PART II.

OF THE RULES WHICH GOVERN THE PRODUCTION OF TESTIMONY.

CHAPTER I.

OF THE RELEVANCY OF EVIDENCE.

§ 49. In trials of fact, without the aid of a Jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the Judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence. But in trials by Jury, it is the province of the presiding Judge to determine all questions on the admissibility of evidence to the Jury; as well as to instruct them in the rules of law, by which it is to be weighed. Whether there be any evidence or not, is a question for the Judge; whether it is sufficient evidence, is a question for the Jury.[1] If the decision of the question of admissibility depends

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[1] Per Buller, J. in Carpenters *v.* Hayward, Doug. 374. The notion that the Jury have the right, in any case, to determine questions of law, was strongly denied, and their province defined by Story, J., in the United States *v.* Battiste, 2 Sumn. 243. "Before I proceed," said he, "to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the Jury are the judges of the law, as well as of

on the decision of other questions of fact, such as the fact of interest, for example, or of the execution of a deed, these pre-

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the fact. My opinion is, that the Jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the Court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the Jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the Jury as to the law; and it is the duty of the Jury to follow the law, as it is laid down by the Court. This is the right of every citizen; and it is his only protection. If the Jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different Juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the Court would not have any right to review the law, as it had been settled by the Jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the Jury, actually was. On the contrary, if the Court should err, in laying down the law to the Jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular Court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a Jury may understand it, or choose, from wantonness or ignorance, or accidental mistake, to interpret it. If I thought that the Jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion." The same opinion, as to the province of the Jury, was strongly expressed by Lord C. J. Best, in Levi *v.* Mylne, 4 Bing. 195.

The same subject was more fully considered, in The Commonwealth *v.* Porter, 10 Metc. 263, which was an indictment for selling intoxicating liquors without license. At the trial, the defendant's counsel, being about to argue the questions of law to the Jury, was stopped by the Judge, who ruled, and so instructed the Jury, that it was their duty to receive the law from the Court, and implicitly to follow its direction upon matters of law. Exceptions being taken to this ruling of the Judge, the point was elaborately argued in

liminary questions of fact are, in the first instance, to be tried by the Judge; though he may, at his discretion, take the

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bank, and fully considered by the Court, whose judgment, delivered by Shaw, C. J., concluded as follows: — "On the whole subject, the views of the Court may be summarily expressed in the following propositions: That in all criminal cases, it is competent for the Jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the Court, in the form of a special verdict. But it is optional with the Jury thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit. In thus rendering a general verdict, the Jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and they may thus incidentally pass on questions of law. In forming and returning such general verdict, it is within the legitimate authority and power of the Jury to decide definitively upon all questions of fact involved in the issue, according to their judgment, upon the force and effect of the competent evidence laid before them; and if in the progress of the trial, or in the summing up and charge to the Jury, the Court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the Jury to revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct, and warranted by the evidence. But it is the duty of the Court to instruct the Jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the Court, upon matters of law. And it is the duty of the Jury to receive the law from the Court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the Jury to revise, reconsider, or decide contrary to such opinion or direction of the Court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent and in the same manner, as they are conscientiously bound to decide all questions of fact according to the evidence. It is no valid objection to this view of the duties of jurors, that they are not amenable to any legal prosecution for a wrong decision in any matter of law; it may arise from an honest mistake of judgment, in their apprehension of the rules and principles of law, as laid down by the Court, especially in perplexed and complicated cases, or from a mistake of judgment in applying them honestly to the facts proved. The same reason applies to the decisions of Juries upon questions of fact, clearly within their legitimate powers; they are not punishable for deciding wrong. The law vests in them the power to judge, and it will presume that they judge honestly, even though there may be reason to apprehend that they judge erroneously; they cannot, therefore, be held responsible for any such decision, unless upon evidence

opinion of the Jury upon them. But where the question is mixed, consisting of law and fact, so intimately blended, as

