party already in possession of land, under a claim of title by deed, purchases peace and quietness and enjoyment, by the mere extinction of a hostile claim by a release, without covenants of title, he is not estopped from denying the validity of the title, which he has thus far extinguished.[1] Neither is this rule applied in the case of a lease already expired; provided the tenant has either quitted the possession, or has submitted to the title of a new landlord;[2] nor is it applied to the case of a tenant, who has been ousted or evicted by a title paramount; or, who has been drawn into the contract by the fraud or misrepresentation of the lessor, and has, in fact, derived no benefit from the possession of the land.[3] Nor is a defendant in ejectment estopped from showing that the party, under whom the lessor claims, had no title when he conveyed to the lessor, although the defendant himself claims from the same party, if it be by a subsequent conveyance.[4]

§ 26. This rule, in regard to the conclusive effect of recitals in deeds, is *restricted* to the recital of things in particular, as being in existence at the time of the execution of the deed; and does not extend to the mention of things in general terms. Therefore, if one be bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognisance, he shall not be permitted to say, that there was no such indenture, or recognisance. But if the bond be conditioned, that the obligor shall perform all the agreements set down by A., or carry away all the marle in

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1 Fox *v.* Widgery, 4 Greenl. 214; Blight's lessee *v.* Rochester, 7 Wheat. 535, 547; Ham *v.* Ham, 2 Shepl. 351. Thus, where a stranger set up a title to the premises, to which the lessor submitted, directing his lessee in future to pay the rent to the stranger; it was held, that the lessor was estopped from afterwards treating the lessee as his tenant; and that the tenant, upon the lessor afterwards distraining for rent, was not estopped to allege, that the right of the latter had expired. Downs *v.* Cooper, 2 Ad. & El. 252, N. S.

2 England *v.* Slade, 4 T. R. 681; Balls *v.* Westwood, 2 Campb. 11.

3 Hayne *v.* Maltby, 3 T. R. 438; Hearn *v.* Tomlin, Peake's Cas. 191.

4 Doe *v.* Payne, 1 Ad. & El. 538.

a certain close, he is not estopped by this general condition from saying, that no agreement was set down by A., or that there was no marle in the close. Neither does this doctrine apply to that, which is mere description in the deed, and not an essential averment; such as, the quantity of land; its nature, whether arable or meadow; the number of tons, in a vessel chartered by the ton; or the like; for these are but incidental and collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties.[1]

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1 4 Com. Dig. Estoppel A. 2; Yelv. 227, (by Metcalf,) note (1); Doddington's case, 2 Co. 33; Skipworth *v.* Green, 8 Mod. 311; 1 Stra. 610, S. C. Whether the recital of the payment of the consideration money, in a deed of conveyance, falls within the rule, by which the party is estopped to deny it, or belongs to the exceptions, and therefore is open to opposing proof, is a point not clearly agreed. In England, the recital is regarded as conclusive evidence of payment, binding the parties by estoppel. Shelley *v.* Wright, Willes, 9; Cossens *v.* Cossens, ib. 25; Rowntree *v.* Jacob, 2 Taunt. 141; Lampon *v.* Corke, 5 B. & Ald. 606; Baker *v.* Dewey, 1 B. & C. 704; Hill *v.* Manchester and Salford Waterworks, 2 B. & Ad. 544. See, also, Powell *v.* Monson, 3 Mason, 347, 351, 356. But the American Courts have been disposed to treat the recital of the *amount* of the money paid, like the mention of the date of the deed, the quantity of land, the amount of tonnage of a vessel, and other recitals of quantity and value, to which the attention of the parties is supposed to have been but slightly directed, and to which, therefore, the principle of estoppels does not apply. Hence, though the party is estopped from denying the conveyance, and that it was for a valuable consideration, yet the weight of American authority is in favor of treating the recital as only *primâ facie* evidence of the amount paid, in an action of covenant by the grantee to recover back the consideration, or, in an action of *assumpsit* by the grantor, to recover the price which is yet unpaid. The principal cases are,—in Massachusetts, Wilkinson *v.* Scott, 17 Mass. 249; Clapp *v.* Tirrell, 20 Pick. 247;—in Maine, Schilenger *v.* McCann, 6 Greenl. 364; Tyler *v.* Carlton, 7 Greenl. 175; Emmons *v.* Littlefield, 1 Shepl. 233; Burbank *v.* Gould, 3 Shepl. 118;—in New Hampshire, Morse *v.* Shattuck, 4 New Hamp. 229; Pritchard *v.* Brown, ib. 397;—in Connecticut, Belden *v.* Seymour, 8 Conn. 304;—in New York, Shepherd *v.* Little, 14 Johns. 210; Bowen *v.* Bell, 20 Johns. 388; Whitbeck *v.* Whitbeck, 9 Cowen, 266; McCrea *v.* Purmort, 16 Wend. 460;—in Pennsylvania, Weigley *v.* Weir, 7 Serg. & Raw. 311; Watson *v.* Blaine, 12 Serg. & Raw. 131; Jack *v.* Dougherty, 3 Watts, 151;—in Maryland, Higdon *v.*

