually are at the time;[7] and when a general agent refuses to deliver the goods, the refusal not having been directed by his principal.[8] But where the refusal is within the scope of the agent's authority, it is otherwise. Thus a refusal by a pawnbroker's servant has been held evidence of a conversion by his master.[9] If, however, the servant actually disposes of the property, or withholds it, though for his master's use, as if he sells it, or tortiously takes it, or, it being a negotiable bill of exchange delivered to him by an agent for discount, he passes it to the agent's credit in his master's books, and afterwards refuses to restore it to the principal, it is a conversion by the servant.[10] So, if the demand is qualified

the hands of a third person, a demand on such person by the bailee, though not specially authorized thereto by the owner, and a refusal, is evidence of a conversion: Bradley *v.* Spofford, 23 N. H. 444.]

[10] Nicoll *v.* Glennie, 1 M. & S. 588; White *v.* Demary, 2 N. H. 546; Griswold *v.* Plumb, 13 Mass. 298; *ante*, Vol. I. §§ 112, 174; Mitchell *v.* Williams, 4 Hill (N. Y.) 13.

[1] Verral *v.* Robinson, 2 C. M. & R. 495.

[2] Solomons *v.* Dawes, 1 Esp. 82, per Ld. Kenyon; Green *v.* Dunn, 3 Campb. 215, n.; Zachary *v.* Pace, 4 Eng. 212; Carr *v.* Gale, Daveis 333. [A bailee of property to which there are adverse claimants may refuse to deliver for a reasonable time, in order to satisfy himself of the true ownership. But after the lapse of such time, and an offer of one claimant to protect him by a satisfactory bond, a refusal is a conversion: Bull *v.* Liney, 48 N. Y. 6. The refusal to deliver must be put distinctly on this ground, otherwise it will be evidence of a conversion: Ingalls *v.* Balkley, 15 Ill. 224.]

[3] Davies *v.* Vernon, 6 Ad. & El. N. S. 443; [Williams *v.* Smith, 153 Pa 462.]

[4] Alexander *v.* Southey, 5 B. & Ald. 247; Cole *v.* Wright, 4 Taunt. 198; Shottwell *v.* Few, 7 Johns. 302. But see Judah *v.* Kemp, 2 Johns. Cas. 411.

[5] Dowd *v.* Wadsworth, 2 Dev. 130.

[6] Rushworth *v.* Taylor, 3 Ad. & El. N. S. 699.

[7] Canot *v.* Hughes, 2 Bing. N. C. 448.

[8] Pothonier *v.* Dawson, Holt Cas. 383.

[9] Jones *v.* Hart, 2 Salk. 441. And see Catterall *v.* Kenyon, 6 Jur. 507.

[10] Cranch *v.* White, 1 Bing. N. C. 414; Perkins *v.* Smith, 1 Wils. 328; Stephens *v.* Elwall, 4 M. & S. 260.

by the claimant's requiring that the goods be restored in their original plight, a general refusal is not evidence of a conversion.[11]

§ 646. **Conversion by Tenant in Common.** If the parties are *tenants in common* of the chattel which is the subject of this action, it will not be sufficient for the plaintiff to prove that the defendant has taken the chattel into his exclusive custody, and withholds the possession from the plaintiff; for this either party may lawfully do, each being equally entitled to the possession and use.[1] And for the like reason this action will not be against one part owner who has change the form of the chattel by converting it to its ultimately intended and profitable use.[2] But the plaintiff, in such cases, must prove that the act of the defendant was tortious, having the effect, so far as the plaintiff is concerned, of a total destruction of the property.[3]

[11] Rushworth *v.* Taylor, 4 Jur. 945; s. c. 3 Ad. & El. N. s. 699.

[1] Barnardiston *v.* Chapman, cited 4 East 120; Holliday *v.* Camsell, 1 T. R. 658; Daniels *v.* Daniels, 7 Mass. 137, per Parsons, C. J.; Bryant *v.* Clifford, 13 Met. 138; [McElroy *v.* O'Callaghan, 70 N. W. 441, Mich. Changed by statute in Wisconsin: Wood *v.* Noack, 84 Wis. 398.]

[2] Fennings *v.* Ld. Grenville, 1 Taunt. 241.

[3] 1 Taunt. 249; Co. Litt. 200 *a*, *b*; Bull. N. P. 34, 35; 2 Saund. 47 *h*, by Williams; Guyther *v.* Pettijohn, 6 Ired. 388; Weld *v.* Oliver, 21 Pick. 559. Whether the absolute sale of the whole of the entire chattel by one of several owners in common is of itself sufficient evidence of a conversion to make him liable in trover at the suit of his co-tenant, is a point upon which there is some difference of opinion. The rule of the common law, that trespass lies where one party destroys the thing owned in common, is not controverted. And it is generally conceded that the party is equally liable in trover for an actual conversion of the property to his own use, at least, where the act of appropriation is such, as finally, by its nature, to preclude the other party from any future enjoyment of it. Such is the case where it is consumed in the use. And upon the same principle, where the sale is one of a series of acts, whether by the vendor or vendee, which result in putting the property forever out of the reach of the other party, it is a conversion. Such was the case of Barnardiston *v.* Chapman, 4 East 121, where the defendant forcibly took the ship, owned in common, from the plaintiff's possession, changed her name, and sold it to a stranger, in whose possession she was lost in a storm at sea. Here the court resolved that the taking from the plaintiff's possession was not a conversion, but left it to the jury to find from the circumstances that the ship was destroyed by the defendant's means; which they did, and it was held well. But a sale alone was deemed insufficient to establish a conversion, by the opinion of the whole court, in Heath *v.* Hubbard, ib. 110, 128, though the case itself was decided on the ground, that in the instance before them there was not a legal sale. Such also was the opinion of Best, J., in Barton *v.* Williams, 5 B. & Ald. 395; to which Holroyd, J., inclined; though Bayley, J., was of a different opinion, and Abbott, C. J., was inclined to think with him, that the sale in that case, which was of India warrants, was a conversion. But afterwards, in the same case, upon a writ of error, in the Exchequer Chamber, 1 McCl. & Y. 406, 415, 416, the court observed that there was "great weight in the argument" that the original plaintiffs, being tenants in common with the defendants, could not maintain trover in a court of law on the ground of a sale, but they did not decide the cause on that point, being of opinion that the tenancy in common had been previously severed by the parties. In this country, in a case where, two being tenants in common of a quantity of wool, one of them, having the possession, sold a part of it and retained the residue, claiming the whole as his own, and refusing to deliver up any part to the other, this was held not such a conversion of the property as to sustain an action of trover: Tubbs *v.* Richardson, 6 Vt. 442. See also Selden *v.* Hickock, 2 Caines 166. The same doctrine was held in Oviatt *v.* Sage, 7 Conn. 95, where one tenant in common of a quantity of cheese had sold the whole to a stranger. That there must either be "a destruction of the chattel, or something that is equivalent to it," was the opinion of Chambre, J., in Fennings *v.* Ld. Grenville, 1 Taunt. 249. And accordingly, in this case, it was resolved, that the conversion of the chattel

§ 647. **Trover by Husband and Wife.** If trover is brought by *husband and wife*, for goods which were the sole property of the

into its ultimately destined and profitable material, as, of a whale into oil, was no severance of the tenancy in common. On the same principle, namely, that while the thing substantially exists within the reach of the party, the tenancy in common remains unchanged, it has been repeatedly held that a sale of the entire chattel by the sheriff, on an execution against one of the owners, does not sever the tenancy, or devest the property of the others: St. John *v.* Standring, 2 Johns. 468; Mersereau *v.* Norton, 15 id. 179. But a disposition of a perishable article by one joint owner, which prevents the other from recovering the possession, is deemed equivalent to its destruction: Lucas *v.* Wasson, 3 Dev. 398; confirmed in Cole *v.* Terry, 2 Dev. & Bat. 252, 254. See also Farrar *v.* Beswick, 1 M. & W. 688; Mayhew *v.* Herrick, 18 Law J. 179, C. P.

But there are cases, on the other hand, in which it has been said that a sale alone by one tenant in common is sufficient to charge him in trover for a conversion of the entire chattel. The earliest and leading case to this effect is that of Wilson *et al. v.* Reed, 3 Johns. 175; in which it appeared that the plaintiff and one Gibbs were joint owners of a hogshead of rum and a pair of scale beams, which the sheriff seized and sold *in toto* to the defendant, by virtue of an execution against Gibbs. The defendant sold the rum at retail to his customers; and in an action of trover brought against him for the goods by the other two owners, the judge at *Nisi Prius* instructed the jury that the retailing of the rum by the defendant was in law a destruction, so as to enable the plaintiffs to maintain the action to this extent; and his instructions were held correct. The learned judge who delivered the opinion of the court in bank, placed it, as to this point, on the general ground, that a sale was a conversion of the property. But as in this case the property had actually been consumed by the vendee, beyond the power of recovery, it was to all intents an actual conversion, and the general remark was wholly uncalled for by the case in judgment. The same doctrine, however, was recognized in Hyde *v.* Stone, 9 Cowen 230. This was an action of trover for certain articles of household furniture, farming utensils, and other personal property, of which the plaintiff was tenant in common with his step-father, the defendant. It was admitted by the defendant, that some of these articles had been sold by him at different times since his marriage, during a period of six or seven years; and that others have been destroyed and others nearly worn out; of all which it appeared that he had exhibited an account, estimating the value of the several articles, and charging the plaintiff for the value of his board, &c., leaving a balance due to the plaintiff, for which he admitted himself liable, and promised to pay. Hereupon the judge instructed the jury that the plaintiff was entitled to recover the value of his share of the goods; and these instructions were held correct. Here also it is manifest, that the articles which had been sold were utterly and forever gone beyond the reach of the plaintiff, by means of the wrongful act of the defendant; and that as to these, as well as those destroyed, the proof of actual conversion was complete. The remark, therefore, of the learned judge, who delivered the opinion of the court, that, for a sale, trover will lie by one tenant in common against another, referring to the case of Wilson *v.* Reed, was not called for by the case before him, and may be regarded as an *obiter dictum*. A new trial having been granted upon other grounds, the jury were again instructed that the plaintiff was entitled to recover the value of his two thirds of all the property sold, lost, or destroyed. But it is observable that the court, in their final judgment (7 Wend. 356–358), regarded the property as wholly lost to the plaintiff by the fault of the defendant; the only proposition laid down as the basis of their judgment being the settled doctrine, that trover will lie by one tenant in common against another for the loss or destruction of the chattel while in his possession. Of a similar character was the case of Mumford *v.* McKay, 8 Wend. 442, which was a sale of wheat in the grain; and of Farr *v.* Smith, 9 id. 338, which was a sale of wheat in the sheaf; in both of which cases the conversion was actual; though in both also, and apparently without much consideration, a sale seems to have been taken as in itself, and in all circumstances, a conversion. But the point was subsequently brought directly before the Supreme Court of the same State, in White *v.* Osborne, 21 id. 72, which was the sale of an entire sloop plying on Lake Champlain: which was held a conversion. The decision of the court in this case was placed partly on the ground of the *dicta* above quoted, and partly on the decisions in Wilson *v.* Reed, Mumford *v.* McKay, and Hyde *v.* Stone, which have just been considered. Subsequently it has been held in *New York*, that if the sheriff sells the entire property in goods owned by two, on an execution against one of them only, it is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*.

feme, and were taken before the marriage, proof of a conversion before or after the marriage will support the action; but if the husband sues alone, he must prove a conversion after the marriage.[1] If the action is against the husband and wife, the plaintiff must aver and prove either a conversion by the wife alone, before the marriage, or a subsequent conversion by the joint act of both; and it seems that, in the latter case, the evidence ought to show some act of conversion other than that which merely goes to the acquisition or detention of the property to their use; for if the goods remain in specie in their hands, it is a conversion only by the husband.[2]

§ 648. **Defence.** The DEFENCE of this action in the United States, when it does not consist of matters of law, is almost universally made under the general issue of *not guilty;* a special plea in trover being as seldom seen here as it was in England under the old rules of practice. And though in the latter country this plea is now held, and perhaps wisely, to put in issue only the fact of conversion,[1] and not its character, as rightly or otherwise, nor any other matter of inducement in the declaration, such as the title of the plaintiff, nor any matter of title or claim in the defendant, or of subsequent satisfaction or discharge of the action; yet in this country, as formerly in England, this plea still puts the whole declaration in issue.[2]

Waddell *v.* Cook, 2 Hill (N. Y.) 47. See also Melville *v.* Brown, 15 Mass. 82, which, though briefly reported, was in fact very elaborately argued and well considered. But this point stands entirely clear of the question, whether one tenant in common may have trover for a sale only by the other. See further, Lowe *v.* Miller, 3 Gratt. 205; Hurd *v.* Darling, 14 Vt. 214; Weld *v.* Oliver, 21 Pick. 559; Rains *v.* McMarry, 4 Humph. 356. {A tenant in common may maintain trover against his co-tenant, after it is proved that a demand was made that he be admitted to his rights as a co-tenant, and there was a refusal to recognize such rights, coupled with a distinct claim of entire *ownership:* Grove *v.* Wise, 39 Mich. 161; Danbury Cornet Band *v.* Bean, 54 N. H. 255; Dahl *v.* Fuller, 50 Wis. 501; [Williams *v.* Rogers, 110 Mich. 418; Pickering *v.* Moor, 32 A. 828, N. H.; Wood *v.* Steinan, 9 S. D. 110; Rosenan *v.* Syring, 25 Or. 386; Reed *v.* McRill, 41 Neb. 206.] Or, when the co-tenant has sold the chattel *as his own:* Weld *v.* Oliver, 21 Pick. (Mass.) 562; Wilson *v.* Reed, 3 Johns. (N. Y.) 177; Person *v.* Wilson, 25 Minn. 189. Cf. Sanborn *v.* Morrill, 15 Vt. 700; Burton *v.* Burton, 27 Vt. 95;} [Grigsby *v.* Day, 70 N. W. 881, S. D.]

[1] 2 Saund. 47 *g*, by Williams.

[2] 2 Saund. 47 *h*, *i*, by Williams; Draper *v.* Fulkes, Yelv. 165, and n. (1), by Metcalf; Keyworth *v.* Hill, 3 B. & Ald. 685.

[1] [Anderson *v.* Agnew, 38 Fla. 30.]

[2] 2 Selw. N. P. 1068 (2d Am. ed.), 13 (Eng.) ed. 1309; 1 Chitty, Pl. (16th Am. ed.) *530; Bull. N. P. 48; [Kerwood *v.* Ayres, 53 P. 134, Kan.; Nichols *v.* Minnesota, etc. Co., 73 N. W. 415, Minn.] {Any matter, however, which must be pleaded in abatement cannot be availed of under the general issue. Thus, where one sued in the name of a next friend, though she was at the time a married woman, it was held that this was waived by a trial on the merits of the case: Royce *v.* Vandeusen, 49 Vt. 26. And it is to be observed, that in States where the defendant is obliged to give *notice*, when he files his general denial, of any justification, any evidence of a justification, such as that the defendant took the goods as sheriff in the execution of process of the court, needs a special plea or notification of matter in justification in order to admit it: Pico *v.* Kalisher, 55 Cal. 153; Fry *v.* Soper, 39 Mich. 727.

There are some cases where it is advantageous to plead a justification rather than to rely on its introduction in the evidence. Thus, when it is intended to rely on judicial proceedings, which, if set up as a plea, act as an estoppel, but which, if introduced in evidence, may be rebutted, it is plainly better to plead the justification: Johnson *v.* Williams, 48 Vt. 565.}

Under it, therefore, the defendant may prove, by any competent evidence, that the title to the goods was in himself, either absolutely, as general owner, or as joint owner with the plaintiff, or specially as bailee, or by way of lien ;[3] or that he took the goods for tolls, or for rent in arrear ;[4] or he may disprove the plaintiff's title by showing a paramount title in a stranger, or otherwise ;[5] or he may prove facts showing a license ;[6] or, a subsequent ratification of the taking ;[7] or, that the plaintiff has discharged other joint parties with the defendant, in the wrongful act complained of.[8] It has been said that a release is the only special plea in trover ;[9] but the statute of limitations also is usually pleaded specially ;[10] and indeed there seems to be no reason why the same principle should not be admitted here which prevails in other actions, namely, that the defendant may plead specially anything which, admitting that the plaintiff had once a cause of action, goes to discharge it.[11]

§ 649. **Damages.** The measure of *damages* in this action has already been considered under its appropriate head.[1] It may be added that special damages are recoverable, if particularly alleged.[2] If the subject is a bill of exchange, or other security, the plaintiff is ordi-

[3] Skinner *v.* Upshaw, 2 Ld. Raym. 752 ; Bull. N. P. 45. But to rebut the evidence of a demand and refusal, he must show that he mentioned his lien at the time of refusal : Boardman *v.* Sill, 1 Campb. 410, n. See further Laclough *v.* Towle, 3 Esp. 114, and the cases of lien collected in Roscoe on Evid. 408–412 (1st Am. ed.), 954–961, 13th (Eng.) ed. ; [Commercial N. B. *v.* Pirie, 82 F. 799, U. S. App.]

[4] Wallace *v.* King, 1 H. Bl. 13 ; Kline *v.* Husted, 3 Caines, 275 ; Shipwick *v.* Blanchard, 6 T. R. 298.

[5] Dawes *v.* Peck, 8 T. R. 330 ; Schermerhorn *v.* Van Volkenburg, 11 Johns. 529 ; Kennedy *v.* Strong, 14 id. 128 ; Rotan *v.* Fletcher, 15 id. 207.

[6] Clarke *v.* Clarke, 6 Esp. 61 ; Bird *v.* Astock, 2 Bulstr. 280.

[7] Hewes *v.* Parkman, 20 Pick. 90.

[8] Dufresne *v.* Hutchinson, 3 Taunt. 117. {Or he may prove a sale to himself by the plaintiff prior to the alleged conversion : Richard *v.* Wellington, 66 N. Y. 308. Where two partners wrongfully took certain property, and one afterwards settled with the owner for one half thereof, the owner was permitted to bring trover against the other partner for the remaining half : McCrillis *v.* Hawes, 38 Me. 566.}

[9] Per Twisden, J., in Devoe *v.* Corydon, 1 Keb. 305.

[10] Bull. N. P. 48 ; Wingfield *v.* Stratford, Sayer 15, 16 ; Swayn *v.* Stephens, Cro. Car. 245 ; Granger *v.* George, 5 B. & C. 150 ; 1 Campb. 558, per Ld. Ellenborough ; 1 Danv. Abr. 25.

[11] 1 Tidd's Pr. 598. See Yelv. 174 *a*, n. (1), by Metcalf.

[1] *Supra*, tit. Damages, § 276. See also *supra*, 635 *a*. See further Countess of Rutland's Case, 1 Roll. Abr. 5. In an action of trover, there can be but one assessment of damages. If there are several defendants, and some are defaulted and others are found guilty, the judgment is joint and the verdict settles the amount of damages for all the defendants, as well those defaulted as those found guilty : Gerrish *v.* Cummings, 4 Cush. 392.

{The rule of damages for the conversion of bonds is the value of the bonds at the time of conversion, with interest after : Tyng *v.* Conn Warehouse Co., 58 N. Y. 308 ; [or rather the highest value between the time of conversion and a reasonable time after notice for the owner to replace them : Galigher *v.* Jones, 129 U. S. 193 ; Dimock *v.* United States N. B., 55 N. J. L. 296 ;] Baker *v.* Drake, 53 N. Y. 211 ; overruling Markham *v.* Jordan, 41 id. 235, which holds that the highest market price between the conversion and bringing the suit is the measure of damages. See also *ante*, § 276.}

[2] Davis *v.* Oswell, 7 C. & P. 804 ; Moon *v.* Raphael, 2 Bing. N. C. 310 ; Bodley *v.* Reynolds, 10 Jur. 310 ; 8 Ad. & El. 779.

narily entitled to the sum recoverable upon it, though the defendant may have sold it for a less sum.[3] And though the defendant cannot, under the general issue, show the non-joinder of another part owner, to defeat the action, yet he may give that fact in evidence, in order to reduce the plaintiff's damages to the value of his own interest or share in the property.[4] Where the property has not been restored, the general measure of damages is the value of the thing taken, to which the jury may, in their discretion, add interest on the value;[5] and if the goods have been fairly sold under authority of law, the amount realized by the sale will ordinarily be taken as their true value.[6] But it has been held in England, that the jury are not bound to find the value at the time of the conversion, but they may find, as damages, the value at a subsequent time, at their discretion.[7] In this country, however, the courts are inclined to adhere to the value at the time of the conversion, unless this value has subsequently been enhanced by the defendant.[8] But if the property has been restored to the plaintiff, this will go in mitigation of the damages;[9]

[3] Alsager *v.* Close, 10 M. & W. 576; McLeod *v.* M'Ghie, 2 Man. & Gr. 326; Mercer *v.* Jones, 3 Camph. 477; [Grigsby *v.* Day, 70 N. W. 881, S. D. The fact that the debtors were insolvent at the time of the conversion does not necessarily limit the recovery to nominal damages if thereafter such debtors become solvent: Rivinus *v.* Langford, 85 P. 959, U. S. App.] {Where the action is for the conversion of the negotiable note of a third person, the measure of damages is the amount of such note and interest, unless it is of less value, by reason of payment, insolvency of the maker, or some other lawful defence, which legitimately impairs its value: Booth *v.* Powers, 56 N. Y. 22; Ingalls *v.* Lord, 1 Cowen (N. Y.) 240; Sedg. on Damages (2d ed.), 488. And the same rule applies where the action is for the conversion of the plaintiff's own note: Evans *v.* Kymer, 1 B. & Ad. 528; Thayer *v.* Manley, 73 N. Y. 305.}

[4] Bloxam *v.* Hubbard, 5 East 420; Nelthrope *v.* Dorrington, 2 Lev. 113; Wheelwright *v.* Depeyster, 1 Johns. 471; [Wing *v.* Milliken, 91 Me. 387.]