which clearly establishes proof of corruption, or other wilful violation of duty. It is within the legitimate power, and is the duty of the Court, to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases or works of supposed authority, which may be offered upon either side; to decide upon all collateral and incidental proceedings; and to confine parties and counsel to the matters within the issue. As the Jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this Court are of opinion that the defendant has a right, by himself or his counsel, to address the Jury, under the general superintendence of the Court, upon all the material questions involved in the issue, and to this extent, and in this connexion, to address the Jury upon such questions of law as come within the issue to be tried. Such address to the Jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the Courts in this Commonwealth in criminal cases, in which it is within the established authority of a Jury, if they see fit, to return a general verdict, embracing the entire issue of law and fact." 10 Metc. 285–287. See, also, the opinion of Lord Mansfield to the same effect, in Rex *v.* The Dean of St. Asaph, 21 How. St. Tr. 1039, 1040; and of Mr. Hargrave in his note, 276 to Co. Lit. 155, where the earlier authorities are cited.

The application of this doctrine to particular cases, though generally uniform, is not perfectly so where the question is a mixed one of law and fact. Thus, the question of *probable cause* belongs to the Court; but where it is a mixed question of law and fact intimately blended, it has been held right to leave it to the Jury, with proper instructions as to the law. McDonald *v.* Rooke, 2 Bing. N. C. 217. And see Taylor *v.* Willans, 2 B. & Ad. 845; 6 Bing. 183; Post, Vol. 2, § 454. The Judge has a right to act upon all the uncontradicted facts of the case; but where the credibility of witnesses is in question, or some material fact is in doubt, or some inference is attempted to be drawn from some fact not distinctly sworn to, the Judge ought to submit the question to the Jury. Michell *v.* Williams, 11 M. & W. 216, 217, per Alderson, B.

In trespass *de bonis asportatis*, the *bona fides* of the defendant in taking the goods, and the reasonableness of his belief that he was executing his duty, and of his suspicion of the plaintiff, are questions for the Jury. Wedge *v.* Berkeley, 6 Ad. & El. 663; Hazeldine *v.* Grove, 3 Ad. & El. 997, N. S.; Hughes *v.* Buckland, 15 M. & W. 346. In a question of *pedigree*, it is for the Judge to decide whether the person, whose declarations are offered in evidence, was a member of the family, or so related as to be entitled to be heard on such a question. Doe *v.* Davies, 11 Jur. 607.

The question, what are the *usual covenants* in a deed, is a question for the

not to be easily susceptible of separate decision, it is submitted to the Jury, who are first instructed by the Judge in the principles and rules of law, by which they are to be governed in finding a verdict; and these instructions they are bound to follow.[1] If the genuineness of a deed is the fact in question,

Jury, and not a matter of construction, for the Court. Bennett *v.* Womack, 3 C. & P. 96.

In regard to *reasonableness of time, care, skill*, and the like, there seems to have been some diversity in the application of the principle; but it is conceded that "whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the Jury, acting under the direction of the Judge, upon the particular circumstances of each case." Mellish *v.* Rawdon, 9 Bing. 416, per Tindal, C. J. The Judge is to inform the Jury as to the degree of diligence, or care, or skill which the law demands of the party, and what duty it devolves on him, and the Jury are to find whether that duty has been done. Hunter *v.* Caldwell, 11 Jur. 770; Burton *v.* Griffiths, 11 M. & W. 817; Facey *v.* Hurdom, 3 B. & C. 213; Stewart *v.* Cauty, 8 M. & W. 160; Parker *v.* Palmer, 4 B. & Ald. 387; Pitt *v.* Shew, ib. 206; Mount *v.* Larkins, 8 Bing. 108; Phillips *v.* Irving, 7 M. & Gr. 325; Reece *v.* Rigby, 4 B. & Ald. 202. But where the duty in regard to time is established by uniform usage, and the rule is well known; as in the case of notice of the dishonor of a bill or note, where the parties live in the same town; or, of the duty of sending such notice by the *next* post, packet, or other ship; or of the reasonable hours or business hours of the day, within which a bill is to be presented, or goods to be delivered, or the like; in such cases, the time of the fact being proved, its reasonableness is settled by the rule, and is declared by the Judge. See Story on Bills, § 231–234, 328, 349; Post, Vol. 2, § 178, 179, 186–188.