§ 27. In addition to estoppels by deed, there are two classes of *admissions*, which fall under this head of conclusive presumptions of law; namely, *solemn admissions*, or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact, or tacitly, by pleading; and *unsolemn admissions*, *extra judicium*, which have been *acted upon*, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied, without a breach of good faith. Of the former class are all agreements of counsel, dispensing with legal proof of facts.[1] So if a material averment, well pleaded, is passed over, by the adverse party, without denial, whether it be by confession, or by pleading some other matter, or by demurring in law, it is thereby conclusively admitted.[2] So also, the payment of money into Court, under a rule for that purpose, in satisfaction of so much of the claim, as the party admits to be due, is a conclusive admission of the character, in which the plaintiff sues, and of his claim to the amount paid.[3]

Thomas, 1 Har. & Gill, 139; Lingan *v.* Henderson, 1 Bland, Ch. 236, 249; — in Virginia, Duval *v.* Bibb, 4 Hen. & Munf. 113; Harvey *v.* Alexander, 1 Randolph, 219; — in South Carolina, Curry *v.* Lyles, 2 Hill, 404; Garret *v.* Stuart, 1 McCord, 514; — in Alabama, Mead *v.* Steger, 5 Porter, 498, 507; — in Tennessee, Jones *v.* Ward, 10 Yerger, 160, 166; — in Kentucky, Hutchinson *v.* Sinclair, 7 Monroe, 291, 293; Gully *v.* Grubbs, 1 J. J. Marsh. 389. The Courts in North Carolina seem still to hold the recital of payment as conclusive. Brocket *v.* Foscue, 1 Hawks, 64; Spiers *v.* Clay, 4 Hawks, 22; Jones *v.* Sasser, 1 Dever. & Batt. 452. And in Louisiana, it is made so by legislative enactment. Civil Code of Louisiana, Art. 2234; Forest *v.* Shores, 11 Louis. 416. The earlier cases, to the contrary, together with a farther examination of the subject, may be found in Cowen & Hill's notes to 1 Phil. Evid. p. 108, note 194, and p. 549, note 964. See also Steele *v.* Worthington, 2 Ohio R. 350.

[1] See *post*, § 169, 170, 186, 204, 205; Kohn *v.* Marsh, 3 Rob. Louis. R. 48.

[2] Young *v.* Wright, 1 Campb. 139; Wilson *v.* Turner, 1 Taunt. 398. But if a deed is admitted in pleading, there must still be proof of its identity. Johnston *v.* Cottingham, 1 Armstr. Macartn. & Ogle, R. 11.

[3] Cox *v.* Parry, 1 T. R. 464; Watkins *v.* Towers, 2 T. R. 275; Griffiths *v.* Williams, 1 T. R. 710.