[5] Finch *v.* Blount, 7 C. & P. 478, per Patteson, J.; Johnson *v.* Sumner, 1 Met. 172; Mathews *v.* Menedger, 2 McLean 145; Clark *v.* Whitaker, 19 Conn. 319; [Continental Divide Co. *v.* Bliley, 23 Col. 160; Walley *v.* Deseret N. B., 14 Utah 305; Arkansas, etc. Co. *v.* Mann, 130 U. S. 69. *Sed quære* as to their "discretion."]

[6] Whitmore *v.* Black, 13 M. & W. 507. If the goods have been converted into money by the defendant, to his own use, this sum, with interest, will be the lowest measure of damages: Ewart *v.* Kerr, 2 McMullen, 141.

[7] Greening *v.* Wilkinson, 1 C. & P. 625. And see Cook *v.* Hartle, 8 id. 528; Whitehouse *v.* Atkinson, 3 id. 344; [Sharpe *v.* Barney, 114 Ala. 361.] {See Forsyth *v.* Wells, 41 Pa. St. 291, where the cases in regard to the measure of damages are cited and reviewed.}

[8] *Supra*, tit. Damages, § 276; {Moody *v.* Whitney, 38 Me. 174; Backmaster *v.* Smith, 22 Vt. 203; Swift *v.* Barnum 23 Conn. 523; Covell *v.* Hill, 2 Selden (N. Y.) 374; Ewing *v.* Blount, 20 Ala. 694; Funk *v.* Dillon, 21 Mo. 294; Salmon *v.* Horwitz, 28 Eng. L. & Eq. 175. In an action against the assignee of an insolvent debtor, for the conversion by him of property claimed by the plaintiff under a conveyance from the debtor, if the jury find the conveyance void under the insolvent law, the plaintiff cannot recover the cash paid by him to the debtor for the difference in value between such property and the debt which the conveyance was made to secure: Bartlett *v.* Decreet, 4 Gray (Mass.) 111, 113. Where a chattel has been sold, with an agreement to pay in instalments, and, on failure to pay, the property vests in the vendor, if he brings trover against a third party for conversion of the chattel, after some instalments have been paid, the measure of damages is the full value of the chattel: Colcord *v.* MacDonald, 128 Mass. 470; Angier *v.* Taunton, etc. Co., 1 Gray (Mass.) 621; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92.

[9] [Watson *v.* Coburn, 35 Nev. 492. A mere tender of the property will not mitigate the damages: Baltimore, etc. R. *v.* O'Donnell, 49 Ohio 489.]

and if it has been recovered by him, by the payment of a reward or otherwise, the expense so incurred is to be allowed to him by the jury.[10] If he can be indemnified by a sum of money less than the full value, as, for example, where he has only a special property, subject to which the defendant is entitled to the goods, that sum is the measure of damages. But if he is responsible over to a third person, or if the defendant is not entitled to the balance of the value, the plaintiff is entitled to recover the whole value.[11] Where the action is against an executor *de son tort*, proof that the goods have been applied in payment of debts of the intestate is admissible to reduce the damages; but he cannot retain for his own debt; nor, as it seems, for moneys of his own which he has expended in payment of other debts of the intestate, if the goods still remain in his hands.[12]

[10] Greenfield Bank *v.* Leavitt, 17 Pick. 1. And see Pierce *v.* Benjamin, 14 id. 356, 361; Yale *v.* Saunders, 16 Vt. 243; [First N. B. *v.* Rush, 85 F. 539, U. S. App.;] {Curtis *v.* Ward, 20 Conn. 204; Ewing *v.* Blount, 20 Ala. 694.} So, if the goods have been illegally sold, in discharge of a lien, and bought in by the owner, who sues the seller in trover: Hunt *v.* Haskell, 11 Shepl. 309. {Where a plaintiff has obtained judgment in trover against one who has converted his goods, he may sue another who has subsequently converted the same goods, and recover the full value of the goods. But if the prior judgment has been satisfied in part, such satisfaction should be deducted from the judgment in the second suit, and if the prior judgment is satisfied in full, this devests the property of the plaintiff, and he cannot sue a second time: Atwater *v.* Tupper, 45 Conn. 144.

Judgment recovered (though without satisfaction) in trover for conversion by a wrongful sale is a bar to an action for money had and received for the proceeds of the same sale, against another, whether a party to the conversion or not: Buckland *v.* Johnson, 26 Eng. Law & Eq. 328.}

[11] Chamberlain *v.* Shaw, 18 Pick. 278, 283, 284.

[12] Bull. N. P. 48; Whitehall *v.* Squire, Carth. 104; Mountford *v.* Gibson, 4 East 441, 447.

WASTE.

§ 650. **Waste defined.** Waste is "a spoil or destruction in corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail."[1] It includes every act of lasting damage to the freehold or inheritance,[2] and is punishable either by an action of waste or by an action on the case. The former is a mixed action, in which the plaintiff generally recovers possession of the place wasted, which is forfeited by the tenant, together with damages for the injury; but, in the latter action, damages only are recovered.

§ 651. **Action of Waste.** The old action of waste still lies in some of the United States, the Statute of Gloucester, 6 Edw. I. c. 5, having been brought over and adopted in those States as part of the common law;[1] though it is seldom resorted to; but, in others, it has never been recognized; the only remedy being either an action on the case or an injunction.[2]

§ 652. **Same Subject.** The *action of waste* lies against a tenant for life or for years, in favor of him only who has the next immediate estate of inheritance in reversion or remainder. The material averments in the declaration, and which the plaintiff must be prepared to

[1] 2 Bl. Com. 281; Co. Lit. 52 *b*, 53. {See Cruise's Digest (Greenleaf's ed. 1856), vol. i. p. 120 (115), tit. iii. c. 2, §§ 1–76, and notes. Plaintiff must have the legal title: Gillett *v.* Treganza, 13 Wis. 472.}

[2] [Removal of a building or fixture is waste: Fortscue *v.* Bowler, 38 A. 445, N. J. Eq.; Bass *v.* Metropolitau R., 82 F. 857, U. S. App.]

[1] Jackson on Real Actions, p. 340; Carver *v.* Miller, 4 Mass. 559; Randall *v.* Cleaveland, 6 Conn. 339; {Cruise's Digest (Greenleaf's ed. 1856), *ut supra*, § 26 and n.}

[2] Shult *v.* Baker, 12 S. & R. 273; Findlay *v.* Smith, 6 Munf. 134; Bright *v.* Wilson, 1 Cam. & Norw. 24; Sheppard *v.* Sheppard, 2 Hayw. 382; Story Eq. Jur. § 917. {The case which must be made out where the reversioner applies to a court of equity to have the tenant enjoined from committing waste, is in most respects similar to that which would be necessary to support an action at law, but it must also be shown that the plaintiff's action at law would not furnish him with an adequate remedy.

If the person who commits the waste is not a *tenant*, the injunction will not be granted. [This rule is now altered in many jurisdictions: Woods *v.* Riley, 72 Miss. 73.] Thus a person who is not tenant in possession, but possesses a right to dig ores, is not guilty of committing waste when he takes more ore out than his contract allows him: Grubb's Appeal, 90 Pa. St. 228.

The complainant in a bill praying an injunction of waste must also show title in the land, and one who is only an attaching creditor or judgment creditor, or a holder of a certificate of purchase under an execution before he gets his deed, has not such a title as will maintain the bill: Law *v.* Wilgees, 5 Biss. C. C. 13.

Nor will such a title maintain a bill for an account of waste: Hughlett *v.* Harris, 1 Del. Ch. 349.

But a purchaser under an execution, who has got his deed of the land, may proceed immediately: Litka *v.* Wilcox, 39 Mich. 94.}

prove, are (1) the title of the plaintiff, in stating which he must show how he is entitled to the inheritance as fully and correctly as in a writ of entry on intrusion, or any other writ in which an estate for life or years is set forth in the tenant; (2) the demise, if there be one, or other title of the tenant, but with no more particularity than is necessary in stating an adversary's title; (3) the quality, quantity, and amount of the waste, and the place in which it was committed, as whether in the whole premises, or in a distinct part of them, and whether it were done *sparsim*, as by cutting trees in different parts of a wood, or totally, as by prostrating an entire building. The averment of tenure may be either in the *tenet* "which the said *T. holds*," or in the *tenuit*, "which he *held*," as it has reference to the time of the waste done, and not the time of bringing the action. In the former case the plaintiff will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But in the latter case, the tenancy being at an end, he will have judgment for his damages alone. If the waste was committed by an assignee of a tenant in dower or by the curtesy, the action, if brought by the heir of the husband or *feme*, must be against the original tenant, the assignee being regarded only as his bailiff or servant. But if the reversioner has also assigned his inheritance, and the assignee of the tenant for life has attorned, the latter is considered as the tenant, and he alone is liable for waste done by himself. So, if any lessee for life or years commits waste, and afterwards assigns his whole estate, the action of waste lies against the original tenant, and the place wasted may be recovered from the assignee, though he is not a party to the suit, the title of his assignor having been forfeited previous to the assignment. But if the assignee himself committed the waste, he alone is liable to the action. It follows that a general plea of *non-tenure* is not a good plea to this action; but the defendant may plead a special non-tenure, as, for example, if he was lessee for life, and not a tenant in dower or by the curtesy, he may plead that he assigned over all his estate, previous to which no waste was committed; or, if he was the assignee, he may plead the assignment, and that no waste had subsequently been committed.[1]

§ 653. **General Issue.** The plea usually termed the *general issue*, in the action of waste is, that the defendant "did not make any waste, sale, or destruction in the messuage and premises aforesaid, as the plaintiff in his writ and declaration has supposed." This plea has been said to put in issue the whole declaration;[1] but the better

[1] See Jackson on Real Actions, pp. 329–337, where also may be found precedents of the various counts in this action. See also 2 Inst. 301–302; 2 Saund. 252 *a*, n. (7) by Williams.

[1] This opinion of Serjeant Williams, 2 Saund. 438, n. (5), founded on an implied admission of the point in a case in 2 Lutw. 1547, is shown to be not well founded, in Jackson on Real Actions, pp. 338, 339.

opinion seems to be, that it puts in issue only the fact and circumstances of the waste done, to which point alone, therefore, is any evidence admissible. If the defendant would contest the plaintiff's title, or would show any matter in justification or excuse, such as, that he cut the timber for repairs, or the wood for fuel, or that his lease was without impeachment of waste, or that he has subsequently repaired the damage prior to the commencement of the action, or that he did the act by license from the plaintiff, or has any other like ground of defence, he must plead it specially.[2]

§ 654. **Case for Waste.** In an *action on the case*, in the nature of waste, brought by a landlord, whether lessor, heir, or assignee, against his tenant, whether lessee or assignee, their respective titles are not set out with so much precision as in the action of waste, but their relations to each other are stated in a more general manner; namely, that the defendant was possessed of the described premises during the period mentioned, and held and occupied them as tenant to the plaintiff to whom the reversion during the same period belonged, under a certain demise previously made, and for a certain rent payable therefor to the plaintiff. But if the defendant is tenant for life, and the plaintiff is remainder-man or reversioner, it seems necessary to set forth the quantity of the defendant's estate; but it is not necessary to state the quantity of the estate of the plaintiff; nor is it expedient, for if he does state it, and mistakes it, the variance will be fatal.[1]

§ 655. **Pleadings.** In *both these kinds of action*, it seems necessary to state in the declaration the *special waste* complained of, as, whether it were voluntary or not, and whether in the house, and in what part thereof, or whether in the fences or trees, and the like;[1] and the plaintiff will not be allowed to give evidence of one kind of waste

[2] 2 Saund. 338, n. (5) by Williams; Jackson on Real Actions, pp. 339, 340.

[1] 2 Saund. 252, *c*, *d*, n. by Williams. {In most States the common-law action of waste is more or less changed by statutes, but the main features of the old common-law action are generally preserved. It is necessary to prove a legal title in the plaintiff.

Thus, where one had lands granted him by act of Congress, but the legal title did not vest in him till the patent and survey had been made, it was held that he had no action of waste till he acquired such legal title: Whitney *v.* Morrow, 34 Wis. 644.

But the privity of estate required by the old *action of waste*, is not necessary in the action *on the case* for waste as it is established in most of the States, and whenever an *action of waste* could be maintained at common law, for an injury committed by one privy in estate to the plaintiff, the remedy for such an injury committed by a stranger is by an *action on the case* in the nature of waste: Patterson *v.* Cunliffe, 11 Phila. 564; [Yocum *v.* Zahner, 162 Pa. 468; Hinston *v.* Hinston, 120 N. C. 400; Morrison *v.* Morrison, 29 S. E. 901, N. C.] The action on the case in the nature of waste was devised to avoid the defective and inadequate remedy afforded by the action of waste at common law, and as modified by the Statute of Marlbridge, 52 Hen. III. c. 23, and by 6 Edw. I. c. 5, and to provide an effectual remedy against tenant or stranger where no privity exists: Dickinson *v.* Mayor, etc. of Baltimore, 48 Md. 583; 4 Kent, Comm. 83; Taylor, Landl. & Ten. § 688; 1 Washburn, Real Prop. 153.}

[1] {The court, in Strout *v.* Dunning, 72 Ind. 343, say, "We cannot say that it is waste in a tenant for life to plough up grass, nor that destroying or selling timber is waste, without some description of the timber destroyed or sold, or some statement of the attending circumstances."}

under an averment of another; as, if the defendant is charged with uncovering the roof of the house, the plaintiff will not be permitted to prove waste in the removal of fixtures; and if the averment is, that the defendant permitted the premises to be out of repair, evidence of acts of voluntary waste is admissible.[2] But it is not necessary in either form of action for the plaintiff to prove the whole waste stated; nor, in an action on the case, is there any need that the jury should find the particular circumstances of the waste, or find for the defendant as to so much of the waste as the plaintiff fails to prove; for in this action the plaintiff goes only for his damages.[3]

§ 656. **What Plaintiff must prove.** Under the *general issue of not guilty*, in the action on the case, the entire declaration being open, the *plaintiff* must prove (1) his title, and the holding by the defendant, as alleged; (2) the waste complained of; and (3) the damages. But it is to be observed that in the United States the law of waste is not held precisely in the same manner as in England; but it is accommodated to the condition and circumstances of a new country, still in the progress of settlement.[1] Therefore, to cut down trees is not always held to be waste here, in every case where, by the common law of England, it would be so held; but regard is had to the condition of the land, and to the object of felling the trees, and whether good husbandry required that the land should be cleared and reduced to tillage; and generally, whether the tenant has, in the act complained of, conformed to the known usage and practice of the country in similar cases.[2] And to what extent wood

[2] 2 Saund. 252 *d*, n. by Williams; Edge *v.* Pemberton, 12 M. & W. 187; *ante*, Vol. I. § 52. If the waste is only permissive, it seems that an action on the case in the nature of waste does not lie, the remedy, if any, being only in contract: Countess of Pembroke's Case, 5 Co. 13; Gibson *v.* Wells, 1 New Rep. 290; Herne *v.* Bembow, 4 Taunt. 764; Jones *v.* Hill, 7 id. 392; Martin *v.* Gillam, 7 Ad. & El. 540. But this action lies for waste done by a tenant, holding over after the expiration of his lease: Kinlyside *v.* Thornton, 2 W. Bl. 1111; Burchell *v.* Hornsby, 1 Campb. 360.

[3] 2 Saund. 252 *d*, *e*, n. by Williams; [Smith *v.* Mattingly, 96 Ky. 228.]

[1] ["It is apprehended, that a more liberal rule is now applied in respect to constructive acts of waste in England than formerly, and there certainly is a much more liberal construction put upon such acts in this country than that of the common law. The proper test in all these cases seems to be, Does the act essentially injure the inheritance as it will come to the reversioner? and this is a question for the jury:" 1 Washburn on Real Property, 146.

In this country, no act of a tenant amounts to waste, unless it is, or may be, prejudicial to the inheritance, or to those who are entitled to the reversion or remainder: Pynchon *v.* Stearns, 11 Met. (Mass.) 304. See also Crockett *v.* Crockett, 2 Ohio St. 180; McCullough *v.* Irvine, 13 Pa. St. 438; Clemence *v.* Steere, 1 R. I. 272. As incident to an estate for life, the wife may rightfully take from the land a reasonable amount of fuel for the supply of herself and family, upon the farm, including the persons employed to cultivate it; and the fact that such persons are paid by a share of the crops, as tenants at the halves, and in cold weather keep a separate fire, does not of itself prove an unreasonable use: Smith *v.* Jewett, 40 N. H. 530.]

[2] Findlay *v.* Smith, 6 Munf. 134; Jackson *v.* Brownson, 7 Johns. 227, 233; Parkins *v.* Cox, 2 Hayw. 339; Hastings *v.* Crunkleton, 3 Yeates 261. See 1 Cruise's Dig. tit. 3, Estates for Life, c. 2 (Greenleaf's ed. 1856), vol. i. p. 120 (*115), § 2, and n. [In England, it is waste if a tenant cuts down trees and sells them in order to get money

and timber may be felled without waste is a question of fact for the jury to decide, under the direction of the court.[3] Under this issue, therefore, it would seem that the *defendant* may show that the act done was according to the custom of the country, and for the benefit of the land, it being virtually to show that it was no waste;[4] though by the common law of England, such a defence, being matter in justification or excuse, must be specially pleaded.[5] But it is no defence to show that the defendant was bound by covenant to yield up the premises in good repair at the end of the term, and that therefore the plaintiff should resort to his remedy on the covenant; for he may have remedy in either mode, at his election; otherwise, he might lose his recompense by being obliged to wait until the end of the term.[6]

to make repairs which he is obliged to make: Bac. Abr. Waste, F. 1, Co. Lit. 53 *b*. In America, this doctrine has been modified by the sound sense of Judge Story in Loomis *v.* Wilbur, 5 Mason C. C. 13, where he holds this not to be waste if it is the most economical way of making repairs, and most for the benefit of all concerned, and the proceeds are *bona fide* applied for that purpose. But it is waste to sell timber off land to make improvements which the tenant is not bound to make, and he cannot justify it on the ground that the benefit to the estate compensates for the injury: Miller *v.* Shields, 55 Ind. 71; Clark *v.* Cummings, 5 Barb. (N. Y.) 339; Sohier *v.* Eldredge, 103 Mass. 341, p. 351; Smith *v.* Jewett, 40 N. H. 530. Thus, where a tenant of a farm rebuilt a barn which had been struck by lightning and burnt, it was held that she could not cut and sell timber, to reimburse herself for the expense of rebuilding: Miller *v.* Shields, *supra*.} [A dowress has no right to take timber for sale, or for use on another estate: Noyes *v.* Stone, 163 Mass. 490. As to what is reasonable cutting of timber, see Smith *v.* Smith, 31 S. E. 135, Ga.]

[3] Jackson *v.* Brownson, 7 Johns. 227, 233. {The tenant for life has a right to work *open mines* (Reed *v.* Reed, 1 C. E. Green (N. J.) 248), but not to open mines that have never been opened before he came into possession, or that have been abandoned before he came into possession (Viner *v.* Vaughan, 2 Beav. 466; Gaines *v.* Green, etc. Co., 32 N. J. Eq. 86); [nor to operate for oil or gas unless operations were begun before the commencement of the life estate: Marshall *v.* Mellen, 179 Pa. 371; Williamson *v.* Jones, 39 W. Va. 231.] Yet if a mine has only been temporarily abandoned, for want of a market, he may work the mine: Bagot *v.* Bagot, 32 Beav. 509; Legge *v.* Legge, ib. 515.}

[4] [Disher *v.* Disher, 45 Neb. 100; although such custom is not immemorial: Dashwood *v.* Magniac, 1891, 3 Ch. 306.]

[5] Jackson *v.* Brownson, 7 Johns. 227, 233. See Simmons *v.* Norton, 7 Bing. 640; s. c. 5 Moore & P. 645.

[6] 2 Saund. 252 *c*, n. by Williams; Kinlyside *v.* Thornton, 2 W. Bl. 1111; Jefferson *v.* Jefferson, 3 Lev. 130. {For an unauthorized removal of fixtures, put in by a lessee under a special agreement in writing as to his right to remove, and the lessor's right to purchase them, the lessor's remedy is by action on the agreement, and not on the covenant against waste in the lease. Where there is a special agreement between landlord and tenant regarding fixtures, it overrules and supersedes the general rules of law regulating their mutual rights and obligations: Naylor *v.* Collinge, 1 Taunt. 19; Thresher *v.* East London Waterworks, 2 B. & C. 608, and 4 D. & R. 62; Amos & Ferard on Fixt. *108, *109; Wall *v.* Hinds, 4 Gray 256, 273.}

WAY.

§ 657. **Foundation of private Right of Way.** A private right of way may be said to exist only by grant or agreement; for prescription is but a conclusive presumption of an original grant or right; and necessity, such as creates a right of way, may be regarded as a conclusive presumption of a grant or a license.[1] The nature of a prescription, whether for a right of way or other incorporeal franchise, has already been considered under that title.[2]

§ 658. **Way of Necessity.** A right of *way of necessity* is founded on an implied grant; but convenience alone is not sufficient to raise the implication of a way.[1] Where one has a way of necessity over

[1] Nichols *v.* Luce, 24 Pick. 102; Woolrych on Ways, p. 72, n. (*q*); Gayetty *v.* Bethune, 14 Mass. 49, 53. {A right of way carries with it all rights to the use of the soil properly incident to the free exercise and enjoyment of the right granted or reserved. The abutters on such way have a right to make improvements therein, so as to make it more beneficial to themselves, without injury to the owners of the land, or others having an equal right of way; but they have not a right to use it for another and distinct purpose, and it is for the jury in any given case to determine whether the use complained of is for another and distinct purpose than that of a way. If it be used for such other and distinct purpose, the owner of the land may have his action, although he sustains no actual damage; the law permitting him to recover nominal damages to vindicate his right. Appleton *v.* Fullerton, 1 Gray (Mass.) 186, 192, 194; Atkins *v.* Boardman, 2 Met. (Mass.) 467. Where a grantor conveys land, bounding it on a street or way, he and his heirs are estopped to deny that there is such a street or way. It is an implied covenant of the existence of such a way: Parker *v.* Smith, 17 Mass. 413; O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292; Tufts *v.* Charlestown, 2 Gray (Mass.) 272. The grantor of land may create a right of way therein in his own favor, [a reservation in favor of a stranger is void: Hall Co. *v.* Dresser, 168 Mass. 136,] by a reservation or exception thereof in the grant, either in gross, or as annexed to the land of the grantor: Bowen *v.* Connor, 6 Cush. (Mass.) 132; Cruise's Digest (Greenleaf's ed. 1856), tit. xxiv., Ways, vol. ii. pp. 25–35 (*85–*91).