Whether by the word "month," in a contract, is meant a calendar or a lunar month, is a question of law; but whether parties, in the particular case, intended to use it in the one sense or the other, is a question for the Jury, upon the evidence of circumstances in the case. Simpson *v.* Margitson, 12 Jur. 155; Lang *v.* Gale, 1 M. & S. 111; Hutchinson *v.* Bowker, 5 M. & W. 535; Smith *v.* Wilson, 3 B. & Ad. 728; Jolly *v.* Young, 1 Esp. 186; Walker *v.* Hunter, 2 M. Gr. & Sc. 324.

[1] 1 Stark. Evid. 510, 519–526; Hutchinson *v.* Bowker, 5 M. & W. 535; Williams *v.* Byrne, 2 N. & P. 139; McDonald *v.* Rooke, 2 Bing. N. C. 217; James *v.* Phelps, 11 Ad. & El. 483; 3 P. & D. 231, S. C.; Panton *v.* Williams, 2 Ad. & El. 169, N. S.; Townsend *v.* The State, 2 Blackf. 151; Montgomery *v.* Ohio, 11 Ohio R. 424. Questions of interpretation, as well as of construction of written instruments, are for the Court alone. Post, § 277, note (1).

the preliminary proof of its execution, given before the Judge, does not relieve the party offering it, from the necessity of proving it to the Jury.[1] The Judge only decides, whether there is, *primâ facie*, any reason for sending it at all to the Jury.[2]

§ 50. The production of evidence to the Jury is governed by certain principles, which may be treated under four general heads or rules. The *first* of these is, that the evidence must correspond with the allegations, and be confined to the point in issue. The *second* is, that it is sufficient, if the *substance* only of the issue be proved. The *third* is, that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the *fourth* is, that the best evidence, of which the case, in its nature, is susceptible, must always be produced. These we shall now consider in their order.

§ 51. *First.* The pleadings at Common Law, are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side, and denied on the other, called the *issue.* If it is a proposition of fact, it is to be tried by the Jury, upon the evidence adduced. And it is an established rule, which we state as the FIRST RULE, governing in the production of evidence, that the *evidence offered must correspond with the allegations, and be confined to the point in issue.* This rule supposes the allegations to be material and necessary. Surplusage, therefore, need not be proved; and the proof, if offered, is to be rejected. The term, *surplusage*, comprehends whatever may be stricken from the record, without destroying the plaintiff's right of action; as if, for example, in suing the defendant for breach of warranty upon the sale of goods, he should set forth, not only, that the goods were not such as the defendant warranted them to be, but that

[1] Ross *v.* Gould, 5 Greenl. 204.

[2] The subject of the functions of the Judge, as distinguished from those of the Jury, is fully and ably treated in an article in the Law Review, No. 3, for May, 1845, p. 27–44.

the defendant well knew that they were not.[1] But it is not every immaterial or unnecessary allegation that is surplusage; for if the party, in stating his title, should state it with unnecessary particularity, he must prove it as alleged. Thus, if, in justifying the taking of cattle damage feasant, in which case it is sufficient to allege, that they were doing damage in his *freehold*, he should state a seisin *in fee*, which is traversed, he must prove the seisin in fee;[2] for if this were stricken from the declaration, the plaintiff's entire title would be destroyed. And it appears, that, in determining the question, whether a particular averment can be rejected, regard is to be had to the nature of the averment itself, and its connexion with the substance of the charge, or claim, rather than to its grammatical collocation or structure.[3]

§ 52. This rule excludes all evidence of *collateral facts*, or those, which are incapable of affording any reasonable presumption or inference, as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the Jurors from the point in issue, and to excite prejudice, and mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.[4] Thus, where the question between landlord and tenant was, whether the rent was payable quarterly, or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was held inadmissible.[5] And where, in covenant, the issue was, whether the

[1] Williamson *v.* Allison, 2 East, 446; Peppin *v.* Solomons, 5 T. R. 496; Bromfield *v.* Jones, 4 B. & C. 380.

[2] Sir Francis Leke's case, Dyer, 365; 2 Saund. 206 *a*, note 22; Stephen on Pleading, 261, 262; Bristow *v.* Wright, Doug. 665; Miles *v.* Sheward, 8 East, 7, 8, 9; 1 Smith's Leading Cases, 328, note.

[3] 1 Stark. Evid. 386.