The latter class comprehends, not only all those declarations, but also that line of conduct, by which the party has induced others to act, or has acquired any advantage to himself.[1] Thus a woman, cohabited with, and openly recognised by a man, as his wife, is conclusively presumed to be such, when he is sued as her husband, for goods furnished to her, or for other civil liabilities, growing out of that relation.[2] So where the sheriff returns anything as fact, done in the course of his duty in the service of a precept, it is conclusively presumed to be true against him.[3] And if one party refers the other to a third person for information concerning a matter of mutual interest, in controversy between them, the answer given is conclusively taken as true, against the party referring.[4] This subject will hereafter be more fully considered, under its appropriate title.[5]

§ 28. Conclusive presumptions of law are also made in respect to *infants*, and *married women*. Thus, an infant, under the age of seven years, is conclusively presumed to be incapable of committing any felony, for want of discretion;[6] and under fourteen, a male infant is presumed incapable of committing a rape.[7] A female under the age of ten years is presumed incapable of consenting to sexual intercourse.[8] Where the husband and wife have cohabited together, as such, and no impotency is proved, the issue is conclusively presumed to be *legitimate*, though the wife is proved to have

[1] See *post*, § 184, 195, 196, 207, 208.

[2] Watson *v.* Threlkeld, 2 Esp. 637; Munro *v.* De Chemant, 4 Campb. 215; Robinson *v.* Nahon, 1 Campb. 245; Post, § 207.

[3] Simmons *v.* Bradford, 15 Mass. 82.

[4] Lloyd *v.* Willan, 1 Esp. 178; Delesline *v.* Greenland, 1 Bay, 458; Williams *v.* Innes, 1 Campb. 364; Burt *v.* Palmer, 5 Esp. 145.

[5] See *post*, § 169 to 212.

[6] 4 Bl. Comm. 23.

[7] 1 Hal. P. C. 630; 1 Russell on Crimes, 801; Rex *v.* Phillips, 8 C. & P. 736; Rex *v.* Jordan, 9 C. & P. 118.

[8] 1 Russell on Crimes, 810.

been at the same time guilty of infidelity.[1] And if a wife act in company with her husband, in the commission of a felony, other than treason or homicide, it is conclusively presumed, that she acted under his coercion, and consequently without any guilty intent.[2]

§ 29. Where the succession to estates is concerned, the question, which of two persons is to be presumed the survivor, where both *perished in the same calamity*, but the circumstances of their deaths are unknown, has been considered in the Roman Law, and in several other codes, but in the Common Law, no rule on the subject has been laid down. By the Roman Law, if it were the case of father and son, perishing together in the same shipwreck or battle, and the son was under the age of puberty, it was presumed that he died first, but if above that age, that he was the survivor; upon the principle, that in the former case the elder is generally the more robust, and in the latter, the younger.[3] The French code has regard to the ages of fifteen and sixty; presuming that of those under the former age, the eldest survived; and that of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male is presumed to have survived; if they were of the same sex, the presumption is in favor of the survivorship of the

[1] Cope *v.* Cope, 1 Mood. & Rob. 269, 276; Morris *v.* Davies, 3 C. & P. 215; St. George *v.* St. Margaret, 1 Salk. 123; Banbury Peerage case, 2 Selw. N. P. (by Wheaton) 558; 1 Sim. & Stu. 153; S. C. Rex *v.* Luffe, 8 East, 193. But if they lived apart, though within such distance as afforded an opportunity for intercourse, the presumption of legitimacy of the issue may be rebutted. Morris *v.* Davis, 5 C. & Fin. 163. Non-access is not presumed from the fact, that the wife lived in adultery with another; it must be proved *aliunde*. Regina *v.* Mansfield, 1 G. & Dav. 7.

[2] 4 Bl. Comm. 28, 29; Anon. 2 East, P. C. 559.