[2] *Supra*, §§ 537–546.

[1] Nichols *v.* Luce, 24 Pick. 102. And see Brice *v.* Randall, 7 Gill & J. 349; {Wissler *v.* Hershey, 23 Pa. St. 333; Kimball *v.* Cocheco R. R. Co., 27 N. H. 448; McTavish *v.* Carroll, 7 Md. 352. See also Hyde *v.* Jamaica, 27 Vt. 443;} [Botsford *v.* Wallace, 69 Conn. 263; Meredith *v.* Frank, 56 Ohio 479; Field *v.* Mack, 125 Mo. 502.] {A right of way by necessity can only arise by grant express or implied; it does not exist where the title of the party is by escheat: Proctor *v.* Hodgson, 29 Eng. Law & Eq. 453. Nor does it exist where neither the party claiming the way, nor the owner of the land over which it is claimed, nor their privies, was ever seised of both tracts of land: Stewart *v.* Hartman, 46 Ind. 331. Where land conveyed is wholly surrounded by land of the grantor, or partly by this and partly by lands of strangers, a "way of necessity" over the grantor's land passes to the grantee by the conveyance without express mention, and will continue to be appurtenant to the land, so as to pass to another: Taylor *v.* Warnaky, 55 Cal. 350; Washburn, Easements and Servitudes, p. *163, and cases there cited; [Palmer *v.* Palmer, 150 N. Y. 139; Estep *v.* Hammon, 46 S. W. 715, Ky.; Willey *v.* Thwing, 68 Vt. 128; Boyd *v.* Woolwine, 40 W. Va. 282; New York, etc. R. *v.* Railroad Commissioners, 162 Mass. 81; Miller *v.* Richards, 139 Ind. 263; Blum *v.* Weston, 102 Cal. 362.] This way of necessity is, however, extinguished when any other suitable approach to the land is provided: Oliver *v.*

another's land, the party, while the way remains undefined, may pass over any part of the land, in the course least prejudicial to the owner, and passable with reasonable convenience. But it is the right of the owner of the land to designate the particular course of such way; and he is bound to designate a convenient course. If he neglects so to do, the other party may select the tract for himself.[2] And if the way of necessity results from successive levies of executions upon the debtor's land, the land taken by the creditor, whose levy creates the necessity, must be burdened with the easement.[3]

§ 659. **Proof of Right.** The *proof of a private way* must correspond with the description, whether it be in the declaration in an action for disturbance of the right, or in a special plea in trespass. Evidence of user of a right of way for all manner of carriages is not sufficient to support an allegation of such right for all manner of cattle, though it is admissible under that issue; nor does evidence of a user of a way with horses, carts, and carriages for certain purposes, necessarily prove a right of way for all purposes.[1] But the allegation of a footway is supported by evidence of a carriage-way; and the allegation of a private way is supported by evidence of a public way; for in these cases the latter includes the former.[2] The extent of the right is a question for the jury, under all the circumstances proved. But a user for all the purposes for which the party had occasion is evidence of a general right of way.[3] The

Hook, 47 Md. 301; Pomfret *v.* Ricroft, 1 Wms. Saunders 323, n.} [A way of necessity is not implied in the absence of evidence that a way by water is unavailable, the land being on the sea-shore: Hildreth *v.* Goggins, 39 A. 550, Me.; Kingsley *v.* Goldsborough Co., 86 Me. 279.]

[2] Holmes *v.* Seeley, 19 Wend. 507; Russell *v.* Jackson, 2 Pick. 574; Capers *v.* Wilson, 3 McCord 170; [Ritchey *v.* Welsh, 149 Ind. 214.] {If a certain route across the grantor's land is used by the grantee as a way of necessity, and the grantor does not object to such use, this is evidence of an establishment of the location of the way of necessity: Bass *v.* Edwards, 126 Mass. 445. If there is but one route along which such a right of way can be exercised, and this is actually so used, it is a location of the way: Gerrish *v.* Shattuck, 128 id. 571. If the owner of the servient estate obstructs a way of necessity, the owner of the dominant estate may deviate from the way so obstructed and go over other parts of the land, doing no unnecessary damage: Farnum *v.* Platt, 8 Pick. (Mass.) 339.}

[3] Russell *v.* Jackson, 2 Pick. 574, 578. And see Pernam *v.* Weed, 2 Mass. 203; Taylor *v.* Townsend, 8 id. 411; Collins *v.* Prentice, 15 Conn. 39, 423; Farnum *v.* Platt, 8 Pick. 339.

[1] Ballard *v.* Dyson, 1 Taunt. 279; Cowling *v.* Higginson, 4 M. & W. 245. And see Brunton *v.* Hall, 1 Ad. & El. N. S. 792; Higham *v.* Rabett, 3 Jur. 588; S. C. 5 Bing. N. C. 622; French *v.* Marstin, 4 Foster (N. H.) 440. [The owner of a right of way of definite width may construct a suitable road of that width: Rotch *v.* Livingston, 91 Me. 461.]

[2] Davies *v.* Stephens, 7 C. & P. 570, per Ld. Denman; Brownlow *v.* Tomlinson, 1 Man. & Gr. 484.

[3] Cowling *v.* Higginson, 4 M. & W. 245; Allan *v.* Gomme, 11 Ad. & El. 759. See *supra*, §§ 544, 545. If the proof is of a use, common to all others, as well as to the party claiming the way, it does not establish a *private* way: Prince *v.* Wilbourne, 1 Rich. 58. {Where a right of way is acquired by adverse possession, proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may reasonably be required for the use of that estate while in

termini of the way are also material to be proved as alleged; for, if the proof stops short of either, it is fatal, unless the pleadings are amended.[4] But the words "towards and unto" do not necessarily bind the party to the proof of a straight road;[5] nor is it a fatal variance, if it appear that the way, in its course, passes over an intermediate close of the party himself who claims it.[6]

§ 659 *a*. **Way appurtenant.** Where a private way is claimed by virtue of a conveyance of land, and as *appurtenant* to the same, evidence *aliunde*, by parol or otherwise, may be given to prove that a particular way was then in use by the grantor; in which case it passed as parcel of the estate conveyed.[1]

substantially the same condition : Ballard *v*. Dyson, 1 Taunt. 279; Williams *v*. James, L. R. 2 C. P. 577. But, if the condition and character of the dominant estate are substantially altered, as in the case of a way to carry off wood from wild land, upon which a manufactory is afterwards established, the right of way cannot be used for new purposes, imposing a greater burden upon the servient tenement: Atwater *v*. Bodfish, 11 Gray (Mass.) 150; Parks *v*. Bishop, 120 Mass. 340. And if it is used for a different purpose, though no injury is inflicted, the owner of the servient tenement may have nominal damages to vindicate his right: Appleton *v*. Fullerton, 1 Gray (Mass.) 186, 192, 194; Atkins *v*. Boardman, 2 Met. (Mass.) 467.]

[4] See *ante*, Vol. I. §§ 58, 62, 63, 71, 72; Wright *v*. Rattray, 1 East 377.

[5] R. *v*. Marchioness of Downshire, 4 Ad. & El. 232.

[6] Jackson *v*. Shillito, cited 1 East 381, 382. See Simpson *v*. Lewthwaite, 3 B. & Ad. 226.

[1] Atkins *v*. Boardman, 2 Met. 457, 464; White *v*. Crawford, 10 Mass. 183; United States *v*. Appleton, 1 Sumn. 492, 501, 502; Staples *v*. Hayden, 6 Mod. 4; Kent *v*. Waite, 10 Pick. 138. [A right of way appurtenant to land passes by a deed of the land, without express mention of such right or of privileges and appurtenances: Brown *v*. Thissell, 6 Cush. (Mass.) 254; Underwood *v*. Carney, 1 id. 285; Pratt *v*. Sanger, 4 Gray (Mass.) 84, 88; [Pavey *v*. Vance, 56 Ohio 162. Such a right also passes to one not in privity with the original owner who acquires title to the dominant tenement by adverse possession: Morton *v*. Thompson, 69 Vt. 432.] A way granted as appurtenant is appurtenant to every part of the close, and parol evidence is inadmissible to limit the right to a particular part: Miller *v*. Washburn, 117 Mass. 371; Walker *v*. Gerhard, 9 Phila. (Pa.) 116.

There has been great diversity of opinion whether an apparent and continuous easement, which the grantor used before severance of the dominant and servient estate, will pass as appurtenant to the dominant estate without special mention, when a separation occurs by sale by the owner. In Gale on Easements, the rule is stated that, "upon the severance of an *heritage*, a grant will be implied first of those continuous and apparent easements which have been in fact used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have no legal existence as easements, and secondly of all those easements without which the enjoyment of the several portions could not be had at all." This principle has been held not to apply to rights of way: Oliver *v*. Hook, 47 Md. 301; Felters *v*. Humphreys, 19 N. J. Eq. 471; O'Rorke *v*. Smith, 11 R. I. 259. But in many States, on the other hand, it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another, will, upon a severance of the estate, pass as implied or constructive easements, appurtenant to the part of the estate, for the benefit of which they were established: Cannon *v*. Boyd, 73 Pa. St. 179; Kieffer *v*. Imhoff, 26 id. 438; Thompson *v*. Miner, 30 Iowa 386; Huttemeier *v*. Albro, 18 N. Y. 48; [Baker *v*. Rice, 56 Ohio 463.]

In England the application of this rule to rights of way is denied: Polden *v*. Bastard, 4 B. & S. 258. The leading case on this point is Pyer *v*. Carter, 1 H. & N. 916. Generally speaking, the rule applies to such servitudes as lateral support, party walls, drains, conduits, sewers, and those which are technically called "continuous." Earl, C. J., in Polden *v*. Bastard, *supra;* Thayer *v*. Payne, 2 Cush. (Mass.) 327; Oliver *v*. Dickenson, 100 Mass. 115.

In Massachusetts it is held that such a way must be "reasonably necessary" to the

§ 660. **Action for Disturbance of Way.** In an action on the case for *disturbance of a way*[1] or other easement, the defendant, on a traverse of the right, may show that it has ceased to exist; or, that, during the period of the supposed acquisition of a way by user, the land was in the possession of a tenant of the plaintiff; or, that the way was only by sufferance, during his own pleasure, for which the plaintiff paid him a compensation, or submitted to the condition of a gate across it;[2] or, that the plaintiff had submitted to an obstruction upon it for more than twenty years;[3] or, that the right has been extinguished by unity of title and possession in the same person;[4] or, that the right is released and gone, by reason of an extinction or abandonment of the object for which it was granted;[5] as if it be a way to a warehouse, and the house is afterwards pulled down, and a dwelling-house is built upon the place.[6] And if the way is claimed by necessity, he may show that the plaintiff can now approach the place by passing over his own land.[7]

§ 661. **Trespass.** In *trespass* also, if the defendant pleads a right of way which is traversed, the same evidence is admissible on the

use of the dominant estate, in order to pass as appurtenant: Leonard *v.* Leonard, 7 Allen (Mass.) 277, p. 283; Bass *v.* Dyer, 125 Mass. 287.

In Maine it is held that the way must be "necessary" to the enjoyment of the dominant estate: Stevens *v.* Orr, 69 Me. 323; Warren *v.* Blake, 54 id. 276.

If a right of way is already appurtenant to an estate as an easement, it will pass under a deed of the land, without the words "appurtenances" or "privileges": Brown *v.* Thissell, 6 Cush. (Mass.) 254; Pratt *v.* Sanger, 4 Gray (Mass.) 84, p. 88.}

[1] [As to what constitutes obstruction, see Jewell *v.* Clement, 39 A. 582, N. H.; Dyer *v.* Walker, 99 Wis. 404; Wells *v.* Tolman, 156 N. Y. 636; Green *v.* Goff, 153 Ill. 534; Hartman *v.* Fick, 167 Pa. 18; Moffitt *v.* Lytle, 165 id. 173.]

[2] Reignolds *v.* Edwards, Willes 282.

[3] Bower *v.* Hill, 1 Bing. N. C. 549, 555, per Tindal, C. J.; R. *v.* Smith, 4 Esp. 109; {Hewins *v.* Smith, 11 Met. (Mass.) 241; Kilburn *v.* Adams, 7 id. 33. If the obstruction be only for part of the space over all of which the plaintiff claims his right of way, it is no answer to the plaintiff's right to pass over the way as reduced in width: Putnam *v.* Bowker, 11 Cush. (Mass.) 542, 546.}

[4] Woolrych on Ways, pp. 70, 71; Onley *v.* Gardiner, 4 M. & W. 496; Thomas *v.* Thomas, 2 C. M. & R. 34; Clayton *v.* Corby, 2 Ad. & El. N. S. 813; [Hetzel *v.* Baltimore, etc. R., 169 U. S. 26.] {A right of way appurtenant to land over and upon adjoining land is not extinguished by the vesting of both estates in the same person as mortgagee, under separate mortgages, until both mortgages are foreclosed: Ritger *v.* Parker, 8 Cush. (Mass.) 145.} [Where there are two servient tenements, X and Y, and one dominant tenement, Z, Y being between X and Z, a conveyance of Y by the owner of Z will extinguish the easement in X: Johnson *v.* Grant, 37 A. 707, R. I. Unity of possession of the dominant and servient tenements in a mortgagor does not affect the rights of the purchaser under a foreclosure of the mortgage of the dominant tenement: Duval *v.* Becker, 81 Md. 537.]

[5] [Shirley *v.* Crabb, 138 Ind. 200.]

[6] Allan *v.* Gomme, 11 Ad. & El. 759. {The right of passage way to certain buildings is extinguished by the laying out and constructing a highway over the site of such buildings: Hancock *v.* Wentworth, 5 Met. (Mass.) 446.} [The destruction of the buildings does not destroy the easement where the enjoyment thereof is not entirely dependent on such buildings: Hottell *v.* Farmers' Ass'n, 53 P. 327, Col.]

[7] Holmes *v.* Goring, 2 Bing. 76. The soundness of this decision is questioned by Mr. Woolrych, in his Treatise on Ways, p. 72, n.; but the rule is recognized in the United States as good law: McDonald *v.* Lindall, 3 Rawle 492; Collins *v.* Prentice, 15 Conn. 39; Smith *v.* Higbee, 12 Vt. 113. See 3 Cruise's Dig. tit. xxiv. § 10, n. (Greenleaf's ed. 1856); [Benedict *v.* Johnson, 42 S. W. 335, Ky.]

part of the plaintiff, by way of rebutting the defence. So, under this issue, in any action, it may be shown that the way has been duly discontinued or stopped.[1] But under a traverse of the right of way pleaded, it is not competent for the plaintiff to show that the trespass complained of was committed beyond the limits of the right alleged; for it is irrelevant to the issue, and should be shown either by a replication of *extra viam* or by a new assignment.[2]

§ 662. **Public Way, how proved.** The existence of a *public way* is proved, either by a copy of the record, or by other documentary evidence of the original laying out by the proper authorities, pursuant to statutes;[1] or, by evidence either of immemorial usage,[2] or of *dedication* of the road to public use. In the latter case, two things are essential to be proved: the *act of dedication*, and the *acceptance* of it on the part of the public; and this may be either limited and partial, as of a way excluding carriages, or it may be absolute and total.[3] Nor is it necessary that the dedication be made specifically to a corporate body capable of taking by grant; it may be to the general public, and limited only by the wants of the community.[4] If accepted and used by the public in the manner intended, it works an estoppel *in pais*, precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. Nor is it necessary to prove who was the owner, nor that he was a private person; for a dedication may be presumed, even against the sovereign; and in all cases; unless the state of the

[1] Davison *v.* Gill, 1 East 64.

[2] Stott *v.* Stott, 16 East 343, 349.

[1] The question whether a way is public or private, where the evidence is conflicting, is to be determined by the jury: Deake *v.* Rogers, 3 Hill (N. Y.) 604.

[2] Com. *v.* Low, 3 Pick. 408; Stedman *v.* Southbridge, 17 id. 162; Williams *v.* Cummington, 18 id. 312; State *v.* Hunter, 5 Ired. 369; Valentine *v.* Boston, 22 Pick. 75; Reed *v.* Northfield, 13 id. 94; Odiorne *v.* Wade, 5 id. 421; Young *v.* Garland, 6 Shepl. 409. Long use of a way by the public is *prima facie* evidence that it was duly laid out as a public highway; and for this purpose twelve years have been held sufficient: Colden *v.* Thurber, 2 Johns 424. So has "a considerable time:" Pritchard *v.* Atkinson, 3 N. H. 335, 339. And see State *v.* Campton, 2 id. 513; Sage *v.* Barnes, 9 Johns. 365; Drury *v.* Worcester, 21 Pick. 44. {A highway may be proved by prescription, even at or near a place where a way is proved by record to have been established: Com. *v.* Old Colony R. R., 14 Gray (Mass.) 93.} [The Statute of Limitations must have run: Engle *v.* Hunt, 50 Neb. 358.]

[3] Marq. of Stafford *v.* Coyney, 7 B. & C. 257; State *v.* Trask, 6 Vt. 355. The inference of acceptance by the public is not negatived by the fact that the land so used is taxed for city and county purposes: Lemon *v.* Hayden, 13 Wis. 159; Wyman *v.* State, ib. 663. {The rule sought to be established in Com. *v.* Low, 3 Pick. (Mass.) 408, and Sturtivant *v.* State, 18 Me. 66, that the only mode of making a town way is that prescribed by the statute, is no longer law. It is overruled in Com. *v.* Belding, 13 Met. (Mass.) 10, and State *v.* Bigelow, 34 Me. 246, and Bigelow *v.* Hillman, 37 id. 52; [Bryant *v.* Tamworth, 39 A. 431, N. H.;] and prescription or dedication are recognized as modes of showing the establishment of such ways. [One of these is essential: Slater *v.* Gunn, 170 Mass. 509.]

If one in a grant bounds by a *street*, the existence of that street cannot be denied by those claiming under such grant: *Re* City of Brooklyn, 73 N. Y. 179; Vanatta *v.* Jones, 42 N. J. L. 561; Tufts *v.* Charlestown, 2 Gray (Mass.) 272.}

[4] New Orleans *v.* U. S., 10 Pet. 662; Bryant *v.* McCandless, 7 Ohio (Part 2), 135; Pawlet *v.* Clark, 9 Cranch 292, 331.

property was such that a dedication of the soil was impossible.[5] The right of the public does not rest upon a grant by deed, nor under a twenty years' possession; but upon the use of the land with the assent of the owner, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.[6] The issue is therefore a mixed question of law and fact, to be found by the jury, under the direction of the court, upon consideration of all the circumstances. The length of the time of enjoyment furnishes no rule of law on the subject which the court can pronounce without the aid of a jury, unless, perhaps, where it amounts to twenty years; but it is a fact for the jury to consider, as tending to prove an actual dedication, and an acceptance by the public.[7] Hence the jury have been held justified in finding a dedication after "four or five years" of enjoyment.[8] In another great case which was much contested, six years were held sufficient;[9] and in others it has been held that, after a user of "a very few years," without prohibition, or any visible sign that the owner meant to preserve his rights, the public title was complete.[10] It is a question of intention, and therefore may be proved or disproved by the acts of the owner, and the circumstances

[5] R. *v.* East Mark, 12 Jur. 332. In this case the way had been used fifty years; which was said to be "extremely strong evidence of an intention of the owner of the soil, whoever he was, to dedicate it to the public, unless there was conclusive proof that he had not consented." Per Erle, J.

[6] Cincinnati *v.* White, 6 Peters 431, 437–440; R. *v.* East Mark, 12 Jur. 332; State *v.* Catlin, 3 Vt. 230; Jarvis *v.* Dean, 3 Bing. 447; Brown *v.* Manning, 6 Ohio 298, 303; Le Clerq *v.* Gallipolis, 7 id. 217, 219; Lade *v.* Shepherd, 2 Stra. 1004; Pawlet *v.* Clark, 9 Cranch 331; Olcott *v.* Banfill, 4 N. H. 537, 545, 546; Abbott *v.* Mills, 3 Vt. 519; [McKey *v.* Hyde Park, 134 U. S. 84.] In Dwinel *v.* Barnard, 2 Law Rep. N. S. 339, 344, it was held by the Supreme Judicial Court of Maine, that though it must appear that the owner of the land designedly offered it for public or common use, yet the law does not require the lapse of any particular time to authorize the inference of a dedication. See s. c. 14 Shepl. 554.

[7] Connehan *v.* Ford, 9 Wis. 240. In the case of a public way by *user*, the jury may be authorized by the circumstances to find that its limits extended beyond the travelled path, to the breadth usually laid out as a highway: Sprague *v.* Waite, 17 Pick. 309; Hannum *v.* Belchertown, 19 id. 311.

[8] Jarvis *v.* Dean, 3 Bing. 447; Poole *v.* Huskinson, 11 M. & W. 830. See Best on Presumptions, pp. 133, 134, § 101.