[4] Post, § 448. But counsel may, on cross examination, inquire as to a fact apparently irrelevant, if he will undertake afterwards to show its relevancy, by other evidence. Haigh *v.* Belcher, 7 C. & P. 339.

[5] Carter *v.* Pryke, Peake's Cas. 95.

defendant, who was a tenant of the plaintiff, had committed waste, evidence of bad husbandry, not amounting to waste, was rejected.[1] So, where the issue was, whether the tenant had *permitted* the premises to be out of repair, evidence of *voluntary* waste was held irrelevant.[2] This rule was adhered to, even in the cross-examination of witnesses; the party not being permitted, as will be shown hereafter,[3] to ask the witness a question in regard to a matter not relevant to the issue, for the purpose of afterwards contradicting him.[4]

§ 53. In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connexion with it; and therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases, in which the *knowledge* or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing, and was therefore admitted. Thus, when the question was, whether the defendant, being the acceptor of a bill of exchange, either knew that the name of the payee was fictitious, or else had given a general authority to the drawer, to draw bills on him payable to fictitious persons, evidence was admitted to show, that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place, at which they bore date.[5] So, in an indict-

[1] Harris *v.* Mantle, 3 T. R. 397. See also Balcetti *v.* Serani, Peake's Cas. 142; Furneaux *v.* Hutchins, Cowp. 807; Doe *v.* Sisson, 12 East, 61; Holcombe *v.* Hewson, 2 Campb. 391; Viney *v.* Barss, 1 Esp. 292; Clothier *v.* Chapman, 14 East, 331, note.

[2] Edge *v.* Pemberton, 12 M. & W. 187.

[3] See *post*, § 448, 449, 450.

[4] Crowley *v.* Page, 7 Car. & P. 789; Harris *v.* Tippet, 2 Campb. 637; Rex *v.* Watson, 2 Stark. R. 116; Commonwealth *v.* Buzzell, 16 Pick. 157, 158; Ware *v.* Ware, 8 Greenl. 42. A further reason may be, that the evidence, not being to a material point, cannot be the subject of an indictment for perjury. Odiorne *v.* Winkley, 2 Gall. 51, 53.

[5] Gibson *v.* Hunter, 2 H. Bl. 288; Minet *v.* Gibson, 3 T. R. 481; 1 H. Bl. 569.

ment for knowingly uttering a forged document, or a counterfeit bank note, proof of the possession, or of the prior or subsequent utterance of other false documents or notes, though of a different description, is admitted, as material to the question of guilty knowledge or intent.[1] So, in actions for defamation, evidence of other language spoken or written by the defendant at other times, is admissible under the general issue, in proof of the spirit and intention of the party, in uttering the words or publishing the libel charged; and this, whether the language thus proved be in itself actionable or not.[2] Cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it.

§ 53 *a.* In proof of the *ownership of lands*, by acts of possession, the same latitude is allowed. It is impossible, as has been observed, to confine the evidence to the precise spot on which a supposed trespass was committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the Jury that the place in dispute belonged to the party, if the other parts did. The evidence of such acts is admissible *proprio vigore*, as tending to prove that he who did them is the owner of the soil; though if they were done in the absence of all persons interested to dispute them, they are of less weight.[3]

[1] Rex *v.* Wylie, 1 New Rep. 92, 94. See other examples in McKenney *v.* Dingley, 4 Greenl. 172; Bridge *v.* Eggleston, 14 Mass. 245; Rex *v.* Ball, 1 Campb. 324; Rex *v.* Roberts, 1 Campb. 399; Rex *v.* Houghton, Russ. & Ry. 130; Rex *v.* Smith, 4 C. & P. 411; Rickman's case, 2 East, P. C. 1035; Robinson's case, ib. 1110, 1112; Rex *v.* Northampton, 2 M. & S. 262; Commonwealth *v.* Turner, 3 Metc. R. 19.

[2] Pearson *v.* Le Maitre, 5 M. & Gr. 700, 6 Scott, N. R. 607, S. C.; Rustell *v.* Macquister, 1 Campb. 49, n.; Saunders *v.* Mills, 6 Bing. 213; Warwick *v.* Foulkes, 12 M. & W. 507; Long *v.* Barrett, 7 Ir. Law R. 439; 8 Ir. Law R. 331, S. C. on error.