[3] Dig. Lib. 34, tit. 5; De rebus dubiis, l. 9, § 1, 3; Ib. l. 16, 22, 23; Menochius de Præsumpt. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

younger, as opening the succession in the order of nature.[1] The same rules were in force in the territory of Orleans at the time of its cession to the United States, and have since been incorporated into the code of Louisiana.[2]

§ 30. This question first arose, in Common Law Courts, upon a motion for a *mandamus*, in the case of Gen. Stanwix, who perished, together with his second wife, and his daughter by a former marriage, on the passage from Dublin to England; the vessel in which they sailed having never been heard from. Hereupon his nephew applied for letters of administration, as next of kin; which was resisted by the maternal uncle of the daughter, who claimed the effects, upon the presumption of the Roman Law, that she was the survivor. But this point was not decided, the Court decreeing for the nephew upon another ground, namely, that the question could properly be raised only upon the statute of distributions, and not upon an application for administration by one clearly entitled to administer by consanguinity.[3] The point was afterwards raised in Chancery, where the case was, that the father had bequeathed legacies to such of his children as should be living at the time of his death; and he having perished, together with one of the legatees, by the foundering

[1] Code Civil, § 720, 721, 722; Duranton, Cours de Droit Français, tom. 6, p. 39, 42, 43, 48, 67, 69; Rogron, Code Civil Expli. 411, 412; Toullier, Droit Civil Français, tom. 4, p. 70, 72, 73. By the Mahometan Law of India, when relatives thus perish together, "it is to be presumed, that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's Moohummudan Law of Inheritance, 172. Such also was the rule of the ancient Danish Law. "Filius in communione cum patre et matre denatus, pro non nato habetur." Ancher, Lex Cimbrica, lib. 1, c. 9, p. 21.

[2] Civil Code of Louisiana, art. 930 – 933; Digest of the Civil Laws of the Territory of Orleans, art. 60 – 63.

[3] Rex *v.* Dr. Hay, 1 W. Bl. 640. The matter was afterwards compromised, upon the recommendation of Lord Mansfield, who said he knew of no legal principle, on which he could decide it. See 2 Phillim. 268, in note; Fearne's Posth. Works, 38.

of a vessel on a voyage from India to England, the question was, whether the legacy was lapsed by the death of the son in the lifetime of the father. The Master of the Rolls refused to decide the question by presumption, and directed an issue, to try the fact by a Jury.[1] But the Prerogative Courts adopt the presumption, that both perished together, and that therefore neither could transmit rights to the other.[2] In the absence of all evidence of the particular circumstances of the calamity, probably this rule will be found the safest and most convenient;[3] but if any circumstances of the death of either party can be proved, there can be no inconvenience in submitting the question to a Jury, to whose province it peculiarly belongs.

§ 31. Conclusive presumptions of law are not unknown to the *law of nations*. Thus, if a neutral vessel be found carrying dispatches of the enemy between different parts of the enemy's dominions, their effect is presumed to be hostile.[4] The *spoliation of papers*, by the captured party, has been

[1] Mason *v.* Mason, 1 Meriv. 308.

[2] Wright *v.* Netherwood, 2 Salk. 593, note (a) by Evans; more fully reported under the name of Wright *v.* Sarmuda, 2 Phillim. 266–277, note (c); Taylor *v.* Diplock, 2 Phillim 261, 278, 280; Selwyn's case, 3 Hagg. Eccl. R. 748. In the goods of Murray, 1 Curt 596; Satterthwaite *v.* Powell, 1 Curt. 705. See also 2 Kent's Comm. 435, 436, (4th ed.), note (b). In the brief note of Colvin *v.* H. M. Procurator Gen. 1 Hagg. Eccl. R. 92, where the husband, wife, and infant child (if any) perished together, the Court seem to have held, that the *primâ facie* presumption of law was, that the husband survived. But the point was not much moved. The subject of presumed survivorship is fully treated by Mr. Burge, in his Commentaries on Colonial and Foreign Laws, Vol. 4, p. 11–29. In Chancery it has recently been held, that a presumption of priority of death might be raised from the comparative age, health, and strength of the parties; and therefore, where two brothers perished by shipwreck, the circumstances being wholly unknown, the elder being the master, and the younger the second mate of the ship, it was presumed that the latter died first. Sillick *v.* Booth, 1 Y. & C. New Cas. 117.