[9] Per Ld. Kenyon, in 11 East 376, n. Eight years were held sufficient by Ld. Kenyon in Rugby Charity *v.* Merryweather, ib. 375, n.; but both these cases were questioned by Mansfield, C. J., in 5 Taunt. 142, though Chambre, J., was of Ld. Kenyon's opinion: ib. 137. See also 5 B. & Ald. 457, per Holroyd, J.; R. *v.* Hudson, 2 Stra. 909; Hobbs *v.* Lowell, 19 Pick. 405. "Six or seven years" were recognized as sufficient, in Barclay *v.* Howell, 6 Peters 498, 513. But see State *v.* Marble, 4 Ired. 318.

[10] British Museum *v.* Finnis, 5 C. & P. 460; R. *v.* Lloyd, 1 Campb. 260. See also Best on Presumptions, pp. 133–137, §§ 101, 102; Lade *v.* Shepherd, 2 Stra. 1004; Com. *v.* McDonald, 16 S. & R. 392; Hobbs *v.* Lowell, 19 Pick. 405; Springfield *v.* Hampden, 10 id. 59; Cleveland *v.* Cleveland, 12 Wend. 172; Denning *v.* Roome, 6 id. 651. {See Gwynn *v.* Homan, 15 Ind. 201; Boyer *v.* State, 16 id. 451; Green *v.* Canaan, 29 Conn. 157. But dedication is to be inferred rather from the assent of the owner than from length of user: Quinn *v.* State, 49 Ala. 353; Morgan *v.* Lombard, 26 La. An. 463; Smith *v.* Flora, 64 Ill. 93; Taylor *v.* Hepper, 5 T. & C. (N. Y.) 173.}

under which the use has been permitted.[11] It does not follow, however, that, because there is a dedication of a public way by the owner of the soil, and the public use it, the town or parish or county is therefore bound to repair. To bind the corporate body to this extent, it is said, that there must be some evidence of acquiescence or adoption by the corporation itself; such as, having actually repaired it, or erected lights or guideposts thereon, or having assigned it to the proper surveyor of highways for his supervision, or the like.[12]

§ 663. **Who may Dedicate.** The dedication, however, must have been made by the *owner of the fee*, or, at least, with his assent.[1] The act of the tenant will not bind the landlord; though after a long lapse of time, and a frequent change of tenants, the knowledge and assent and concurrence of the landlord may be presumed from the notorious and uninterrupted use of the way by the public.[2]

§ 664. **Dedication, how disproved.** The evidence of dedication of a way may be *rebutted* by proof of any acts on the part of the owner of the soil showing that he only intended to give license to pass over his land, and not to dedicate a right of way to the public. Among acts of this kind may be reckoned putting up a bar, though it be for only one day in a year, or excluding persons from passing through it by positive prohibition.[1] But the erection of a gate is not conclusive evidence of a prohibition, since it may have been an original qualification of the grant.[2]

§ 665. **Non-user of public Way, no Discontinuance.** In the case of a *public way*, no length of time, during which it may not have been used, will operate of itself to prevent the public from resuming the right, if they think proper.[1] But in regard to private ease-

[11] Barraclough *v.* Johnson, 8 Ad. & El. 99; Woodyer *v.* Hadden, 5 Taunt. 125; R. *v.* Wright, 3 B. & Ad. 681; Surrey Canal Co. *v.* Hall, 1 Man. & Gr. 392; R. *v.* Benedict, 4 B. & Ald. 447; Hannum *v.* Belchertown, 19 Pick. 311; Sprague *v.* Waite, 17 id. 309; Wright *v.* Tukey, 3 Cush. 290; {Boston *v.* Lecraw, 17 How. (U. S.) 426; Hoole *v.* Attorney-General, 22 Ala. 190; Larned *v.* Larned, 11 Met. (Mass.) 421; Bigelow *v.* Hillman, 37 Me. 52; State *v.* Nudd, 23 N. H. 327; Gould *v.* Glass, 19 Barb. (N. Y.) 179; Smith *v.* State, 3 Zabr. (N. J.) 130; Stacey *v.* Miller, 14 Mo. 478; R. *v.* Petrie, 30 Eng. Law & Eq. 207; Kelley's Case, 8 Gratt. 632;} [State *v.* Gross, 119 N. C. 868; McKey *v.* Hyde Park, 134 U. S. 84.]

[12] R. *v.* Benedict, 4 B. & Ald. 447, per Bayley, J. But see R. *v.* Leake, 5 B. & Ad. 469; Hobbs *v.* Lowell, 19 Pick. 410. See also Todd *v.* Rome, 2 Greenl. 55; Estes *v.* Troy, 5 id. 368; Rowell *v.* Montville, 4 id. 270; Moore *v.* Cornville, 1 Shepl. 293; State *v.* Campton, 2 N. H. 513; {Hemphill *v.* Boston, 8 Cush. 195; Bowers *v.* Suffolk Man. Co., 4 id. 332, 340; Wright *v.* Tukey, 3 id. 290; Oswego *v.* Oswego Canal Co., 2 Selden (N. Y.) 257; Com. *v.* Cole, 26 Pa. St. 187; State *v.* Carver, 5 Strobh. 217.}

[1] {When land is conveyed to a town for a road, they take the fee thereof, and not merely an easement: Alling *v.* Burlock, 46 Conn. 504.}

[2] Baxter *v.* Taylor, 1 Nev. & Man. 13; Wood *v.* Veal, 5 B. & Ald. 454; R. *v.* Bliss, 7 Ad. & El. 550; Davies *v.* Stephens, 7 C. & P. 570; R. *v.* Barr, 4 Campb. 16; Harper *v.* Charlesworth, 4 B. & C. 574.

[1] Best on Presumptions, p. 134, § 101; R. *v.* Loyd, 1 Campb. 260; Roberts *v.* Karr, ib. 261, n.; British Museum *v.* Finnis, 5 C. & P. 465, per Patteson, J.

[2] Davies *v.* Stephens, 7 C. & P. 570. But see Com. *v.* Newbury, 2 Pick 57.

[1] Per Gibbs, J., in R. *v.* St. James, 2 Selw. N. P. 1334 (10th ed.); Vooght *v.* Winch, 2 B. & Ald. 667, per Abbott, C. J.; Best on Presumptions, p. 137, § 103. But see Com-

ments, though generally they are not lost by non-user for twenty years, unless the right as well as the possession is interrupted,[2] yet in the case of a *private way*, or other intermittent easement, it is said, that, though slight intermittence of the user, or slight alterations in the mode of enjoyment, will not be sufficient to destroy the right, when circumstances do not show any intention of relinquishing it, yet a much shorter period than twenty years, when it is accompanied by circumstances, such as disclaimer, or other evidence of intention to abandon the right, will be sufficient to justify the jury in finding an extinguishment.[3]

missioners *v.* Taylor, 2 Bay 286; [Bradley *v.* Appanoose County, 106 Iowa 105; Currier *v.* Davis, 41 A. 239, N. H.]

[2] *Supra*, tit. Prescription, § 545; Emerson *v.* Wiley, 10 Pick. 310, 316; Yelv. 142, n. (1), by Metcalf; White *v.* Crawford, 10 Mass. 183, 189; Bannon *v.* Angier, 2 Allen 128; [Ford *v.* Harris, 95 Ga. 97; Edgerton *v.* McMullan, 55 Kan. 90; Butterfield *v.* Reed, 160 Mass. 361; Welsh *v.* Taylor, 134 N. Y. 450; Lathrop *v.* Elsner, 93 Mich. 599.]

[3] Gale & Whateley on Easements, pp. 381, 382; Norbury *v.* Meade *et al.*, 3 Bligh 241; Harvie *v.* Rogers, 3 Bligh N. S. 447; Best on Presumptions, pp. 137, 140, §§ 104, 106; Doe *v.* Hilder, 2 B. & Ald. 791, per Abbott, C. J.; Hoffman *v.* Savage, 15 Mass. 130, 132. {The fact that the owner of the dominant tenement does not use his right of way, or uses another more convenient way, is strong evidence of abandonment, but not conclusive, unless an intention to abandon accompanies it: Jamaica Pond, etc. Co. *v.* Chandler, 121 id. 3; Erb *v.* Brown, 19 P. F. Smith 216; Bombaugh *v.* Miller, 82 Pa. St. 203;} [Nichols *v.* Peck, 70 Conn. 439; Jones *v.* Van Bochore, 103 Mich. 98.]

WILLS.

§ 666. **Proof necessary to establish a Will.** In order to ascertain the quantity and kind of proof necessary to establish a will, regard is to be had either to the law of the domicile of the testator or to the law of the country where the property is situated, and sometimes to both. The mode of proof is also affected by the nature of the proceedings under which it is offered. In some cases it is necessary to prove the concurrence of all the circumstances essential to a valid will, by producing all the subscribing witnesses, after due notice to the parties in interest; while, in others, it is sufficient for the occasion to prove it by a single witness.[1] There is also a diversity in the effect of these different modes of proof; the one being in certain cases conclusive, and the other not. There is, moreover, a diversity of rule, arising from the nature of the property given by the will; a few States still recognizing the distinction between a will of personalty, at common law, and a devise of lands under the Statute of Frauds, in regard to the formalities of their execution; and others having by statute established one uniform rule in all cases. These varieties of law and practice create great embarrassments in the attempt to state any general rules on the subject. But still it will be found that, on the question as to what law shall govern, in the requisites of a valid will, there is great uniformity of opinion; and that the several United States, in their legislation respecting wills, have generally adopted the provisions of the statute of 29 Car. II. c. 3, commonly called the Statute of Frauds.

§ 667. **Division of the Subject.** It will therefore be attempted, first to consider by what law wills are governed, and then to state the

[1] {If a will is conditional, or only to take effect on certain contingency, the condition must be shown to be fulfilled by him who would set up the will: Parsons *v.* Land, 1 Ves. Sr. 190; Sinclair *v.* Howe, 6 Ves. 607; Cowley *v.* Knapp, 42 N. J. L. 297; Estate of White, Myrick's Prob. (Cal.) 157. But if the contingency is the *occasion of making* the will, and not a condition on which the instrument is to become operative, the happening of the contingency need not be shown. Thus where the will was in this form: "Let all men know hereby, if I get drowned this morning, Mar. 7, 1872, that I bequeath all my property, personal and real, to my beloved wife, Florence. Witness my hand and seal, 7th March, 1872. Wm. T. French:" it was held not to be a contingent will, and that it took effect though the testator lived a long time after that morning: French *v.* French, 14 W. Va. 460, where the subject of conditional wills and the authorities are very fully cited and discussed. Nuncupative wills will not be favored, and if admitted to probate will be construed strictly (Peirce *v.* Peirce, 46 Ind. 86); and, if invalid as to a part of a specific item of property bequeathed, it is invalid as to the whole (Striker *v.* Oldenburgh, 39 Iowa 653).}

formalities generally required in the execution of wills, noting some local exceptions as we proceed. Thus it will be seen to what extent the evidence must be carried, in the complete and formal proof of any will.

§ 668. **Law which governs Will.** (1) As to *what law is to govern* the formalities of a will, a distinction is to be observed between a will of personalty or movables and a will of immovable or real property. In regard to a will of *personal or movable property*, the doctrine is now fully established, that the law of the actual domicile of the testator is to govern;[1] and if the will is void by that law, it is a nullity everywhere, though executed with the formalities required by the law of the place where the personal property is locally situated. There is no difference, in this respect, between cases of succession by testament, and by intestacy, both being alike governed by the rule *Mobilia personam sequuntur.*[2] And if, after making a valid will, the testator changes his domicile to a place by whose laws the will thus made is not valid, and there dies, his will cannot be established; but if, still surviving, he should return to and use his former domicile, or should remove to another place having similar laws, the original validity of his will or testament will be revived.[3] It results, that a will of personalty may be admitted to probate, if it is valid by the law of the testator's last domicile at the time of his decease, though it is not valid by the law of the place of the probate.[4]

§ 669. **Lex Fori governs in Wills of Personalty.** From this rule it would seem to follow, almost as a matter of necessity, that the *same evidence* must be admitted to establish the validity and authenticity of wills of *movables*, made abroad, as would establish them in the domicile of the testator; for otherwise the general rule above stated might be sapped to its very foundation, if the law of evidence in any country, where the movable property was situate, was not precisely the same as in the place of the testator's domicile. And therefore parol evidence has been admitted in courts of common law, to prove the manner in which a will is made and proved in the place

[1] [Shute *v.* Sargent, 36 A. 282, N. H.; Dammert *v.* Osborn, 141 N. Y. 564. As that law exists at the testator's death: Agnoor's Trust, 13 Rep. 677. A will executed under a power, in accordance with the directions of the power, may be good for the purposes of the appointment, though not executed according to the law of the testator's domicile: In the Goods of Huber, 1896, P. 209. If, however, a power is given simply to appoint by will, the appointment must be by will executed in accordance with the law of the domicile of the donor of the power: Blount *v.* Walker, 134 U. S. 607.] {An Englishman, residing in Spain, directed his wife to make his will after his decease, such a will being valid by the law of Spain; and a will so made by the wife, in pursuance of such directions, was held valid in England: *In re* Osborne, 33 Eng. Law & Eq. 625.}

[2] Story, Confl. Laws, §§ 467–469; Stanley *v.* Barnes, 3 Hagg. Eccl. 373; Dessebats *v.* Barquier, 1 Binn. 336; Crofton *v.* Ilsley, 4 Greenl. 134; Vattel, b. 2, c. 8, §§ 110, 111; 4 Kent Comm. 513; 1 Jarman on Wills, pp. 2–6, and notes by Perkins, 5th (Am.) ed. *2, *7; De Zichy Ferraris *v.* Marquis of Hertford, 3 Curt. 468.

[3] Story, Confl. Laws, § 473; 4 Burge on Col. & For. Law, pp. 580, 591.

[4] *In re* De Vaer Meraver, 1 Hagg Eccl. 498.

of the testator's domicile, in order to lay a suitable foundation to establish the will elsewhere.[1]

§ 670. **Lex Rei Sitæ; Realty.** But in regard to wills of *immovable* or *real property*, it is equally well established, that the law of the place where the property is locally situated is to govern, as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will its due attestation and effect.[1]

§ 671. **Interpretation.** In the *interpretation* of wills, whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the common law is, that it is to be interpreted by the law of that place at the time when the will

[1] Story, Confl. Laws, § 636; De Sobry *v.* De Laistre, 2 Har. & Johns. 191, 195; Clark *v.* Cochran, 3 Martin 353, 361, 362. And see Wilcox *v.* Hunt, 13 Peters 378, 379; Don *v.* Lippmann 5 Cl. & Fin. 15, 17; Yates *v.* Thompson, 3 id. 544, 574. The rule that a devise of lands must be executed in the form required by the law of the place where the lands lie, though a general rule of law, has been expressly enacted in the statutes of Maine, New Hampshire, Delaware, Rhode Island, Indiana, and Missouri. In several other States a contrary rule is adopted, by which lands in those States may pass by a will, made in a foreign State, in the form required by the law of the place where it was made. But to have this effect, the foreign will must have been first proved abroad, and then be admitted by a certified copy, to be filed and registered in the State where the lands lie. Such is the rule as expressly enacted in Massachusetts, Vermont, Florida, Michigan, Illinois, Louisiana, and Arkansas. Whether such is the legitimate effect of the rule adopted in other States, as in Virginia, Ohio, New Jersey, Kentucky, Tennessee, Mississippi, and Alabama, where a copy of the foreign will, being duly proved abroad, may be allowed in the court of probate, and admitted to be recorded, *quære*. See Dublin *v.* Chadbourn, 16 Mass. 433; Parker *v.* Parker, 11 Cush. 519; Bailey *v.* Bailey, 8 Ohio 239; Mease *v.* Keefe, 10 id. 362; 1 Jarm. on Wills, pp. 1, 2, n. by Perkins; Maine Rev. St. 1840, c. 107, § 20; Mass. St. 1843, c. 92, Pub. St. pp. 748, 749; Bayley *v.* Bayley, 5 Cush. 245; N. H. Rev. St. 1842, c. 157, § 13; R. I. Rev. St. 1844, p. 237; Vt. Rev. St. 1839, c. 45, § 24; Del. Rev. St. 1829, p. 557; Ind. Rev. St. 1843, c. 30, § 51; Missouri Rev. St. 1845, c. 185, § 35; Fla. Thomps. Dig. p. 194; Mich. Rev. St. 1846, c. 68, §§ 21–24; Ill. Rev. St. 1839, p 688; La. Civ. Code, art. 1589; Ark. Rev. St. 1837, c. 157, § 36; Tate's Dig. p. 900; Ohio Rev. St. 1841, c. 120, §§ 29–33; N. J. Rev. St. 1846, tit. 10, c. 9, § 2; Ky. Rev. St. 1834, vol. ii. p. 1548; Tenn. Rev. St. 1836, p. 593; Miss. Rev. St. 1840, c. 36, §§ 13, 14; Ala. Tolm. Dig. p. 885. See 6 Cruise's Dig. tit. 38, c. 5, § 69, n. (Greenleaf's ed. 1857.) {Upon the principle that personal property must follow the domicile of the testator, it was held, if a will disposing of movables situated in Delaware, was made in Pennsylvania, where was the domicile of the testator, and was valid by the laws of Pennsylvania, though not by those of Delaware, it was a good will and would pass title to the personal estate. In order, however, to give effect to it in Delaware, probate of it must be made in the county where the goods were situated, but that the proof required would be that requisite by the laws of Pennsylvania, not of Delaware: St. James Church *v.* Walker, 1 Del. Ch. 284. Cf. *Re* Osborne, 33 Eng. Law & Eq 625.}

[1] Story, Confl. Laws, § 474, and authorities there cited; 4 Burge on Col. & For. Law, pp. 217, 218; 1 Jarman on Wills, pp. 1, 2, and notes by Perkins; 4 Kent Comm. 513; [Evansville Ice Co. *v.* Winsor, 148 Ind. 682; Frazier *v.* Boggs, 37 Fla. 307; Carpenter *v.* Bell, 96 Tenn. 294; *Re* Hewit, 1891, 3 Ch. 568; Guarantee Trust Co. *v.* Maxwell, 30 A. 339, N. J. Eq. See also Sickles *v.* New Orleans, 80 F. 868.] {Where a testator made a will in Pennsylvania, attested by two witnesses, conveying both real and personal estate, it appearing that his domicile was in Rhode Island, where three witnesses are required, the will was refused probate in Pennsylvania. Carey's Appeal, 75 Pa. St. 201. A person's domicile is that place where he has fixed his habitation, without any present intention of removing therefrom: Bouvier, Law Dict. v. 1, 489; Story, Confl. Laws, 43.}

was made.[1] Thus, for example, if the question be, whether the terms of a foreign will include the "real estate" of the testator, or what he intended to give under those words; or whether he intended that the legatee should take an estate in fee or for life only; or who are the proper persons to take, under the words "heirs at law," or other *designatio personarum*, recourse is to be had to the law of the place where the will was made and the testator domiciled.[2] And if the will is made in the place of his actual domicile, but he is in fact a native of another country; or if it is made in his native country, but in fact his actual domicile at the time is in another country; still, it is to be interpreted by reference to the law of the place of his actual domicile.[3] The question whether, if the testator makes his will in one place, where he is domiciled, and afterwards acquires a new domicile in another country, where he dies, the rule of interpretation is changed by his removal, so that if the terms have a different meaning in the two countries, the law of the new domicile shall prevail, or whether the interpretation shall remain as it stood by the law of the domicile where the will was made, is a question which does not seem yet to have undergone any absolute and positive decision in the courts acting under the common law.[4]

672. **Probate.** In determining the *effect of the probate* of wills, regard is to be had to the jurisdiction of the court where the will is proved, and to the nature of the proceedings. For, as we have heretofore seen, it is only the judgments of courts of exclusive jurisdiction, directly upon the point in question, that are conclusive everywhere, and upon all persons.[1] In England, the ecclesiastical courts have no jurisdiction whatsoever over wills, except those of personal estate; and hence the probate of wills, by the sentence or decree of those courts, is wholly inoperative and void, except as to personal estate; being, as to the realty, not even evidence of the execution of the will. The validity of wills of real estate is there cognizable only in the courts of common law, and in the ordinary forms of suits; and the verdict and judgment are conclusive only upon the parties and privies, as in other cases. But as far as the personal estate is concerned, the sentence or decree of the proper ecclesiastical court, as to the validity or invalidity of the will, is final and conclusive upon all persons, because it is in the nature of proceedings *in rem*, in which all persons may appear and be heard upon the question, and it is the judgment of a court of competent jurisdiction directly upon the subject-matter in controversy.[2] But in many of the United States,

[1] [Keith *v.* Eaton, 58 Kan. 732; Loundes *v.* Cooch, 39 A. 1045, Del.; Adams *v.* Farley, 18 S. 390, Miss.]

[2] Story, Confl. Laws, § 479, *a*, *b*, *c*, *e*, *h*, *m*; Harrison *v.* Nixon, 9 Peters 483.

[3] Story, Confl. Laws, § 479 *f*; 4 Burge on Col. & For. Law, pp. 590, 591; Anstruther *v.* Chalmer, 2 Sim. 1; *ante*, Vol. I. §§ 282, 287, 292; 1 Jarman on Wills, 5th (Am.) ed. pp. *5–*8.

[4] Harrison *v.* Nixon, 9 Peters 483, 505; Story, Confl. Laws, § 479 *g*.

[1] *Ante*, Vol. I. §§ 528, 550.

[2] 1 Williams on Executors, b. 6, c. 1, pp. 339–348 (1st Am. ed.), 8th (Eng.) ed. pp.

courts are constituted by statute, under the title of courts of Probate, Orphans' courts, or other names, with general power to take the probate of wills, no distinction being expressly mentioned between wills of personalty and wills of real estate; and where such power is conferred in general terms, it is understood to give to those courts complete jurisdiction over the probate of wills as well of real as of personal estate, and therefore to render their decrees conclusive upon all persons, and not re-examinable in any other court.[3]

§ 673. **Execution of Wills.** (2) The highest degree of solemnity which is required in the *formal execution* of wills is that which is required in a will of lands, by the Statute of Frauds;[1] and this chiefly respects the *signature* and the *attestation by witnesses.* These formalities, all of which are ordinarily required to be shown upon

556–565; 1 Jarman on Wills, pp. 22, 23, and notes by Perkins; Tompkins *v.* Tompkins, 1 Story 547. [See Young *v.* Holloway, 1895, P. 87.]