[3] Jones *v.* Williams, 2 M. & W. 326, per Parke, B. And see Doe *v.* Kemp, 7 Bing. 332; 2 Bing. N. C. 102.

§ 54. To this rule may be referred the admissibility of evidence of the *general character* of the parties. In civil cases, such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it.[1] Thus, evidence impeaching the previous general character of the wife or daughter in regard to chastity, is admissible, in an action by the husband or father for seduction; and this, again, may be rebutted by counter proof.[2] But such evidence, referring to a time subsequent to the act complained of, is rejected.[3] And generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it.[4] So also, in criminal prosecutions, the charge of a rape, or of an assault with intent to commit a rape, is considered as involving not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connexion with the prisoner; though not with other persons.[5] And in all cases, where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him.[1]

[1] Att'y Gen. *v.* Bowman, 2 B. & P. 532, expressly adopted in Fowler *v.* Ætna Fire Ins. Co. 6 Cowen, 673, 675; Anderson *v.* Long, 10 S. & R. 55; Humphrey *v.* Humphrey, 7 Conn. 116; Nash *v.* Gilkeson, 5 S. & R. 352; Jeffries *v.* Harris, 3 Hawks, 105.

[2] Bate *v.* Hill, 1 C. & P. 100; Verry *v.* Watkins, 7 C. & P. 308; Carpenter *v.* Wahl, 11 Ad. & El. 803; 3 P. & D. 457, S. C.; Elsam *v.* Faucett, 2 Esp. 562; Dodd *v.* Norris, 3 Campb. 519. See contra, M'Rea *v.* Lilly, 1 Iredell, R. 118.

[3] Elsam *v.* Faucett, 2 Esp. 562; Coote *v.* Berty, 12 Mod. 232. The rule is the same in an action by a woman, for a breach of a promise of marriage. See Johnson *v.* Caulkins, 1 Johns. Ca. 116; Boynton *v.* Kellogg, 3 Mass. 189; Foulkes *v.* Sellway, 3 Esp. 236; Bamfield *v.* Massey, 1 Campb. 460; Dodd *v.* Norris, 3 Campb. 519.

[4] Ruan *v.* Perry, 3 Caines, 120, reviewed and approved in 6 Cowen, 675. See also Walker *v.* Stephenson, 3 Esp. 284.

[5] Rex *v.* Clarke, 2 Stark. 241; 1 Phil. & Am. on Evid. 490; Low *v.* Mitchell, 6 Shepl. 372; Commonwealth *v.* Murphy, 14 Mass. 387; 2 Stark Evid. (by Metcalf,) 369, note (1); Rex *v.* Martin, 6 C. & P. 562; Rex *v.* Hodgson, Russ. & Ry. 211. But in an action on the case for seduction, evidence of particular acts of unchastity with other persons is admissible. Verry *v.* Watkins, 7 C. & P. 308.

§ 55. It is not every allegation of fraud, that may be said to put the character in issue; for if it were so, the defendant's character would be put in issue in the ordinary form of declaring in assumpsit. This expression is technical, and confined to certain actions, from the nature of which, as in the preceding instances, the character of the parties, or some of them, is of particular importance. This kind of evidence is therefore rejected, wherever the general character is involved by the plea only, and not by the nature of the action.[2] Nor is it received in actions of assault and battery,[3] nor in assumpsit;[4] nor in trespass on the case for malicious prosecution;[5] nor in an information for a penalty for violation of the civil police or revenue laws;[6] nor in ejectment, brought in order to set aside a will, for fraud committed by the defendant.[7] Whether evidence, impeaching the plaintiff's previous general character, is admissible in an action of slander, as affecting the question of damages, is a point, which has been much controverted; but the weight of authority is in favor of admitting such evidence.[8]

[1] Douglass *v.* Tousey, 2 Wend. 352.

[2] Anderson *v.* Long, 10 S. &. R. 55; Potter *v.* Webb & al. 6 Greenl. 14; Gregory *v.* Thomas, 2 Bibb, 286.

[3] Givens *v.* Bradley, 3 Bibb, 192.

[4] Nash *v.* Gilkeson, 5 S. & R. 352.