[3] It was so held in Coye *v.* Leach, 8 Metc. 371.

[4] The Atalanta, 6 Rob. Adm. 440.

regarded, in all the States of Continental Europe, as conclusive proof of guilt; but in England and America it is open to explanation, unless the cause labors under heavy suspicions, or there is a vehement presumption of bad faith or gross prevarication.[1]

§ 32. In these cases of conclusive presumption, the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good. It does not, for example, assume that all landlords have good titles; but that it will be a public and general inconvenience to suffer tenants to dispute them. Neither does it assume, that all averments and recitals in deeds and records are true; but, that it will be mischievous, if parties are permitted to deny them. In does not assume, that all simple contract debts, of six years' standing, are paid, nor that every man, quietly occupying land twenty years as his own, has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods affords, should not be countenanced; and that society is more benefitted by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things, which are possible; on the contrary, it is founded, not only on the possibility of their existence, but on their occasional occurrence; and it is against the mischiefs of their occurrence, that it interposes its protecting prohibition.[2]

§ 33. The SECOND CLASS of presumptions of law, answering to the *presumptiones juris* of the Roman Law, which may always be overcome by opposing proof,[3] consists of those termed *disputable presumptions*. These, as well as the for-

[1] The Pizarro, 2 Wheat. 227, 241, 242, note (e); The Hunter, 1 Dods. Adm. 480, 486.

[2] See 6 Law Mag. 348, 355, 356.

[3] Heinnec. ad Pand. Pars. iv. § 124.

mer, are the result of the general experience of a connexion between certain facts or things, the one being usually found to be the companion, or the effect, of the other. The connexion, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient, that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a Jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode, *the law* defines the nature and amount of the evidence, which it deems sufficient to establish a *primâ facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the Jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside, as being against evidence.

§ 34. The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all farther evidence; but only excusing or dispensing with it, till some proof is given, on the other side, to rebut the presumption thus raised. Thus, as men do not generally violate the penal code, the law presumes every man *innocent;* but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the Jury, in every case, as matter of evidence, to the benefit of which the party is entitled. And where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.[1] On the other hand, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended, until the contrary appears. Thus on a charge

[1] Hodge's case, 2 Lewin, Cr. Cas. 227, per Alderson, B.

of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused.[1] The same presumption arises in civil actions, where the act complained of was unlawful.[2] So also, as men generally own the personal property they possess, proof of possession is presumptive proof of *ownership*. But possession of the fruits of

[1] Foster's Crown Law, 255; Rex *v.* Farrington, Rus. & Ry. 207.

[2] In Bromage *v.* Prosser, 4 B. & C. 247, 255, 256, which was an action for words spoken of the plaintiffs, in their business and trade of bankers, the law of implied or legal malice, as distinguished from malice in fact, was clearly expounded by Mr. Justice Bayley, in the following terms. — "Malice, in the common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. Russell on Crimes, 614, n. 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in action of slander. In an ordinary action for words, it is sufficient to charge, that the defendant spoke them falsely; it is not necessary to state, that they were spoken maliciously. This is so laid down in Styles, 392, and was adjudged upon error in Mercer *v.* Sparks, Owen, 51; Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously, but the Court answered, that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander, as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communication to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in Edmonson *v.* Stevenson, Bull. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander."

crime, recently after its commission, is *primâ facie*, evidence of *guilty possession;* and, if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive.[1] This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption, that he was present and concerned in the offence.[2] The like presumption is raised in the case of murder, accompanied by robbery;[3] and in the case of the possession of an unusual quantity of counterfeit money.[4]