[3] Such is the law in Maine and Massachusetts: Potter *v.* Webb, 2 Greenl. 257; Small *v.* Small, 4 id. 220, 225; Osgood *v.* Breed, 12 Mass. 533, 534; Dublin *v.* Chadbourn, 16 id. 433, 441; Laughton *v.* Atkins, 1 Pick. 548, 549; Brown *v.* Wood, 17 Mass. 68, 72. So in Rhode Island: Tompkins *v.* Tompkins, 1 Story 547. So in New Hampshire: Poplin *v.* Hawke, 8 N. H. 124. So in Connecticut: Judson *v.* Lake, 3 Day 318; Bush *v.* Sheldon, 1 id. 170. So in Ohio: Bailey *v.* Bailey, 8 Ohio 239, 346. So in Louisiana: Lewis's Heirs *v.* His Ex'rs, 5 La. 387, 393, 394; Donaldson *v.* Winter, 1 id. 137, 144. So in Virginia: Bagwell *v.* Elliott, 2 Rand. 190, 200. [So in Wisconsin: Dicke *v.* Wagner, 95 Wis. 260. So now in Maryland: McDaniel *v.* McDaniel, 86 Md. 623. So now in North Carolina: Varner *v.* Johnston, 17 S. E. 483, N. C. So now in New York: Bolton *v.* Schriever, 135 N. Y. 65.] So in Alabama, after five years: Toulman's Dig. 887; {Goodman *v.* Winter, 64 Ala. 410. Cf. Hardy *v.* Hardy, 26 id. 524;} Tarver *v.* Tarver, 9 Peters 180. {In Massachusetts, the decree of the court of probate, duly approving and allowing the will of a married woman, unappealed from and unreversed, is final and conclusive upon the heirs-at-law of the testator, and they cannot in a court of common law deny the legal capacity of the testatrix to make such a will: Parker *v.* Parker, 11 Cush. 519, 524.}

In Pennsylvania and [in] North Carolina [it was held formerly that] the probate of a will of land is *prima facie* evidence of the will, but not conclusive: Smith *v.* Bonsall, 5 Rawle 80, 83; Coates *v.* Hughes, 3 Binn. 498, 507; Stanley *v.* Kean, 1 Taylor 93. [So in other States: Barbour *v.* Moore, 4 App. D. C. 535; Newman *v.* Virginia Steel Co., 80 F. 228, U. S. App; Belton *v.* Sumner, 31 Fla. 139.]

In several other States the English rule is followed; as [formerly] in New York (Jackson *v.* Legrange, 10 Johns. 386; Jackson *v.* Thompson, 6 Cowen 178; Rogers *v.* Rogers, 3 Wend. 514, 515); and in New Jersey (Harrison *v.* Rowan, 3 Wash. 580); and [formerly] in Maryland (Smith *v.* Steele, 1 Har. & McH. 419; Darby *v.* Mayer, 10 Wheat. 470); and in South Carolina (Crossland *v.* Murdock, 4 McCord 217).

Whether a will of lands, duly proved and recorded, in one State, so as to be evidence in the courts of that State, is thereby rendered evidence in the courts of another State, under the Constitution of the United States, art. 4, does not appear to have been decided. See Darby *v.* Mayer, 10 Wheat. 465. In Ohio, it is made evidence by statute: Bailey *v.* Bailey, 8 Ohio 239, 240.

[1] 29 Car. II. c. 3, § 5. By Stat. 7 W. IV. & 1 Vict. c. 26, § 9, it is now provided, that no will, whether of real or personal estate (except certain wills of soldiers and sailors), shall be valid, "unless it shall be in writing and signed at the foot or end thereof by the testator, or some other person in his presence and by his direction; and unless such signature be made or acknowledged by him in the presence of two or more witnesses present at the same time, and unless such witnesses attest and subscribe the will in his presence; and no publication other than is implied in the execution so attested shall be necessary." For the formalities required in the execution of wills in the United States, see 6 Cruise's Dig. tit. 38, c. 5, *passim*, notes (Greenleaf's ed. 1827). [See Royle *v.* Harris, 1895, P. 163; Horne *v.* Featherstone, 73 L. T. N. S. 32; *ante*, Vol. I. § 272.]

the probate of wills in the courts of probate in the United States, we now proceed to state.

§ 674. **Signature of Testator.** And, first, as to the *signature of the testator.* A "signature" consists both of the *act of writing* the party's name, and of the *intention* of thereby finally authenticating the instrument.[1] It is not necessary that the testator should write his entire name. His *mark* is now held sufficient, even though he was able to write.[2] And if the signature is made by another person guiding his hand, with his consent, it is sufficient.[3] But sealing alone, without signing, will not suffice; nor is a seal necessary in any case, unless it is required by an express statute.[4] One signature by the testator is enough, though the will is written upon several sheets of paper; and if the *testimonium* clause refers to the preceding sheets as severally signed with his name, whereas

[1] {A will written in pencil is valid, under a statute which simply requires a "writing:" Myers *v.* Vanderbelt, 84 Pa. St. 510; *Re* Fuguet's Will, 11 Phila. (Pa.) 75; Dickenson *v.* Dickenson, 2 Phill. Eccl. 173; *Re* Dyer, 1 Hagg. Eccl. 219; 1 Redf. Wills, § 17, pl. 2; Merritt *v.* Clason, 12 Johns. (N. Y.) 102.

But that a will written on a *slate* is not such a "writing," was held in Reed *v.* Woodward, 11 Phila. (Pa.) 541, on the ground that the statute requiring a writing meant a writing with the instruments and on the materials commonly used for such purposes.

It is no objection to a will that it is in the form of a letter, provided it sufficiently shows a final testamentary intent, and is properly executed: Cowley *v.* Knapp, 42 N. J. L. 297.}

[2] Baker *v.* Dening, 8 Ad. & El. 94; Jackson *v.* Van Dusen, 5 Johns. 144; *In re* Field, 3 Curt. 752; Taylor *v.* Draing, 3 N. & P. 228; *In re* Bryce, 2 Curt. 325; Wilson *v.* Beddard, 12 Sim. 28; Harrison *v.* Elwin, 3 Ad. & El. N. S. 117; {Pridgen *v.* Pridgen, 13 Ired. (N. C.) 259;} [Mullin's Estate, 110 Cal. 252; Rook *v.* Wilson, 142 Ind. 24; Stephens *v.* Stephens, 129 Mo. 422; Berclot *v.* Lestrade, 153 Ill. 625. It is not necessary that the words composing the testator's name should be written at the end of the will in addition to his mark: Thompson *v.* Thompson, 49 Neb. 157.] In Pennsylvania, the will must be signed at the end with the testator's own name, if he is able to write it; and if not, by some person in his presence and by his express direction; the incompetency and signature by request being provided by two witnesses (Stat. April 8, 1833); or by his mark or cross (Stat. Jan. 27, 1848); Dunlap's Dig. pp. 571, 1106; Brightly's Purdon's Dig. 1475, § 7; {Main *v.* Ryder, 84 Pa. St. 217; Davies *v.* Morris, 17 id. 205.} Where the testator made his mark, but the scrivener wrote the wrong Christian name over it, the court held, that under this latter statute the will was well executed, the mark governing the written name, and satisfying the statute: Long *v.* Zook, 3 Am. Law Journ. 27. In Ohio, New York, and Arkansas, also, the signature must be at the end of the will. See 6 Cruise's Dig. tit. 38, c. 5, §§ 1, 9, notes (Greenleaf's ed.). {A testator's name was signed to his will by another person at his request, and he then made his mark. It was held that this was not a sufficient execution of the will under the Missouri statute: Northcutt *v.* Northcutt, 20 Mo. 266. If the attestation clause in a will recites that the testator has made his mark, it is sufficient if the testator writes his initial, instead of making a mark: *In re* Savory, 6 Eng. Law & Eq. 583. A dying man declared a paper to be his will, tried to sign it, and failed, and made no request that any one should sign it for him; and it was held, that the instrument was no will: Ruloff's Appeal, 26 Pa. St. 219.}

[3] Stevens *v.* Vancleve, 4 Wash. 262, 269.

[4] Pratt *v.* McCullough, 1 M'Lean 69. And see Avery *v.* Pixley, 4 Mass. 460, 462; Hight *v.* Wilson, 1 Dall. 94; Doe d. Knapp *v.* Pattison, 2 Blackf. 355; *ante*, Vol. I. § 272; [Bigelow on Wills, 43.] A *seal* is not now requisite to the validity of a will, in any of the United States, except New Hampshire, in which State a seal seems still to be required in a devise of real estate, but not in a will of personalty. See Gen. Laws, p. 455; Rev. Stat. c. 156, § 6; Stat. 1848, c. 424.

he has signed at the end only, this will suffice, if it appears to have been in fact intended to apply to the whole.[5] Such intention would probably be presumed from his acknowledgment of the instrument, to the attesting witnesses, as his will, without alluding to any further act of signing.[6] Nor is it material on what part of the document the signature is written, if it was made with the design of completing the instrument, and without contemplating any further signature. On this ground, a will written by the testator, and beginning, — "I, A. B., do make," etc., has been held, under the circumstances, sufficiently signed.[7]

§ 675. **Publication.** *Publication* is defined to be that by which the party designates that he means to give effect to the paper as his will.[1] A *formal publication* of the will by the testator is not now deemed necessary; it being held, that the will may be good, under the Statute of Frauds, without any words of the testator, declaratory of the nature of the instrument, or any formal recognition of it, or allusion to it.[2] But though sanity is generally presumed, yet it is incumbent on the party asking for the probate of a will affirmatively to establish that the testator, at the time of executing it, knew that it was his will.[3] It is not necessary, however, that this

[5] Winsor *v.* Pratt, 2 B. & B. 650. {It is not essential to the validity of a will that the different parts of it should be physically connected. It is sufficient if they are connected by their internal sense, or by a coherence and adaptation of parts: Wikoff's Appeal, 15 Pa. St. 281; *ante*, § 673, n. "The true question is, was the identical writing, the document, in all its parts finished and completed as the testatrix wanted it. . . . It would be a dangerous rule to say, that all wills must be written on one continuous sheet of paper, or that they must necessarily be tied or fastened together, with tape and a waxen or other seal:" Jones *v.* Habersham, 63 Ga. 146. In the absence of proof to the contrary, several sheets of paper, showing a connected disposal of property, the last only being signed, will be presumed to be parts of one will: Marsh *v.* Marsh, 1 Sw. & Tr. 528; *post*, § 674, n.;} [Barnewall *v.* Murrell, 108 Ala. 366. But see Whitney's Will, 153 N. Y. 259.]

[6] 1 Jarman on Wills, pp. 70, 71, 5th (Am.) ed. *80.

[7] Lemayne *v.* Stanley, 3 Lev. 1; 1 Jarman on Wills, p. 70, and n. (3), by Perkins, 5th (Am.) ed. *80; Right *v.* Price, 1 Dougl. 241; Doe *v.* Evans, 1 C. & M. 42; 3 Tyrw. 56; Sarah Miles's Will, 4 Dana 1. In Ohio, Pennsylvania, New York, and Arkansas, the signature is, by statute, required to be placed at the end of the will: 2 Rev. Stat. N. Y. p. 63; Watts *v.* The Public Administrator, 4 Wend. 168; Rev. Stat. Ark. c. 157, § 4. See 6 Cruise's Dig. tit. 38, c. 1, 5, 9, 14, 18, 19, notes (Greenleaf's ed. 1857); [Bigelow on Wills, 45.] {See Adams *v.* Field, 21 Vt. 256, where this subject is very thoroughly discussed; and 1 Redf. Wills, § 18, pl. 10–12.}

[1] Per Gibbs, C. J., in Moodie *v.* Reid, 7 Taunt. 362; {Dean *v.* Dean, 27 Vt. 746; Cilley *v.* Cilley, 34 Me. 162. When a will has been revoked, its republication cannot be proved by parol. There must be the same evidence as of publication: Carey *v.* Baughm, 36 Iowa 540; Smith's Will, 9 Phila. (Pa.) 362.}

[2] Ibid.; 1 Jarman on Wills, p. 71, 5th (Am.) ed. *80. See 6 Cruise's Dig. tit. 38, c. 5, §§ 14, 18, 52, notes (Greenleaf's ed. 1857); White *v.* British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Warren *v.* Postlethwaite, 9 Jur. 721. And see 4 Kent Comm. pp. 515, 516; Small *v.* Small, 4 Greenl. 220. This question is now settled, accordingly, in England, by Stat. 1 Vict. c. 26, §§ 9, 11–13: [Gable *v.* Rauch, 50 S. C. 95; Bigelow on Wills, 47.]

[3] White *v.* British Museum, 6 Bing. 310; Sweet *v.* Boardman, 1 Mass. 258; 4 Dane, Abr. p. 568; Gerrish *v.* Nason, 9 Shepl. 438. In New York, a declaration of the testator, that the instrument is his will, is required by 2 Rev. Stat. p. 63, § 40. See Brinckerhoof *v.* Remsen, 8 Paige 488; s. c. 26 Wend. 325, 330. So in North Carolina: 1 Jarman on Wills, p. 71, n. (1), by Perkins. {Declarations of the testator,

knowledge be proved by direct evidence; it may be inferred from his observance of the forms and solemnities required by statute for the due execution of a will.[4] And where the testator,[5] knowing the instrument to be his will, produced it to three persons, asking them to attest it as witnesses; and they did so in his presence, and returned it to him, this was considered as a sufficient acknowledgment to them, in fact, that the will was his.[6]

§ 676. **Same Subject.** Nor is it deemed necessary that the witnesses should *actually see* the testator sign his name. The statute does not in terms require this, but only directs that the *will* be "attested and subscribed in the presence of the testator by three or four credible witnesses." They are witnesses of the entire transaction; and therefore it is held that an acknowledgment of the instrument, by the testator, in the presence of the witnesses whom he requests to attest it, will suffice;[1] and that this acknowledgment need not be made simultaneously to all the witnesses, but is sufficient if made separately to each one, and at different times.[2] Nor is it necessary that the acknowledgment be made in express terms;

made subsequent to the execution of the instrument which is offered as a will, showing that he still supposed a previous will to be operative and valid, and proposing alteration in it, and, in general, treating it as still in full force, are admissible to show that he did not knowingly sign the instrument offered as his will. The weight of these declarations is for the jury: Canada's Appeal, 47 Conn. 450. If, prior to the execution of the will, it was read over to the testator, or otherwise brought to his notice, his knowledge and approval of the contents will be presumed: Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109.]

[4] Ray *v.* Walton, 2 A. K. Marsh. 71. And see Trimmer *v.* Jackson, 4 Burn's Eccl. L. p. 130 (8th ed.); [*In re* Maxwell's Will, 4 Halst. Ch. (N. J.) 251. And where the due execution of the will and the sanity of the testator are shown, it will be presumed that the testator knew its purport, though he could not read the language in which it was written: Hoshauer *v.* Hoshauer, 26 Pa. St. 404.] On proof of the signature of the testator, it will ordinarily be presumed that he knew the contents of the will: Billinghurst *v.* Vickers, 1 Philim. Eccl. 191; Fawcett *v.* Jones, 3 id. 476; Wheeler *v.* Alderson, 3 Hagg. Eccl. 587. But this presumption may be repelled by proof of any circumstances of an opposite nature, such as his ignorance, sickness, state of mind, or the like; or, the inconsistency of its provisions with his obvious duty or known affections; or, the character and interests of the person who wrote the instrument: ibid.; Ingram *v.* Wyatt, 1 Hagg. Eccl. 384; Parke *v.* Ollat, 2 Phillim. Eccl. 324; Paine *v.* Hall, 18 Ves. 475; Durling *v.* Loveland, 2 Curt. 226.

[5] [Or the person who drew the will, in the presence of the testator, and at his request: Harp *v.* Parr, 168 Ill. 459.]

[6] White *v.* British Museum, 6 Bing. 310. See also Hall *v.* Hall, 17 Pick. 373. [A will in the handwriting of the testator, and signed by him in the presence of three competent witnesses, who attest the same at his request and in his presence, is well executed, although the testator does not declare to the witnesses, and they do not know, that it is his will: Osborn *v.* Cook, 11 Cush. (Mass.) 532; Hogan *v.* Grosvenor, 10 Met. (Mass.) 54. See also Beane *v.* Yerby, 12 Gratt. (Va.) 239. But see Brown *v.* De Selding, 4 Sandf. Sup. Ct. 10.]

[1] [Skinner *v.* American Bible Soc., 92 Wis. 209.]

[2] Ilott *v.* George, 3 Curt. 160; *In re* Rawlins, 2 id. 326; *In re* Warden, ib. 334; *In re* Ashmore, 3 id. 607; Blake *v.* Knight, ib. 547. [Where *one* of the subscribing witnesses positively negatives the fact of the signing or of the acknowledgment of the signature by the deceased in his presence, and there are no circumstances that raise any presumption of his being mistaken, the proposed will cannot be admitted to probate: Noding *v.* Alliston, 2 Eng. Law & Eq. 594. See Shaw *v.* Neville, 33 id. 615; Bennett *v.* Sharpe, ib. 618.]

it may be implied from circumstances, such as requesting the persons to sign their names as witnesses. But in such cases, it must appear that the instrument had previously been signed by the testator.[3]

§ 677. **Attestation by Witnesses.** The will must also be attested and subscribed by at least three competent *witnesses*.[1] And here also, as in the case of the testator, a *mark* made by the witness as his signature is a sufficient attestation.[2] No particular form of

[3] 1 Jarman on Wills, pp. 71, 72, and n. (1) by Perkins, 5th (Am.) ed. *80; Grayson *v.* Atkinson, 2 Ves. 454, 460; Hall *v.* Hall, 17 Pick. 373; Dewey *v.* Dewey, 1 Met. 349; Gaze *v.* Gaze, 3 Curt. 551; Keigwin *v.* Keigwin, ib. 607; Cooper *v.* Bockett, 4 Moore P. C. 419. It is held otherwise in New Jersey, under the act of 1714. Den *v.* Matlock, 2 Harrison 86; 4 Kent Comm. 414, n.; Johnson *v.* Johnson, 1 Cr. & M. 140; *supra*, § 295. {The request to sign in attestation may be inferred from the acts of the testator; Bundy *v.* McKnight, 48 Ind. 502. See also Atter *v.* Atkinson, L. R. 1 P. & D. 665.}

[1] "By the New York Revised Statutes (vol. ii. p. 63, §§ 40, 41), the testator is to subscribe the will at the end of it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under the penalty of fifty dollars; but the omission to do it will not affect the validity and efficiency of their attestation: Lewis *v.* Lewis, 13 Barb. 17. Three witnesses, as in the English Statute of Frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, Florida, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are required in New York, Ohio, Michigan, Delaware, Virginia, Indiana, Illinois, Missouri, North Carolina, Kentucky, Tennessee, Wisconsin, and Arkansas. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by witnesses, proof of it may be made by others: Hight *v.* Wilson, 1 Dallas 94, per Huston, J.; 1 Watts 463. Proof of the signature of the testator to a will by two witnesses is *prima facie* evidence of its execution, although the body of it be not in the handwriting of the testator: Weigel *v.* Weigel, 5 Watts 486. In North Carolina, two witnesses are required to a will of real estate, unless the will is in the handwriting of the deceased person, and is found among his valuable papers, or lodged with some person for safe-keeping. The name of the testator in such case must be proved by the opinion of three witnesses: 1 Rev. Laws N. C. 619, 620, c. 122, § 1. So in Tennessee. In Virginia, if the will is not wholly written by the testator, it must be attested by two or more credible witnesses, etc: 1 Rev. Code Va. 375. In Mississippi, there must be three witnesses to a will of real, and one to a will of personal, estate, unless wholly written and subscribed by the testator: Howard & Hutch. Dig. Laws Miss. (1840), p. 386, § 2. In Arkansas, a will written through by the testator needs no subscribing witness, but the will must be proved in such case by three disinterested witnesses, swearing to their opinion. Still a will in due form subscribed will be effectual as against one not so subscribed: Rev. Stat. c. 157, §§ 4, 5. Every person in that State who subscribes the testator's name shall sign as witness, and state that he signed the testator's name at his request: ibid. A will executed in South Carolina, in the presence of two witnesses, who alone subscribe it, is not sufficiently executed under the statute to pass real estate, although the scrivener was also present at the execution, and a codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will as to the real estate: Dunlap *v.* Dunlap, 4 Desaus. 305. The laws of South Carolina, at the time of the above decision, required three witnesses to a will of real estate only: Statutes at Large of S. Car. vol. iii. p. 342, No. 544, § 2; ib. vol. iv. p. 106, No. 1455, § 2; ib. vol. vi. p. 238, No. 2334, § 8." See 1 Jarman on Wills, p. 69 *a*, n. by Perkins, 5th (Am.) ed. *77; 4 Kent Comm. 514; *ante*, Vol. I. § 272, n. (1); 6 Cruise's Dig. tit. 38, c. 5, § 1, n.; ib. § 14, n. (Greenleaf's ed. 1857).