§ 35. This presumption of *innocence* is so strong, that even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved by the party alleging the guilt; though the general rule of law devolves the burden of proof on the party holding the affirmative. Thus, where the plaintiff complained, that the defendants, who had chartered his ship, had put on board an article highly inflammable and dangerous, without giving notice of its nature to the master or others in charge of the ship, whereby the vessel was burnt; he was held bound to prove this negative

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1 Rex *v.* ——, 2 C. & P. 459; Regina *v.* Coote, 1 Armst. Macartn. & Ogle, R. 337; The State *v.* Adams, 1 Hayw. 463; Wills on Circumstantial Evidence, 67. Where the things stolen are such as do not pass from hand to hand, (e. g. the ends of unfinished woollen clothes,) their being found in the prisoner's possession, two months after they were stolen, is sufficient to call for an explanation from him how he came by them, and to be considered by the Jury. Rex *v.* Partridge, 7 C. & P. 551. Furtum præsumitur commissum ab illo, penes quem res furata inventa fuerit, adeo ut si non docuerit à quo rem habuerit, justè, ex illa inventione, poterit subjici tormentis. Mascard. De Probat. Vol. 2, Concl. 834; Menoch. De Præsumpt. Lib. 5, Præsumpt. 31.

2 Rickman's case, 2 East, P. C. 1035.

3 Wills on Circumst. Evid. 72.

4 Rex *v.* Fuller et al. Russ. & Ry. 308.

averment.[1] In some cases, the presumption of innocence has been deemed sufficiently strong to overthrow the presumption of life. Thus, where a woman, twelve months after her husband was last heard of, married a second husband, by whom she had children; it was held, that the Sessions, in a question upon their settlement, rightly presumed that the first husband was dead at the time of the second marriage.[2]

§ 36. An *exception* to this rule, respecting the presumption of innocence, is admitted in the case of a libel. For where a libel is sold in a bookseller's shop, by his servant, in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This exception is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. Whether such evidence is conclusive against the master, or not, the books are not perfectly agreed; but it seems conceded, that the want of privity in fact by the master is not sufficient to excuse him; and that the presumption of his guilt is so strong as to fall but little short of conclusive evidence.[3] Proof, that the libel was sold in violation of express orders from the master, would clearly take the case

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1 Williams *v.* E. Ind. Co. 3 East, 192; Bull. N. P. 298. So of allegations, that a party had not taken the sacrament; Rex *v.* Hawkins, 10 East, 211; had not complied with the act of uniformity, &c.; Powell *v.* Milburn, 3 Wills. 355, 366; that goods were not legally imported; Sissons *v.* Dixon, 5 B. & C. 758; that a theatre was not duly licensed; Rodwell *v.* Redge, 1 C. & P. 220.

2 Rex *v.* Twyning, 2 B. & Ald. 385. But in another case, where, in a question upon the derivative settlement of the second wife, it was proved, that a letter had been written by the first wife, from Van Diemen's Land, bearing date only twenty-five days prior to the second marriage, it was held, that the Sessions did right in presuming that the first wife was living at the time of the second marriage. Rex *v.* Harborne, 2 Ad. & El 540.

3 Rex *v.* Gutch et al. 1 M. & M. 433; Harding *v.* Greening, 8 Taunt. 42; Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Walter, 3 Esp 21; 1 Russ. on Crimes, 341, (3d ed. p. 251); Ph. & Am. on Evid. 466; 1 Phil. Evid. 446.

out of this exception, by showing that it was not sold in the ordinary course of the servant's duty. The same law is applied to the publishers of newspapers.[1]

§ 37. The presumption of innocence may be overthrown, and a *presumption of guilt* be raised, by the misconduct of the party in suppressing or *destroying evidence*, which he ought to produce, or to which the other party is entitled. Thus, the spoliation of papers, material to show the neutral character of a vessel, furnishes a strong presumption, *in odium spoliatoris*, against the ship's neutrality.[2] A similar presumption is raised against a party, who has obtained possession of papers from a witness, after the service of a *subpœna duces tecum* upon the latter for their production, which is withheld.[3] The general rule is, *Omnia, præsumuntur contra spoliatorem.*[4] His conduct is attributed to his supposed knowledge that the truth would have operated against him. Thus, also, where the finder of a lost jewel would not produce it, it was presumed against him, that it was of the highest value of its kind.[5] But if the defendant has been guilty of no fraud, or

[1] 1 Russ. on Crimes, 341; Rex *v.* Nutt, Bull. N. P. 6; (3d ed. p. 251); Southwick *v.* Stevens, 10 Johns. 443.

[2] The Hunter, 1 Dods. 480; The Pizarro, 2 Wheat. 227; 1 Kent, Comm. 157; Ante, § 31.

[3] Leeds *v.* Cook, 4 Esp. 256. But a refusal to produce books and papers, under a notice, though it lays a foundation for the introduction of secondary evidence of their contents, has been held to afford no evidence of the fact sought to be proved by them; such, for example, as the existence of a deed of conveyance from one mercantile partner to another. Hanson *v.* Eustace, 2 Howard, S. C. Rep. 653.

[4] 2 Poth. Obl. (by Evans,) 292; Dalston *v.* Coatsworth, 1 P. Wms. 731; Cowper *v.* Earl Cowper, 2 P. Wms. 720, 748–752; Rex *v.* Arundel, Hob. 109, explained in 2 P. Wms. 748, 749; D. of Newcastle *v.* Kinderley, 8 Ves. 363, 375; Annesley *v.* E. of Anglesea, 17 Howell's St. Tr. 1430. See also Sir Samuel Romilly's argument in Lord Melville's case, 29 Howell's St. Tr. 1194, 1195; Anon. 1 Ld. Raym. 731. In Barker *v.* Ray, 2 Russ. 73, the Lord Chancellor thought that this rule had in some cases been pressed a little too far. See also Harwood *v.* Goodright, Cowp. 86.

[5] Armory *v.* Delamirie, 1 Stra. 505.

improprer conduct, and the only evidence against him is of the delivery to him of the plaintiff's goods, of unknown quality, the presumption is, that they were goods of the cheapest quality.[1] The *fabrication of evidence*, however, does not of itself furnish any presumption of law against the innocence of the party, but is a matter to be dealt with by the Jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts; of which several instances are stated in the books.[2] Neither has the mere nonproduction of books, upon notice, any other *legal* effect, than to admit the other party to prove their contents by parol, unless under special circumstances.[3]

§ 38. Other presumptions, of this class, are founded upon the experience of human *conduct in the course of trade;* men being usually vigilant in guarding their property, and prompt in asserting their rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues. Thus where a bill of exchange, or an order for the payment of money, or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is raised, that he has paid the money due upon it, and delivered the goods ordered.[4] A bank note will be presumed to have been signed before it was issued, though the signature be torn off.[5] So, if a deed is found in the hands of the grantee, having on its face the evidence of its regular execution, it will be presumed to have been delivered by the grantor.[6] So, a receipt for the last year's or quarter's rent is

[1] Clunnes *v.* Pezzey, 1 Campb. 8.

[2] See 3 Inst. 104; Wills on Circumst. Evid. 113.

[3] Cooper *v.* Gibbons, 3 Campb. 363.

[4] Gibbon *v.* Featherstonhaugh, 1 Stark. R. 225; Egg *v.* Barnett, 3 Esp. 196; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Weidner *v.* Schweigart, 9 Serg. & R. 385; Shepherd *v.* Currie, 1 Stark. R. 454; Brembridge *v.* Osborne, Ib. 374.

[5] Murdock *v.* Union Bank Louis. 2 Rob. Louis. R. 112.

[6] Ward *v.* Lewis, 4 Pick. 518.