[2] *Ante*, Vol. I. § 272; Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, ib. 504; George *v.* Surrey, 1 M. & Malk. 516; Jackson *v.* Van Dusen; 5 Johns. 144; Adams *v.* Chaplin, 1 Hill (S. C.) 266; 9 La. 512; 4 Kent Comm. 514, n.; Harrison *v.* Elwin, 3 Ad. & El. N. S. 117; Doe *v.* Davis, 11 Jur. 182; [Bigelow on Wills, 51.]

words is necessary in the attestation clause, nor need it express that the witnesses signed in the presence of the testator, it being sufficient if this is actually proved.[3] It may also be inferred from the regular appearance of the instrument, or other circumstances in the case.[4]

§ 678. **Must be in Presence of Testator.** The requisition that the witnesses should subscribe their names *in the presence of the testator* is in order that he may have ocular evidence of the identity of the instrument attested as his will, and to prevent the fraudulent substitution of another.[1] To constitute this "presence" it is necessary not only that the testator be corporally present, but that he be mentally capable of recognizing, and be actually conscious of, the act which is performed before him. Therefore if, after he had signed and published his will, and before the witnesses subscribe it, he falls into a state of insensibility, whether temporary or permanent;[2] or, if the will is subscribed by the witnesses in a secret and clandestine manner, without his knowledge, though it be in the same apartment; in both cases it is alike void.[3] To be corporally present, it is not essential that the testator be in the same apartment; for if the situation and circumstances of the parties are such that the testator in his actual position might have seen the act of attestation, it is enough, though they are not in the same apartment,[4] nor even in the same house;[5] and, on the other hand, if his view of the proceedings is necessarily obstructed, the mere proximity of the places of his signature and of their attestation will not suffice, even though it were in the same apartment.[6] An attestation,

[3] [Olerich *v.* Ross, 45 N. E. 192, Ind.] Where the witnesses testified that they saw the testator write on a paper, and that they signed it as witnesses, but they could not now swear that what he wrote was his name, nor to his name being on the will, but they identified the instrument produced as being the paper they subscribed, on which was the testator's signature; this was held sufficient: Thompson *v.* Hall, 16 Jur. 1144; 14 Eng. L. & Eq. 596. {And if they cannot remember other circumstances transpiring at the time, the attestation clause is *prima facie* evidence of what it states: Allaire *v.* Allaire, 37 N. J. L. 312.}

[4] Handy *v.* James, 2 Com. 531; Croft *v.* Pawlett, 2 Stra. 1109; Jackson *v.* Christman, 4 Wend. 277; Burgoyne *v.* Showler, 1 Rob. Eccl. 5.

[1] [That the witnesses may sign before the testator, if all the signatures are made in the presence of all the others, see Kaufman *v.* Caughman, 49 S. C. 159.

[2] Right *v.* Price, 1 Doug. 241. In New York, the statute has not made it necessary that the witnesses should subscribe in the presence of the testator: 4 Kent Comm. 514, 515. So in Arkansas and in New Jersey. In Vermont alone the witnesses are required to sign in presence of each other. See 6 Cruise's Dig. tit. 38, c. 5, §§ 1, 23, notes (Greenleaf's ed. 1857); Blanchard *v.* Blanchard, 32 Vt. 62.

[3] Longford *v.* Eyre, 1 P. Wms. 740.

[4] Shires *v.* Glascock, 2 Salk. 688; s. c. 1 Ld. Raym. 507; Winchelsea *v.* Wauchope, 3 Russ. 441, 444; s. c. Tod *v.* E. of Winchelsea, 2 C. & P. 488; Davy *v.* Smith, 3 Salk. 395. {See Moore *v.* Moore, 8 Gratt. 307; Lyon *v.* Smith, 11 Barb. 104.} In Russell *v.* Falls, 3 Har. & McHen. 463, 464, which was very much considered, it was held, that it was necessary that the testator should have been able to see the attestation without leaving his bed. And see, to the same effect, Doe *v.* Manifold, 1 M. & S. 294; [Witt *v.* Gardnier, 158 Ill. 176.]

[5] Casson *v.* Dade, 1 Bro. Ch. Cas. 99; Dewey *v.* Dewey, 1 Met. 349.

[6] Edlestone *v.* Speake, 1 Show. 89; s. c. Eccleston *v.* Petty al. Speke, Carth. 79; Edelen *v.* Hardey, 7 Har. & J. 61; Russell *v.* Falls, 3 Har. & McHen. 457; *In re* Col-

made in the same room with the testator, is presumed to have been made in his presence, until the contrary is shown;[7] and an attestation not made in the same room is presumed not to have been made in his presence, until it is shown to have been otherwise.[8] In the absence of opposing evidence, it will also be presumed, that the attestation was subscribed in the most convenient part of the room for that purpose, taking into consideration the kind, and the ordinary or actual position, of the furniture therein.[9]

§ 679. **Presumption from Lapse of Time.** It is proper here to add, that, after the lapse of *thirty years*, with possession of the estate according to the tenor of the will, its regular execution will be presumed, without proof, by subscribing witnesses.[1] Whether the thirty years are to be computed from the date of the will or from the death of the testator is a question upon which learned judges are not agreed; some holding the former, which is now considered the better opinion, upon the ground that the rule is founded on the presumption that the witnesses are dead, and the consequent impossibility of proving the execution of the will;[2] and others holding the latter, on the ground that it is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed.[3]

§ 680. **Revocation.** A will of lands, thus proved to have been made with all the legal formalities, is presumed to have existed

man, 3 Curt. 118; {Mandeville *v.* Parker, 31 N. J. Eq. 242.} But see Newton *v.* Clark, 2 Curt. 320. The cause of the witnesses' absence does not affect the rule, even though it were at the request of the testator: Broderick *v.* Broderick, 1 P. Wms. 239; Machell *v.* Temple, 2 Show. 288.

[7] [Campbell *v.* McGuiggan, 34 A. 383, N. J.]

[8] Neil *v.* Neil, 1 Leigh 6; {Goods of Colman, 3 Curt. C. C. 113. The certificate of attestation is evidence that the witnesses signed in presence of the testator, and puts the burden of showing that they did not in fact so sign, on the opponents of the will: Tappen *v.* Davidson, 12 C. E. Green 459; and in general, the certificate is *prima facie* evidence of what it states: Allaire *v.* Allaire, 37 N. J. L. 312.

Where the witnesses to a will subscribe their names not in the same room with, nor in the presence, view, or hearing of, the testator, although in a room connected by an intermediate room with that in which he is lying, it is not a sufficient signing: Boldry *v.* Parris, 2 Cush. (Mass.) 434:} [Mendell *v.* Dunbar, 169 Mass. 74.]

[9] Winchelsea *v.* Wauchope, 3 Russ. 441; {Clifton *v.* Murray, 7 Ga. 564. If the witnesses to the will are unable to remember the facts of the due execution of the instrument, the certificate of attestation is sufficient *prima facie* evidence: Allaire *v.* Allaire, *supra*.} The will of a blind man is valid, notwithstanding his blindness, if it clearly appears that no imposition was practised upon him, and that all other legal formalities were observed: 1 Jarman on Wills, pp. 29, 30, 5th (Am.) ed. *34; Longchamp *v.* Fisk, 2 New Rep. 415; Fincham *v.* Edwards, 3 Curt. 63; Boyd *v.* Cook, 3 Leigh 32; Lewis *v.* Lewis, 7 S. & R. 489; In the Goods of Piercy, 1 Rob. Eccl. 278; Ray *v.* Hill, 3 Strobh. 297.

[1] *Ante*, Vol. I. §§ 21, 142–144, 570; Croughton *v.* Blake, 12 M. & W. 205, 208; Jackson *v.* Thompson, 6 Cowen 178, 180; Fetherly *v.* Waggoner, 11 Wend. 599; Staring *v.* Bowen, 9 Barb. S. C. 109.

[2] Jackson *v.* Blanshan, 3 Johns. 292, 295, per Spencer, J. See accordingly, Oldnall *v.* Deakin, 3 C. & P. 402; Gough *v.* Gough, 4 T. R. 707, n.; McKenire *v.* Frazer, 9 Ves. 5; Doe *v.* Woolley, 8 B. & C. 22; *ante*, § 310, and Vol. I. § 570.

[3] Jackson *v.* Blanshan, 3 Johns. 292, 298, per Kent, C. J., and Van Ness, J.; Shaller *v.* Brand, 6 Bing 435, 439, 444, 447.

until the death of the testator;[1] but this presumption may be rebutted by proof of its subsequent *revocation*.[2] And this revocation may be proved by evidence of an *express* act of revocation by the testator, such as *cancelling*, *obliterating*, or *destroying* the instrument, or executing some other will or codicil, or *writing* of revocation; or it may be *implied* from other acts and circumstances, inconsistent with the continuance of any intention that the will should stand, such as *alienation* or *alteration of the estate*, *marriage*, *and the birth of issue*, or other sufficient material change in the relations and condition of the testator. The former class falls under the Statute of Frauds, which enacts, that "no devise of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil, in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent."[3] And to such writing of revocation the attestation of three witnesses, at least, is required.

§ 681. **Express Revocation.** The acts of *express revocation* are therefore of three classes. First, by a subsequent will or codicil, inconsistent with the former, or plainly intended as a substitute for it; and this must be executed in the manner we have already considered. If the subsequent instrument, whether it be a will or a codicil, though it professed an intent to make a different disposition of the whole estate, does in fact so dispose of a part only, it is but a revocation *pro tanto*.[1] Secondly, by a written instrument of revocation; which, it is to be observed, the statute does not require should be attested in the presence of the testator, like a will; but to take effect as a revocation only, it must contain an express declaration of an intention to revoke. If the instrument purports to be a subsequent will, and is well executed to take effect as a will, it will also have effect as a revocation of all former wills touching the same matter, without any words of revocation; but if it does not contain any testamentary disposition, then, though it is well executed as a

[1] Jackson *v.* Betts, 9 Cowen 208; Irish *v.* Smith, 8 S. & R. 573.

[2] As to the revocation of wills, see 6 Cruise's Dig. tit. 38, c. 6 (Greenleaf's ed. 1857), where the American law is stated in the notes.

[3] Stat. 29 Car. II. c. 3, § 6. Such is, in general, the language of the American statutes on this subject: 4 Kent Comm. 514, 520, 521, n.: [Kirkpatrick *v.* Jenkins, 96 Tenn. 85.] The difference between wills of land and of personal property, in regard to the evidence of revocation, as well as the formalities of execution, is now admitted in so few, if any, of the United States, that it is deemed inexpedient here to advert to it.

[1] Brant *v.* Wilson, 8 Cowen 56; Harwood *v.* Goodright, Cowp. 87. See also Hearle *v.* Hicks, 1 Cl. & Fin. 20; Henfrey *v.* Henfrey, 4 Moore P. C. 29. The republication of a former inconsistent will is also a revocation of a subsequent will: Harvard *v.* Davis, 2 Binn. 406. {See also Coffin *v.* Otis, 11 Met. (Mass.) 156; Plenty *v.* West, 15 Eng. Law & Eq. 283; Freeman *v.* Freeman, 27 id. 351. A determination expressed by a testator, in a codicil to his will, to make an alteration in the will in one particular, negatives by implication any intention to alter it in any other respect: Quincy *v.* Rogers, 9 Cush. (Mass.) 291.}

revocation, it will not so operate, unless such intention is expressed.[2] Thirdly, by some act of reprobation, spoliation, or destruction done upon the instrument, *animo revocandi*. But if the act be done without such intention,[3] or not in the presence of the testator, though by his direction, it is of no force.[4] It has accordingly been held, that slightly tearing the will and throwing it on the fire, though it were only singed,[5] or a partial burning of the paper,[6] or tearing off a seal, though superfluous,[7] the intention thereby to revoke being clear, was a sufficient revocation. So, if a material part of a devise or bequest be obliterated by the testator, it is a sufficient revocation *pro tanto*, although it be merely by drawing the pen across, and the writing be still legible.[8] But if it be an obliteration of the name of a devisee or legatee, in some parts of the will, while in other parts it is left standing, the court will not ordinarily feel warranted in holding that the bequest is thereby revoked.[9] So, if the obliteration

[2] Roberts on Frauds, 463–466; Onions *v.* Tyrer, 1 P. Wms. 343; Limbery *v.* Mason, 2 Com. 451; Bethell *v.* Moore, 2 Dev. & Bat. 311; 1 Jarm. on Wills, 121, 122, 125, 129, 156, 5th (Am.) ed. *168, 169, 173, 180, 201. The same principle applies to an intended revocation by obliteration; if it be not duly attested, it has no effect: ibid.; Kirk *v.* Kirk, 4 Russ. 435. But though the second will should fail of taking effect, yet if it is perfectly executed and the failure arises merely from some incapacity of the party for whose benefit it is made to take under it, the second will may still operate as a revocation of the first: Laughton *v.* Atkins, 1 Pick. 535, 543.

[3] Hence, if the testator were insane, the destruction of the instrument by his order is no revocation: Ford *v.* Ford, 7 Humph. 92.

[4] Onions *v.* Tyrer, 1 P. Wms. 343, 345; Scruby *v.* Fordham, 1 Add. 74; Trevelyan *v.* Trevelyan, 1 Phillim. 149; Haines *v.* Haines, 2 Vern. 441; Dan *v.* Brown, 4 Cowen 490; Boudinot *v.* Bradford, 2 Dall. 266; s. c. 2 Yeates 170; Clarke *v.* Scripps, 16 Jur. 783; *ante*, Vol. I. § 263; [Miles' Appeal, 68 Conn. 237.]

[5] Bibb *v.* Thomas, 2 W. Bl. 1043; Winsor *v.* Pratt, 2 B. & B. 650; Johnson *v.* Brailsford, 2 Nott & McCord 272. The mere direction to another by the testator, to destroy his will, is not sufficient, unless some act of destruction is thereupon done: Giles *v.* Giles, 1 Cam. & Nor. 174; Ford *v.* Ford, 7 Humph. 92.

[6] Doe *v.* Harris, 6 Ad. & El. 209.

[7] Avery *v.* Pixley, 4 Mass. 462. See *ante*, Vol. I. § 273. In all these and similar cases, the will being *prima facie* revoked, the burden of proof is on the party setting up the will to show that the act of destruction was done by accident or mistake, or without intention to revoke the will: Case of Cook's Will, 3 Am. Law Journ. N. S. 353.

[8] Sutton *v.* Sutton, Cowp. 812; Mence *v.* Mence, 18 Ves. 348, 350. As to the time when alterations are presumed to have been made, see *ante*, Vol. I. § 564. The cases of Burgoyne *v.* Showler, 1 Rob. Eccl. 5, and Cooper *v.* Bockett, 4 Moore P. C. C. 419, on this point, turn on the language of the Stat. 1 Vict. c. 26, § 21. {Where there is a statutory form of revocation by cancellation, and alterations are made, but the will is not executed again with the requisite formalities, the altered bequests are invalid for want of such execution, and the will as it originally stood is the will: Matter of Prescott, 4 Redf. (N. Y.) 178;} [Miles' Appeal, 68 Conn. 237. Interlineation of a clause without re-attestation does not revoke the original will: Hesterberg *v.* Clark, 166 Ill. 241.]

But where no statutory provisions regarding partial revocation by cancellation exist, a cancellation is final and the will stands without the clause cancelled: Estate of Chinmark, Myrick's Prob. (Cal.) 128.

Generally, where a will has been revoked, its republication cannot be by parol, but there must be the same evidence as of publication: Carey *v.* Baughm, 36 Iowa 540; Smith's Will, 9 Phil. (Pa.) 362.}

[9] Martins *v.* Gardiner, 8 Sim. 73; Utterton *v.* Utterton, 3 Ves. & Beames 122. If the will is found in the testator's possession, obliterated, the presumption is that it was so done by him; and the burden of showing that it was done otherwise lies on the

is on the envelope only, it is not sufficient.[10] If an alteration or obliteration is in *pencil*, it may be final,[11] or it may be deliberative. From the nature of the act, unexplained, it is held to be, *prima facie*, deliberative, and not final; but it will be left with the jury to determine, upon the collateral evidence, the actual intent with which it was made.[12] If the will is proved to have been in the testator's possession, and cannot afterwards be found, it will be presumed that he destroyed it, *animo revocandi*;[13] but if it is shown out of his possession, the party asserting the revocation must show that it came again into his custody, or was actually destroyed by his direction.[14]

§ 682. **Same Subject; Duplicates.** If the will was *executed in duplicate*, and the testator destroys one part, the inference generally is that he intended to revoke the will; but the strength of the presumption will depend much on the circumstances. Thus, if he destroys the only copy in his possession, an intent to revoke is very strongly to be presumed; but if he was possessed of both copies and destroys but one, it is weaker; and if he alters one and then destroys it, retaining the other entire, the presumption has been said still to hold, though more faintly;[1] but the contrary also has been asserted.[2] If the will is destroyed, but a codicil is left entire, the question,

party offering it for probate, or claiming under it: Baptist Ch. *v.* Robbarts, 2 Barr 110. And see Wyn *v.* Heveningham, 1 Col. N. C. 630. But if it has been in the possession of one adversely interested, the presumption does not arise: Bennett *v.* Sherrod, 3 Ired. 303. [See *ante*, Vol. I. §§ 564, 566.]

[10] Grantley *v.* Garthwaite, 2 Russ. 90.

[11] [Townshend *v.* Howard, 86 Me. 285.]

[12] Francis *v.* Grover, 5 Hare 39. And see Edwards *v.* Astley, 1 Hagg. Eccl. 493, 494; Hawkes *v.* Hawkes, ib. 321; Rymes *v.* Clarkson, 1 Phillim. Eccl. 25, 35; Parkin *v.* Bainbridge, 3 id. 321; Dickenson *v.* Dickenson, 2 id. 173; Lavender *v.* Adams, 1 Adams 403; Ravenscroft *v.* Hunter, 2 Hagg. Eccl. 68; {Rhodes *v.* Vinson, 9 Gill 169; Clarke *v.* Scripps, 22 Eng. Law & Eq. 627. Where the testator, at the time of making the pencil alterations, said to his brother, "It will be a good will anyhow if I do not prepare another before I die," and he did not prepare another, and the will as altered was a complete and perfect will, there is sufficient evidence to warrant the jury in finding that the intent was final and testamentary, and not deliberative: *Re* Fuguet's Will, 11 Phila. (Pa.) 75.} The testator, to revoke this will, must at the same time be competent to make a will, or the act of revocation will be a nullity: Smith *v.* Waite, 4 Barb. S. C. 28.

[13] [Boyle *v.* Boyle, 158 Ill. 228.]

[14] 1 Jarman on Wills, 119, and cases there cited, 5th (Am.) ed. *133; Minkler *v.* Minkler, 14 Vt. 174; Helyar *v.* Helyar, 1 Phillim. 417, 421, 427, n., 430, 439, n.; Lillie *v.* Lillie, 3 Hagg. Eccl. 184; Loxley *v.* Jackson, 3 Phillim. 126; Jackson *v.* Betts, 9 Cowen 208. {If the testator becomes insane after the will is made, the burden of proof that he destroyed the will *sano animo* is upon the party setting up the revocation: Sprigge *v.* Sprigge, L. R. 1 P. & D. 608. The finding of a will among the testator's papers with the signature cut out, and pasted on again at its original place, is *prima facie* a revocation, the pasting on of the signature not having the effect to revive the will: Bell *v.* Fothergill, L. R. 2 P. & D. 148. Revocation by destruction of the will is *prima facie* a revocation of the codicil: Greenwood *v.* Cozens, 2 Sw. & Tr. 364; *In re* Dutton, 3 id. 66. But see Black *v.* Jobling, L. R. 1 P. & D. 685.}

[1] Seymour's Case, cited 1 P. Wms. 346; 2 Com. 453; Burtenshaw *v.* Gilbert, Cowp. 49, 52; Pemberton *v.* Pemberton, 13 Ves. 310. And see O'Neal *v.* Farr, 1 Rich. 80.

[2] Roberts *v.* Round, 3 Hagg. Eccl. 548.

whether the destruction of the will operates as a revocation of the codicil also, will depend much upon their contents. If they are inseparably connected, the codicil will be held revoked also; but if, from the nature of its contents, it is capable of subsisting independently of the will, its validity may not be affected.[8]

§ 683. **Whether Revocation of Later revives a Former Will.** Where the latter of two inconsistent wills is subsequently destroyed, or otherwise revoked, by the testator, it was formerly held, that this revived and restored the original will to its former position, provided it remained entire.[1] But this doctrine has since been greatly modified, if not wholly abandoned, in the ecclesiastical courts, and the question is now held open for decision either way, according to the circumstances.[2]

§ 684. **Implied Revocation.** In regard to *implied revocations*, these are said to be founded on the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties.[1] A *subsequent marriage* alone, if the testatrix was a *feme sole*, will always have this effect, even though she should survive her husband; for by the marriage her will ceased to be ambulatory, and was therefore void.[2] But the marriage of a man is

[8] Usticke *v.* Bawden, 2 Add. 116; Medlycot *v.* Assheton, ib. 229; Togart *v.* Hooper, 1 Curt. 289. See Bates *v.* Holman, 3 Hen. & Munf. 502.

[1] Goodright *v.* Glazier, 4 Burr. 2512; Lawson *v.* Morrison, 2 Dall. 289; James *v.* Marvin, 3 Conn. 576; Taylor *v.* Taylor, 2 Nott & McCord 482. [Unless the second will contained an express revocation of the first: Cheever *v.* North, 106 Mich. 390.]

[2] Usticke *v.* Bawden, 2 Add. 116; James *v.* Cohen, 3 Curt. 770. See 4 Kent Comm. 531, and cases there cited; and 1 Jarm. on Wills, 122, 123, and cases in notes by Perkins, 5th (Am.) ed. *136, 137; Moore *v.* Moore, 1 Phillim. 375, 400, 406; Boudinot *v.* Bradford, 2 Dall. 268; Linginfetter *v.* Linginfetter, Hardin 119; Bohanon *v.* Walcott, 1 How. (Mo.) 336. {Randall *v.* Beatty, 31 N. J. Eq. 643, follows the principle of Usticke *v.* Bawden, that if the previous will is kept safely, it raises a presumption that the testator intended to revive the former if he should revoke the latter will. Thus, where one made three successive wills, each revoking all previous wills, and then said he should destroy the two he did not want, and keep the one he did want, and he did destroy the first and third wills and kept the second, it was held that this was evidence of an intention to revive the second will by a destruction of the third: Williams *v.* Williams, 142 Mass. 515.} By Stat. 1 Vict. c. 25, § 22, no will, once revoked, can be revived, otherwise than by a re-execution thereof. Hence parol evidence of an intention to set up the prior will by cancelling the second has been rejected: Major *v.* Williams, 3 Curt. 432.

In New York, by Rev. Stat. vol. ii. p. 126 (3d ed.), "the destruction, cancelling, or revocation of such second will shall not revive the first, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will," or unless the first is afterwards republished.

[1] 4 Kent Comm. 521–524. {Revocation of a will cannot be implied by law from the following facts: the death of the testator's wife, and of one of his children leaving issue; and the birth of another child, contemplated in the will; and the testator's insanity from soon after making the will until his death, a period of forty years; and a fourfold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some children and the shares of other children who were made residuary legatees: Warner *v.* Beach, 4 Gray (Mass.) 162.} [Divorce does not operate as a revocation in itself: Baacke *v.* Baacke, 50 Neb. 18; but may do so under certain circumstances: Lansing *v.* Hayes, 54 N. W. 699, Mich.]

[2] 1 Williams on Executors, pp. 93–95, 8th (Eng.) ed. pp. 195, 196; Forse & Hem-

not, alone, a revocation of his will;[3] for the common law has made sufficient provision for the wife, by her right of dower. Nor is the birth of a child after the making of the will, in itself, and independent of statutory provisions, a revocation of a will made subsequent to the marriage; for the testator is presumed to have contemplated such an event.[4] But a subsequent marriage and the birth of a child, taken together, are held to be a revocation of his will, whether of real or personal estate, as they amount to such a change in his situation as to lead to a presumption that he could not intend that the previous disposition of his property should remain unchanged.[5] But this presumption is not conclusive: it may be repelled by intrinsic proof of circumstances showing that the will, though made previous to the marriage, was in fact made in contemplation of both marriage and the birth of issue;[6] such as, a provision

bling's Case, 4 Co. 20; Hodsden *v.* Lloyd, 2 Bro. Ch. Cas. 544, and notes by Eden; [Hale *v.* Hale, 90 Va. 728. Changed by statute in some States: Colcord *v.* Conroy, 23 S. 561, Fla.; Ingersoll *v.* Hopkins, 49 N. E. 623, Mass.; Lyon's Will, 96 Wis. 339. The rule does not apply to a second marriage: McLarney's Estate, 153 N. Y. 416.]

[3] [Hulett's Estate, 66 Minn. 327.] {In [several States,] marriage alone revokes a previous will: Duryea *v.* Duryea, 85 Ill. 41;} [Scherrer *v.* Brown, 21 Col. 481; Ingersoll *v.* Hopkins, 49 N. E. 623, Mass.]

[4] {In Pennsylvania, the birth of a child after the making of a will, even though the child is posthumous, is a revocation of a will *pro tanto*, and such child shares the estate as if the father had died intestate:} [Wilson *v.* Ott, 160 Pa. 433.]

[5] 1 Jarm. on Wills, p. 107, 5th (Am.) ed. *122; 1 Williams on Executors, pp. 95–98, 8th (Eng.) ed. pp. 196–206; Doe *v.* Lancashire, 5 T. R. 58. See also Church *v.* Crocker, 3 Mass. 17, 21; Brush *v.* Wilkins, 4 Johns. Ch. 506. A testator, dangerously ill, and unmarried, made a will in favor of his intended wife. Being restored to health, he married her, and had issue, four children. The will was carefully preserved and recognized by him, but never was re-executed. The wife and children survived him; but it was held, that the will was revoked: Matson *v.* Magrath, 13 Jur. 350. Prerog. C.

[6] 1 Jarman on Wills, pp. 107, 109, 110, 5th (Am.) ed. pp. *122, 127, 128; 1 Williams on Executors, p. 94, 8th (Eng.) ed. p. 196; Fox *v.* Marston, 1 Curt. 494. And see Johnston *v.* Johnston, 1 Phillim. 447; Gibbens *v.* Cross, 2 Ad. 455; Talbot *v.* Talbot, 1 Hagg. Eccl. 705; Jacks *v.* Henderson, 1 Desaus. 543, 557; Brush *v.* Wilkins, 4 Johns. Ch. 506; Yerby *v.* Yerby, 3 Call 334. The doctrine that the presumption is not conclusive has been overruled upon great consideration, in the cases of Marston *v.* Roe, 8 Ad. & El. 14, and Israel *v.* Rodon, 2 Moore P. C. 51, in the former of which the following points were resolved: —

1. Where an unmarried man without children by a former marriage devises all the estate he has at the time of making his will, and leaves no provision for any child of a future marriage, *the law annexes to such will the tacit condition*, that if he afterwards marries, and has a child born of such marriage, the will shall be revoked: Upon the happening, therefore, of those two events, the will is *ipso facto* revoked.

2. Evidence not amounting to proof of publication cannot be received in a court of law, to show that the testator intended that his will should stand good, notwithstanding his subsequent marriage and the birth of issue; because these events operate as a revocation, by force of a *rule of law*, and independent of the testator.

3. The operation of this rule of law is not prevented by a provision in the will or otherwise, for the future wife only: such provision must also extend to the children of the marriage.

4. The provision, also, must be made by the will; the condition annexed to it by law, so far as relates to the existence or extent of the provision, having reference, in its own nature, to the existing state of things at the time the will itself was made. And it must give to the child a beneficial, and not a merely legal, interest as a trustee.

Therefore it was held that the descent of after-acquired lands upon the child did

of any sort in the will itself for the future wife and children; or a provision for children alone;[7] but provision for the wife only has been held insufficient.[8] Any other evidence of intent, to have this effect, it seems, must amount to proof of republication of the will, after the birth of the issue. For any other purpose than this, parol evidence of the intentions of the testator, that his will should stand unrevoked, has been held inadmissible to control the presumption resulting from marriage and the birth of issue.[9]

not prevent the operation of the rule of revocation above stated; especially as the child, in the case at bar, took only a legal estate in trust for the devisee. See also, as to the conclusiveness of the presumption, Goodtitle *v.* Otway, 2 H. Bl. 522, by Eyre, C. J.; Doe *v.* Lancashire, 5 T. R. 58, per Ld. Kenyon; Gibbons *v.* Caunt, 4 Ves. 848; Walker *v.* Walker, 2 Curt. 854. See 6 Cruise's Dig. tit. 38, c. 6, § 48, n. (Greenleaf's ed. 1857).

[7] Kenebel *v.* Scrafton, 2 East 530; 1 Jarman on Wills, p. 109, 5th (Am.) ed. *127.

[8] Marston *v.* Roe, 8 Ad. & El. 14.

[9] Ibid. In several of the United States, the effect of marriage and the birth of a child, upon a prior will, has been definitely settled by statute. Thus, in Rhode Island, a will is *ipso facto* revoked "by a marriage of the testator subsequent to the date thereof." R. I. Rev. St. 1844, p. 231. In Connecticut, "If, after the making of a will, a child shall be born to the testator, and no provision shall be made in the will for such contingency, such *birth* shall operate as a revocation of such will:" Conn. Rev. St. 1849, pp. 346, 347.

In New York, the enactment is more particular. "If, after the making of any will, disposing of the *whole* estate of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be *living at the death of the testator*, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received." N. Y. Rev. St. vol. ii. p. 124, § 35 (3d ed.). In Arkansas, Indiana, and Missouri, the language of the statutes is substantially the same as in New York: Ark. Rev. St. 1837, c. 157, § 7; Ind. Rev. St. 1843, c. 30, § 8; Mo. Rev. St. 1845, c. 185, § 7.

In Pennsylvania, if the testator, after making his will, "shall marry or have a child not provided for in such will, and die leaving a widow and child, or either a *widow or child*, though such child be born after the death of the father, every such person, *so far* as shall regard the widow or child, shall be deemed and construed to die intestate:" Dunlop's Dig. p. 573, § 15; Coates *v.* Hughes, 3 Binn. 498; Tomlinson *v.* Tomlinson, 1 Ashm. 224.

In Virginia, "If the testator, having no issue then living, shall make a will wherein any child he may have is not provided for nor mentioned, and shall at his death leave a child, or leave his wife pregnant of a child which shall be born; the will "shall have no effect during the life of such after-born child, and shall *be void unless* the child die, without having been married, *and* before he or she shall have attained the age of twenty-one years:" Tate's Dig. p. 892. In New Jersey, in the like case, the will is declared void; without reference either to the marriage or majority of the child: N. J. Rev. St. 1846, p. 368, § 20.

In South Carolina, a will is revoked by the subsequent *marriage* of the testator, *and his death, leaving issue:* S. Car. St. at Large, vol. v. p. 107; Jacks *v.* Henderson, 1 Desaus. 543, 557.

In Georgia, the will is revoked, if the testator shall afterwards marry *or* have a child born; no provision being made for either wife or child in the will, and no alteration being made in the will, subsequent to the marriage or birth of the child: Ga. Rev. St. 1845, p. 457, § 16.

In Ohio, "If the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked;" unless the child shall have been provided for by some settlement, or in the will, or so mentioned therein as to show an intention not to make such provision;

§ 685. **By Marriage and Birth of Issue.** The rule that marriage and the birth of issue operates as a revocation of the previous will, is not affected by the circumstances, that the testator was married at the time of making the will, and survived his wife, and afterwards married again and had issue by the second wife; but such second marriage and the birth of issue is equally a revocation of the will as though it had been made while he was single. Nor does it make any difference that the issue was posthumous; nor that the testator died without knowing that his wife was pregnant;[1] nor, that the child died in the lifetime of the testator.[2]

§ 686. **By Alteration in Estate.** Another case of implied revocation is that which arises from an *alteration of the estate* of the devisor, after the making of the will; it being generally considered essential to the validity of a devise of lands, that the testator should be seised thereof at the making of the will, and that he should continue so seised thereof until his decease. If, therefore, a testator, after making his will, should by deed aliene the lands which he had disposed of by the will, the disposition by will thereby becomes void; and should he afterwards acquire a new freehold estate in the same lands, such newly acquired estate will not pass to the devisee under the will.[1] And though the conveyance be for a partial, or a

"and no other evidence to rebut the presumption of such revocation shall be received:" Ohio Rev. St. 1841, c. 129, § 40.

In Louisiana, "the testament falls by the *birth* of legitimate children of the testator, posterior to its date:" La. Civil Code, art. 1698.

In all the other States, this subject is believed to have been left to the implication of law.

Whether the birth of a child by the first wife, after the making of the will, and, after the death of the first wife, a second marriage, but no more children, is a revocation of the will, — *quære*. See 4 Ves. 848; Yerby *v.* Yerby, 3 Call 334; 1 Jarman on Wills, 108, 5th (Am.) ed. *124. See 6 Cruise's Dig. tit. 38, c. 6, §§ 45, 46, notes (Greenleaf's ed. 1857). As to the effect of marriage upon the will of a *feme sole*, see 6 Cruise's Dig. tit. 38, c. 2, § 5, n.; ib. c. 6, § 57, n. (Greenleaf's ed. 1857).

[1] Christopher *v.* Christopher, Dick. 445, cited 3 Burr. 2171, marg.; ib. 2182. See *supra*, § 684, n., and cases there cited. In Doe *v.* Barford, 4 M. & S. 10, the will was held not revoked, where the testator died leaving his wife pregnant, of which fact he was ignorant. But if, as is now settled by the cases of Marston *v.* Roe, and Israel *v.* Rodon, *supra*, the revocation results from an imperative rule of law, and not from any supposed change of intention, the propriety of that decision may well be questioned.

[2] Wright *v.* Netherwood, 2 Salk. 593, n. (*a*), by Evans; more fully reported in 1 Phillim. 266, n. (*c*). See also Emerson *v.* Boville, 6 Phillim. 342. In England, it is now provided, by Stat. 7 W. IV. and 1 Vict. c. 26, § 18, that "every will made by a man or woman shall be revoked by his or her marriage," except wills made under powers of appointment, in certain cases; and that "no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances."

[1] {Coulson *v.* Holmes, 5 Sawy. C. C. 279.} See 1 Jarman on Wills, c. 7, § 3, pp. 130–148, 5th (Am.) ed. *147–165; 2 Williams on Executors, part 3, b. 3, c. 2, § 1, pp. 820–827. See also 6 Cruise's Dig. tit. 38, c. 6 (Greenleaf's ed.), where the subject of revocations by an alteration of the estate is more largely treated; Walton *v.* Walton, 7 Johns. Ch. 258.

After-acquired lands also pass by the will, if such was the intent of the testator, by the statutes of most of the United States. But such intent must clearly appear on the face of the will, by the statutes of Maine, Massachusetts, New Hampshire, New York, Virginia, Ohio, Michigan, Wisconsin, and Kentucky. It is inferred from the general terms of a devise of all his estate, by the statute of Pennsylvania, and Indiana;

mistaken or unnecessary purpose, yet if it embraces the whole estate which is the subject of the devise or bequest, it is a total revocation. But if it is only a conveyance of part of the testator's estate or interest, — as, for example, if, owning the fee, or entire interest, he makes a lease for years or a mortgage, or pledges the property, — it is only a revocation *pro tanto*, or a gift by will, subject to the lien thus created.[2] But a subsequent partition of lands held in common at the time of making the will is no revocation; as it does not affect the nature or quantity of the estate, but only the manner of enjoyment.[3] Nor will an interruption of the testator's seisin work a revocation of the will, where it is involuntary and temporary; for if he be disseised subsequently to making the will, and afterwards re-enters, he is restored to his original seisin, by relation back, and the devise is not revoked.[4]

§ 687. **Same Subject.** Even a *void conveyance* may sometimes operate as a revocation of a previous devise, on the principle that it is inconsistent with the testamentary disposition.[1] This rule is applied to cases where the failure of the conveyance arises from the incapacity of the grantee, as where the husband conveys by deed directly to his wife lands which he had previously devised to another;[2] and also to cases where the conveyance is inoperative for the want of some ceremony essential to its validity, as where it is

and also of Connecticut, unless apparently otherwise intended. In Vermont, the intent must appear in the will, or be found "by a proper construction." In Rhode Island, the lands pass, if such intent "appears by the express terms of his will." In Illinois and Mississippi the statutes empower the testator to devise all the estate which he has "or may have at the time of his death;" which seems imperatively to include after-acquired lands, if not excluded by the terms of the will. See Me. Rev. St. 1840, c. 92, § 13; Mass. Rev. St. 1836, c. 62, § 3; Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterston, ib. 662; Winchester *v.* Foster, 3 Cush. 366; N. H. Rev. St. 1842, c. 156, § 2; Vt. Rev. St. 1839, c. 45, § 2; R. I. Rev. St. 1844, p. 231; Conn. Rev. St. 1848, tit. 14, c. 1, § 4; Brewster *v.* McCall, 15 Conn. 290; N. Y. Rev. St. vol. ii. p. 119; Dunlop's Dig. LL. Pa. p. 572; Tate's Dig. LL. Va. p. 889; 1 Wash. 75; 8 Cranch 69, 70; Ohio Rev. St. 1841, c. 129, § 48; Mich. Rev. St. 1846, c. 68, § 3; LL. Ky. vol. ii. p. 1537, § 1; Roberts *v.* Elliott, 3 Monr. 396; Robertson *v.* Barber, 6 id. 524; Ind. Rev. St. 1843, c. 30, § 4; Ill. Rev. St. 1839, p. 686, § 1; Mo. Rev. St. 1840, c. 36, § 2; Wis. Rev. St. 1849, c. 66, § 3; Iowa Rev. St. 1851, § 1278. See also Allen *v.* Harrison, 3 Call 289; Walton *v.* Walton, 7 J. J. Marsh. 58; Denis *v.* Warder, 3 B. Monr. 173; Smith *v.* Jones, 4 Ohio 115; Willis *v.* Watson, 4 Scam. 64; 4 Kent Comm. 511–513.

In the absence of any statute, lands purchased after the date of a devise will pass by a codicil made after their purchase; the codicil containing no expressions limiting the effect of the devise to lands comprised in the will: Yarnold *v.* Wallis, 4 Y. & C. 160. And see Bridge *v.* Yates, 14 Law Journ. N. S. 426.

[2] 4 Kent's Comm. 511, 512; Brydges *v.* Duchess of Chandos, 2 Ves. 417, 427, 428; Carter *v.* Thomas, 4 Greenl. 341.

[3] 1 Jarman on Wills, 134, 135 (Perkins's ed.), 5th (Am.) ed. *151, 152; Risley *v.* Boltinglass, T. Raym. 240; Brydges *v.* Duchess of Chandos, 2 Ves. 417, 429.

[4] 1 Jarman on Wills, p. 133, 5th (Am.) ed. *149; Goodtitle *v.* Otway, 1 B. & P. 576, 602; s. c. 2 H. Bl. 516; Cave *v.* Holford, 3 Ves. 650, 670; Attorney-General *v.* Vigor, 8 id. 256, 282. In Pennsylvania, it seems that a testator may devise lands of which he is disseised at the time: Hume *v.* McFarlane, 4 S. & R. 435.

[1] 1 Jarman on Wills, pp. 149, 152, 5th (Am.) ed. *165–*168; Walton *v.* Walton, 7 Johns. Ch. 269; Hodges *v.* Green, 4 Russ. 28.

[2] Beard *v.* Beard, 3 Atk. 72, 73.

by feoffment, but there is no livery of seisin.[3] But the rule does not apply to a conveyance which is void at law on account of fraud or covin; yet if the deed is valid in law, but impeachable in equity, it will be held in equity as a revocation.[4]

§ 688. **Evidence invalidating Will.** The *formal proof* of a will may also be *rebutted*, by evidence showing that it was obtained by *fraud and imposition* practised upon the testator; or, by *duress;* or, that the testator was *not of competent age;* or, was a *feme covert;* or, was *not of sound and disposing mind and memory;* or, that it was obtained by *undue influence.* But it is said that undue influence is not that which is obtained by modest persuasion, or by arguments addressed to the understanding, or by mere appeals to the affections; it must be an influence obtained either by flattery, excessive importunity, or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his free will, what he is unable to refuse.[1]

[3] Beard *v.* Beard, 3 Atk. 72, 73; 1 Jarman on Wills, p. 150, 5th (Am.) ed. *165.

[4] Simpson *v.* Walker, 5 Simons 1; Hawes *v.* Wyatt, 2 Cox 263, per Ld. Alvanley, M. R. And see s. c. in 3 Bro. Ch. 156, and notes by Perkins.

[1] Marshall's Case, 2 Barr 388. And see Duffield *v.* Morris, 2 Harringt. 375; O'Neall *v.* Farr, 1 Rich. 80; Lide *v.* Lide, 2 Brev. 403; Harrison's Case, 1 B. Monroe 351; Brown *v.* Moore, 6 Yerg. 272; {Zimmerman *v.* Zimmerman, 23 Pa. St. 375; Hoshaner *v.* Hoshauer, 26 id. 404; McMahon *v.* Ryan, 20 id. 329; Parramore *v.* Taylor, 11 Gratt. (Va.) 220; Roberts *v.* Trawick, 17 Ala. 55; Coleman *v.* Robertson, ib. 84; Walker *v.* Hunter, 17 Ga. 364; Nailing *v.* Nailing, 2 Sneed (Tenn.) 630; Minor *v.* Thomas, 12 B. Monroe 106; Taylor *v.* Wilburn, 20 Mo. 306; Stultz *v.* Schaeffle, 18 Eng. Law & Eq. 576; Bundy *v.* McKnight, 48 Ind. 502. We think it obvious from the cases, that the influence to avoid a will must be such as: 1. To destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his own. 2. That it must be an influence specially directed towards the object of procuring a will in favor of particular parties. 3. If any degree of free agency, or capacity, remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty, and it must have proved successful to some extent, certainly: Redfield on Wills, pt. 1, 497–537.

The constraint which will avoid a will must be one operating in the act of making the will. Threats, violence, or any undue influence, long past and not shown to be in any way connected with the testamentary act, are not evidence to impeach a will: Thompson *v.* Kyner, 65 Pa. St. 368. Unlawful cohabitation of a legatee with the testator is not of itself evidence of undue influence: Rudy *v.* Ulrich, 69 id. 177; Wainwright's Appeal, 89 id. 220. It may be used, however, in connection with other facts; Main *v.* Ryder, 3 Norris (Pa.) 217. The burden of proof of undue influence is on the party setting it up: Baldwin *v.* Barker, 99 Mass. 79;} [Gordon *v.* Burris, 141 Mo. 602; King *v.* King, 42 S. W. 347, Ky.]

Where the testator is left free from undue influence, and at liberty to act upon his own perceptions, less mind is ordinarily requisite to make a will than to make a contract of sale. But mere *passive* memory is not alone sufficient. He must retain sufficient *active* memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind long enough to perceive at least their more obvious relations to each other, and to form a rational judgment in regard to them. The elements of such a judgment should be, the number of his children, their deserts with reference to conduct and capacity, as well as need, and what he had done for them in the way of advancement, the amount and condition of his property, and the like. See Converse *v.* Converse, 2 Law Rep. N. S. 516, per Redfield, J.; s. c. 6 Washb. 168.

[The killing of the testator by the devisee does not invalidate the will; but equity

§ 688 *a*. **Probate of Lost Wills.** If the will is *proved to be lost*, it may still be admitted to probate, upon secondary evidence, as in the case of lost deeds and other writings.[1] And though, as we have seen,[2] if the will, shown once to have existed, cannot be found after the death of the testator, the presumption is that he destroyed it *animo revocandi*, yet this presumption may be rebutted by evidence. But if it be so rebutted, yet the contents of the will cannot be proved, unless by the clearest and most stringent evidence.[3]

§ 689. **Insanity; Burden of Proof.** In regard to *insanity* or want of sufficient soundness of mind, we have heretofore seen, that though in the probate of a will, as the real issue is whether there is a valid will or not, the executor is considered as holding the affirmative,[1] and therefore may seem bound affirmatively to prove the sanity of the testator; yet we have also seen that the law itself presumes every man to be of sane mind, until the contrary is shown.[2] The burden of proving unsoundness or imbecility of mind in the

will prevent the murderer from enjoying the benefit of the devise: Ellerson *v.* Westcott, 148 N. Y. 149.]

[1] See *ante*, Vol. I. §§ 84, 509, 575; Kearns *v.* Kearns, 4 Harringt. 83; [1 Redf. Wills, § 28, pl. 9; Everitt *v.* Everitt, 41 Barb. 385; Youndt *v.* Youndt, 3 Grant's Cas. 140; [Steinke's Will, 95 Wis. 121. As to the practice in such cases, see Pearson's Goods, 1896, P. 289.]

[2] See *supra*, § 681.

[3] Davis *v.* Sigourney, 3 Met. 487; Davis *v.* Davis, 2 Addams 223; Thornton's Case, 2 Curt. 913; Betts *v.* Jackson, 6 Wend. 173; Clark *v.* Wright, 3 Pick. 67; 1 Jarman on Wills, 119, by Perkins, 5th (Am.) ed. *134; Huble *v.* Clark, 1 Hagg. Eccl. 115; Steele *v.* Price, 5 B. Monroe 58; [Rhodes *v.* Vinson, 9 Gill 169; Batton *v.* Watson, 13 Ga. 63. Cf. the case of Sugden *v.* Lord St. Leonards, 34 L. T. N. S. 372, upon this point. In this case, it was held, that the declarations of the testator, both before and after the execution of the will, were admissible, and that where it is impossible to prove all the contents of a lost will, probate should be allowed of so much — being the substantial parts of the will — as could be satisfactorily proved, although there was proof that some material provisions were omitted from inability to remember them with accuracy. See also *ante*, Vol. I. § 558. [The testator's declarations are admissible to rebut the presumption of revocation: Steinke's Will, 95 Wis. 121; but not to show the contents of the will: Clark *v.* Turner, 50 Neb. 290.]

[1] *Ante*, Vol. I. § 77. [When it is attempted to set up a series of wills as last wills of the deceased, the practice in English probate courts is to allow the party who propounds the last will to begin. So when the plaintiff propounded a will dated in 1867, and the defendants alleged that that will had been revoked by a will dated in 1872, which they propounded, and the plaintiffs in their reply alleged that the will propounded by the defendants had not been duly executed, and that the deceased was not, at the time of its execution, of sound mind, memory, and understanding, it was held that the defendants were entitled to begin: Hutley *v.* Grimstone, L. R. 5 P. D. 24.]

[2] *Ante*, Vol. I. § 42; *supra*, tit. Insanity, § 373; Brooks *v.* Barrett, 7 Pick. 94; [Dean *v.* Dean, 27 Vt. 746; Trumbull *v.* Gibbons, 2 N. J. 117; Zimmerman *v.* Zimmerman, 23 Pa. St. 375. It has been held that the burden of proof is on him who contests the sanity of the testator. Therefore, if the evidence is evenly balanced, he should fail and the will should be established. This is so held in Grubbs *v.* McDonald, 91 Pa. St. 236, but it is not so held universally, and the better rule is that the burden of proof, both of the execution and the capacity of the testator, is upon him who attempts to set up the will: Smee *v.* Smee, L. R. 5 P. D. 84, p. 91; Robinson *v.* Adams, 62 Me. 369; Evans *v.* Arnold, 52 Ga. 169; Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524, qualifying Brooks *v.* Barrett, *supra;* Delafield *v.* Parish, 25 N. Y. 9; Comstock *v.* Hadlyme Eccl. Soc., 8 Conn. 261; Taff *v.* Hosmer, 14 Mich. 309. Indeed, the question of the burden of proof in a plea of insanity is one which is variously decided. Cf. *supra*, tit. Insanity.]

testator is therefore on the party impeaching the validity of the will for this cause. But, as has also been shown,[3] insanity or imbecility of mind, once proved to have existed, is presumed to continue, unless it was accidental or temporary in its nature, as, where it was occasioned by the violence of disease. And, on the other hand, the proof of insanity at the time of the transaction may be rebutted by evidence that the act was done during a *lucid interval* of reason, the burden of proving which is devolved on the party asserting this exception.[4]

§ 690. **Proof of Insanity.** In the *proof of insanity*, though the evidence *must relate to the time of the act* in question,[1] yet evidence of insanity immediately before or after the time is admissible.[2] *Suicide*, committed by the testator soon after making his will, is admissible as evidence of insanity, but it is not conclusive.[3] The fact of his being *under guardianship* at the time falls under the same rule; being *prima facie* evidence of incapacity, but open to explanation by other proof.[4] It may here be added, that where a devisee or legatee is party in a suit touching the validity of a will, his *declara-*

[3] *Supra*, tit. Insanity, § 371. And see Vol. I. § 42. Evidence of prior bodily disease, and of different intentions, previously expressed, has been held admissible in proof of incapacity at the time of making the will: Irish *v.* Smith, 8 S. & R. 573. But *moral insanity*, or the perversion of the moral feelings, not accompanied with insane delusion, which is the *legal* test of insanity, is held insufficient to invalidate a will: Frere *v.* Peacocke, 1 Rob. Eccl. 442.

[4] Attorney-Gen. *v.* Parnther, 3 Bro. Ch. 441; *Ex parte* Holyland, 11 Ves. 11; White *v.* Wilson, 13 Ves. 87; Cartwright *v.* Cartwright, 1 Phillim. 100. And see 1 Williams on Executors, pp. 17–30, 8th (Eng.) ed. pp. 21–28; 1 Jarman on Wills, c. 3; Ray's Medical Jurisprudence of Insanity, c. 14, §§ 230–246; Bannatyne *v.* Bannatyne, 14 Eng. Law & Eq. 581; {Lee *v.* Scudder, 31 N. J. Eq. 633. Although the testator entertains exaggerated and absurd opinions on certain subjects, this is not sufficient evidence of insanity to justify the setting aside of his will, if it also appear that he has the use of his faculties, and the will itself indicates that he was in the possession of his reasoning powers at the time of making the will: Thompson *v.* Thompson, 21 Barb. 107; Newhouse *v.* Godwin, 17 id. 236; Trumbull *v.* Gibbons, 2 N. J. 117; Denton *v.* Franklin, 9 B. Mon. 28; Austen *v.* Graham, 29 Eng. Law & Eq. 38. A belief in witchcraft is not evidence of such insanity as would disable a person from making a will: Addington *v.* Wilson, 5 Ind. (Porter) 137. A good general statement of the rule seems to be that, when a testator has sufficient capacity to make a disposition of his estate with judgment and understanding with reference to the amounts and situation of his property and the relative claims of different persons who are or should be objects of his bounty, he is of sound and disposing mind, notwithstanding some hallucination on other subjects: McElwee *v.* Ferguson, 43 Md. 479.

In order to have the effect of invalidating a will, intoxication must be shown to have been of such a nature as to render the testator incapable of knowing what he was doing when he executed the will: Pierce *v.* Pierce, 38 Mich. 412.}

[1] Attorney-Gen. *v.* Parnther, 3 Bro. Ch. 441, 443; White *v.* Wilson, 13 Ves. 87.

[2] Dickinson *v.* Barber, 9 Mass. 225. {On the trial of the validity of a will executed when the testatrix was seventy-eight years old, there is no ground of exception to the exclusion of evidence of her mental and moral condition fifteen months afterwards, when she was affected with paralysis; and also of evidence of her bodily and mental condition at subsequent periods until her death at the age of ninety-one; which is offered to prove that she was weak in body and mind when she executed the will: Shailer *v.* Bumstead, 99 id. 112.}

[3] Brooks *v.* Barrett, 7 Pick. 94.

[4] Stone *v.* Damon, 12 Mass. 488; Breed *v.* Pratt, 18 Pick. 115; {Hamilton *v.* Hamilton, 10 R. I. 538; Crowninshield *v.* Crowninshield, 2 Gray (Mass.) 524; Jenks *v.* Smithfield, 2 R. I. 255.

tions and admissions in disparagement of the will are competent to be given in evidence against him; but if he is not a party to the record, nor party in interest, it is otherwise.[5] So the declaration of his opinion in favor of the sanity of the testator is admissible against a party opposing the probate of the will on the ground of his insanity.[6] The *declarations of the testator* himself are admissible only when they were made so near the time of the execution of the will as to become a part of the *res gestæ*.[7]

§ 691. **Insanity; Opinions.** The *attesting witnesses* are regarded in the law as persons placed round the testator in order that no fraud may be practised upon him in the execution of the will, and to judge of his capacity. They must, therefore, be competent witnesses at the time of attestation; otherwise the will is not well executed.[1] On this ground, these witnesses are permitted to testify as to the opinions they formed of the testator's capacity at the time of

[5] Atkins *v.* Sanger, 1 Pick. 192; Phelps *v.* Hartwell, 1 Mass. 71; Bovard *v.* Wallace, 4 S. & R. 499; Nusscar *v.* Arnold, 13 id. 323, 328, 329.

[6] Ware *v.* Ware, 8 Greenl. 42; Atkins *v.* Sanger, 1 Pick. 192. But declarations by a devisee, that he procured the devise to be made, are not admissible for this purpose; it not being unlawful so to do, provided there were no fraud, imposition, or excessive importunity: Miller *v.* Miller, 8 S. & R. 267; Davis *v.* Calvert, 5 Gill & Johns. 265.

[7] Smith *v.* Fenner, 1 Gall. 170. See also, as to declarations of testators, Den *v.* Vancleve, 2 South. 589; Reel *v.* Reel, 1 Hawks 248; Farrar *v.* Ayers, 5 Pick. 404; Wadsworth *v.* Ruggles, 6 id. 63; Rambler *v.* Tryon, 7 S. & R. 90; Betts *v.* Jackson, 6 Wend. 173; {Marx *v.* McGlynn, 4 Redf. 455. It is certain such testimony is not admissible for the purpose of proving any distinct fact, depending upon the force of the admission, since the testator is not a party to the question of the validity or interpretation of his will: Comstock *v.* Hadlyme, 8 Conn. 254. Nor can such declarations, whether made before, contemporaneously with, or subsequent to, the making of the will, be received to affect its construction: Redfield on Wills, pt. 1, 539, and cases cited. See also same, 538–572, for a full discussion of the law as to admissibility of testator's declarations.}

[1] Such was the opinion of Lord Camden, which he maintained in an energetic protest against that of a majority of the court, in Doe d. Hindson *v.* Hersey, reported in 4 Burn, Eccl. L. 88, and in a note to Cornwell *v.* Isham, 1 Day 41–88. His opinion is now acquiesced in as the true exposition of the statute of wills. See Borgrave *v.* Winder, 2 Ves. 634, 636; Amory *v.* Fellows, 5 Mass. 219, 229; Sears *v.* Dillingham, 12 id. 358, 361; Anstey *v.* Dowsing, 2 Stra. 1253, 1255; *ante*, Vol. I. §§ 333, 353, 440; 1 Jarman on Wills, pp. 63, 64, 66. {But in a later case than Anstey *v.* Dowsing it is expressly decided that a witness to a will, who is a legatee under it, may become competent to prove the same by releasing such legacy: Lowe *v.* Joliffe, 1 W. Black. 365. Some of the late American cases adhere to the rule as laid down by our author: Patten *v.* Tallman, 27 Me. 17; Warren *v.* Baxter, 48 id. 193. But these cases gave rise to the English statute (25 Geo. II. c. 6) which provided that if any person should attest any will or codicil, to whom any beneficial devise, legacy, etc., was given, such interest or estate as to the person attesting the will only, or any one claiming under him, should be absolutely void, and such person should be admitted as a witness; and creditors, whose debts are charged on real estate, are by the same statute also made competent. A similar statute exists in many of the American States. Under this statute it has been decided that its provisions do not extend to an executor or devisee in trust: Lowe *v.* Joliffe, 1 W. Black. 365; Fountain *v.* Coke, 1 Mod. 107; Goodtitle *v.* Welford, Doug. 139; Phipps *v.* Pitcher, 6 Taunt. 220. The operation of the statute is so sweeping, that it seems it will render void any beneficial interest of any one under the will, who is a witness, although there may be other witnesses, sufficient in number to meet the requirements of the statute: Doe *v.* Wills, 1 Moody & Rob. 288; Wigan *v.* Rowland, 11 Hare 157. An interest in the wife, as it seems, will disqualify the husband as a witness, to the extent of the wife's interest: Hatfield *v.* Thorp, 5 B & Ald. 589. See, on this general subject, 1 Redf. Wills, § 21, pl. 2–5.}

executing his will; though the opinions of other persons are ordinarily inadmissible, at least unless founded upon facts testified by themselves or others in the cause.[2]

§ 692. **Requisites of Formal Execution.** The foregoing requisites to the formal execution of a valid will are all demanded, whenever the instrument is to be proved in the more ample or *solemn form;* and this mode of proof, as we have before intimated, is now generally required in the United States, the probate of the will being ordinarily held conclusive in the common-law courts, for reasons already given. And this amount of proof by all the attesting witnesses, if they can be had, may be demanded by any person interested in the will.[1]

§ 693. **Proof on Issue of Devisavit vel non.** Upon the trial of an issue of *devisavit vel non*, or other issue of *title to lands*, in the courts of common law, in those States in which the probate of the will is not regarded as conclusive in respect to lands, it is necessary, in the first place, to *produce the original will*, or to prove its former existence and its subsequent loss, in order to let in the secondary evidence of its contents.[1] And for this purpose the probate of the will, or an exemplification, is not received as evidence, without proof, *aliunde*, that it is a true copy.[2]

§ 694. **Whether all the Subscribing Witnesses necessary.** It is ordinarily held sufficient, in the courts of common law, to call *one only of the subscribing witnesses*, if he can speak to all the circumstances of the attestation; and it is considered indispensable that he should be able, alone, to prove the perfect execution of the will, in

[2] *Ante*, Vol. I. § 440, and cases there cited; Hathorn *v.* King, 8 Mass. 371; Dickinson *v.* Barber, 9 id. 225. {The decided weight of authority is now in favor of the admissibility of the opinions of such witnesses, and of other non-experts who have had opportunities of observation, on the question of sanity: Robinson *v.* Adams, 62 Me. 369; Hardy *v.* Merrill, 56 N. H. 227; Nash *v.* Hunt, 116 Mass. 237; Dennis *v.* Weekes, 51 Ga. 24; *ante*, § 369, n. But see Rollwagen *v.* Rollwagen, 3 Hun (N. Y.) 121; 1 Redf. Wills, § 15, pl. 5. It is settled law in Massachusetts that the witnesses to the will, the family physician who has been the medical adviser of the deceased, and witnesses who are by special skill and experience qualified as experts in the knowledge and treatment of mental diseases, are alone competent to give their opinions in evidence on this issue. The testimony of other witnesses is confined to a statement of facts and the declarations manifesting mental condition, of which they have knowledge: Hastings *v.* Ryder, 99 Mass. 622, p. 625; Nash *v.* Hunt, 116 id. 237, p. 251; May *v.* Bradlee, 127 id. 414, p. 421.}

[1] See 1 Williams on Executors, pp. 192–200, 8th (Eng.) ed. pp. 337–347; Sears *v.* Dillingham, 12 Mass. 358; Chase *v.* Lincoln, 3 id. 236. In Massachusetts, a will devising land must be proved and allowed in the probate court, before it can be used as evidence of title *in* a court of common law: Shumway *v.* Holbrook, 1 Pick. 114; Laughton *v.* Atkins, ib. 535, 549. And for this purpose, it may be admitted to probate, though more than twenty years have elapsed since the death of the testator: ibid.

[1] See *ante*, Vol. I. §§ 557–563, 569–575; ib. § 84, n. The nature and effect of probate in general has already been considered. See *ante*, Vol. I. §§ 518, 550; also *supra*, § 315. The issue of *devisavit vel non* involves only the question of the valid execution of the will, and not of its contents: Patterson *v.* Patterson, 6 S. & R. 55. In North and South Carolina, the probate of the will is by statute made sufficient evidence of a devise: N. Car. Stat. 1837, c. 122, § 9; S. Car. Stat. at Large, vol. vi. p. 209.

[2] Doe *v.* Calvert, 2 Campb. 389; Bull. N. P. 246.

order to dispense with the testimony of the other witnesses, if they are alive, and within the jurisdiction.[1] But in chancery, a distinction is taken, in principle, between a suit by a devisee, to establish the will against the heir, and a bill by the heir-at-law, to set aside the will for fraud, and to have it delivered up. For, in the former case, a decree in favor of the will is final and conclusive against the heir; but in the latter, after a decree against him, dismissing the bill, his remedies at law are still left open to him. It is therefore held incumbent on the devisee, whenever he sues to establish the will against the heir, to produce all the subscribing witnesses, if they may be had, that the heir may have an opportunity of cross-examining them; but where the heir sues to set aside the will, this degree of strictness may, under circumstances, be dispensed with, on the part of the devisee.[2]

[1] Longford *v.* Eyre, 1 P. Wms. 741; Bull. N. P. 264; Jackson *v.* Legrange, 19 Johns. 386; Dan *v.* Brown, 4 Cowen 483; Jackson *v.* Vickory, 1 Wend. 406; Jackson *v.* Betts, 6 Cowen 377; Turnipseed *v.* Hawkins, 1 McCord 272. [See *ante*, Vol. I. § 569 *d*.] {It seems to be conceded on all hands, that where the subscribing witnesses, one or more, become disqualified from giving testimony, subsequent to the time of attestation, or have deceased, or removed beyond the jurisdiction of the court, so that their testimony cannot be had, the will may be established by proving the handwriting of the witnesses and of the testator; and some authorities say, by proving that of the witnesses alone, — although it would seem, that where the execution of such an instrument as a will requiring such formalities is attempted to be established by circumstantial evidence, it could not fail to strike all minds, that proof of the signature of the testator would be essential. See 1 Redf. Wills, § 19, pl. 20; also Dean *v.* Dean, 27 Vt. 746, where the authorities are discussed somewhat in detail by Mr. Justice Isham.} In Pennsylvania, two witnesses are required in proof of every testamentary writing, whether in the general probate before the register of wills, or upon the trial of an issue at common law; and each witness must separately depose to all facts necessary to complete the chain of evidence, so that no link may depend on the credibility of but one: Lewis *v.* Maris, 1 Dall. 278; Hock *v.* Hock, 4 S. & R. 47. And if there are three witnesses, and the proof is fully made by two only, it is enough, without calling the third: Jackson *v.* Vandyke, 1 Coxe 28; Fox *v.* Evans, 3 Yeates 506. But if one or both witnesses are dead, the will may be proved by the usual secondary evidence: Miller *v.* Carothers, 6 S. & R. 215.

[2] Bootle *v.* Blundell, 19 Ves. 494; Tatham *v.* Wright, 2 Russ & My. 1. In the latter case, which was a bill by the heir to set aside the will, the rule was expounded by Tindal, C. J., in the following terms: "It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question *devisavit vel non*, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the interference of this court; and he ought not to obtain it until he has given every opportunity to the heir-at-law to dispute the validity of the will. This is the ground upon which the practice is put in the cases of Ogle *v.* Cook (1 Ves 178), and Townsend *v.* Ives (1 Wils. 216). But it appears clearly from the whole of the reasoning of the Lord Chancellor in the case of Bootle *v.* Blundell (1 Mer. 193; Cooper 136), that this rule, as a general rule, applies only to the case of a bill filed to establish the will (*an establishing bill*, as Lord Eldon calls it in one part of his judgment), and an issue directed by the court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For in Lowe *v.* Joliffe

§ 695. **Competency of Witnesses.** The *competency of the witnesses*, and the admissibility of their *opinions* in evidence, have already been considered in the preceding volume.[1]

(1 W. Black. 365), where the bill was filed by the devisee under the will, and an issue *devisavit vel non* was tried at bar, it appears from the report of the case, that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the reporter says, 'to encounter this evidence, the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity;' and, again, the Chief Justice expressed his opinion to be, that all the defendant's witnesses were grossly and corruptly perjured. And after the trial of this issue the will was established. In such a case, to have compelled the devisee to call these witnesses would have been to smother the investigation of truth. Now, in the present case, the application to this court is not by the devisee seeking to establish the will, but by the heir-at-law, calling upon this court to declare the will void, and to have the same delivered up. The heir-at-law does not seek to try his title by an ejectment, and apply to this court to direct that no mortgage or outstanding terms shall be set up against him to prevent his title from being tried at law, but seeks to have a decree in his favor; in substance and effect, to set aside the will. This case, therefore, stands upon a ground directly opposite to that upon which the cases above referred to rest. So far from the heir-at-law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee, and such is the form of his application, that, if he fails upon his issue, he would not be bound himself. For the only result of a verdict in favor of the will would be, that the heir-at-law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule had been held to apply to such a proceeding; and, certainly, neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court, in directing an issue, is to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule that such witnesses must be called by one and such by the other party, but by subjecting the witnesses to the examination in chief of that party whose interest it is to call him, from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party against whom his evidence is expected to make." See 2 Russ. & Mylne, pp. 13–15.

[1] *Ante*, Vol. I. §§ 327–430, 440. As to the competency of executors and trustees, see particularly §§ 333, 409. {A wife is not a competent witness to a will containing a devise to her husband: Pearse *v.* Allis, 110 Mass. 157; Sullivan *v.* Sullivan, 106 id. 474. As to alterations, interlineations, and erasures, see *ante*, Vol. I. § 564. The filling up of blanks is presumed to have been done before the execution, as otherwise the execution would be an idle ceremony: Birch *v.* Birch, 6 Ec. & Mar. Cas. 581.}

END OF VOL. II.