[5] Gregory *v.* Thomas, 2 Bibb, 286.

[6] Attorney Gen. *v.* Bowman, 2 B. & P. 532, note.

[7] Goodright *v.* Hicks, Bull. N. P. 296.

[8] 2 Starkie on Slander, 88, 89–95, note; Root *v.* King, 7 Cowen, 613; Bailey *v.* Hyde, 3 Conn. 463; Bennett *v.* Hyde, 6 Conn. 24; Douglass *v.* Tousey, 2 Wend. 352; Inman *v.* Foster, 8 Wend. 602; Larned *v.* Buffington, 3 Mass. 552; Wolcott *v.* Hall, 6 Mass. 514; Ross *v.* Lapham, 14 Mass. 275; Bodwell *v.* Swan, 3 Pick. 378; Buford *v.* McLuny, 1 Nott & McCord, 268; Sawyer *v.* Eifert, 2 Nott & McCord, 511; King *v.* Waring & ux. 5 Esp. 14; Rodriguez *v.* Tadmire, 2 Esp. 721; ——— *v.* Moore, 1 M. & S. 284; Earl of Leicester *v.* Walter, 2 Campb. 251; Williams *v.* Callender, Holt's Cas. 307; 2 Stark. Evid. 216. In Foot *v.* Tracy, 1 Johns 45, the Supreme Court of New York was equally divided upon this

But it seems that the character of the party, in regard to any particular trait, is not in issue, unless it be the trait, which is involved in the matter charged against him; and of this it is only evidence of general *reputation*, which is to be admitted, and not positive evidence of general bad *conduct*.[1]

question; Kent and Thomson, Js., being in favor of admitting the evidence, and Livingston and Tompkins, Js., against it. In England, according to the later authorities, evidence of the general bad character of the plaintiff seems to be regarded as irrelevant, and therefore inadmissible. Phil. & Am. on Evid. 488, 489; Cornwall *v.* Richardson, Ry. & Mood. 305; Jones *v.* Stevens, 11 Price, 235. In this last case, it is observable, that though the reasoning of the learned Judges, and especially of Wood, B., goes against the admission of the evidence, even though it be of the most general nature, in any case, yet the record before the Court contained a plea of justification aspersing the professional character of the plaintiff in general averments, without stating any particular acts of bad conduct; and the point was, whether, in support of this plea, as well as in contradiction of the declaration, the defendant should give evidence, that the plaintiff was of general bad character and repute in his practice and business of an attorney. The Court strongly condemned the pleading, as reprehensible, and said, that it ought to have been demurred to, as due to the Court, and to the Judge, who tried the cause. See J'Anson *v.* Stuart, 1 T. R. 747; 2 Smith's Leading Cases, 37. See also Rhodes *v.* Bunch, 3 McCord, 66.

[1] Swift's Evid. 140; Ross *v.* Lapham, 14 Mass. 275; Douglass *v.* Tousey, 2 Wend. 352; Andrews *v.* Vanduzer, 11 Johns. 38; Root *v.* King, 7 Cowen, 613; Newsam *v.* Carr, 2 Stark. R. 69; Sawyer *v.* Eifert, 2 Nott & McCord, 511.

CHAPTER II.

OF THE SUBSTANCE OF THE ISSUE.

§ 56. A SECOND RULE, which governs in the production of evidence, is, that *it is sufficient, if the substance of the issue be proved.* In the application of this rule, a distinction is made between allegations of matter of *substance*, and allegations of matter of *essential description.* The former may be substantially proved; but the latter must be proved with a degree of strictness, extending in some cases, even to literal precision. No allegation, descriptive of the identity of that, which is legally essential to the claim or charge, can ever be rejected.[1] Thus, if, in an action for malicious prosecution, the plaintiff alleges, that he was acquitted of the charge on a certain day; here the substance of the allegation is the acquittal, and it is sufficient, if this fact be proved on any day, the time not being material. But if the allegation be, that the defendant drew a bill of exchange of a certain date and tenor, here every allegation, even to the precise day of the date, is descriptive of the bill, and essential to its identity, and must be literally proved.[2] So also, as we have already seen, in justifying the taking of cattle damage feasant, because it was upon the close of the defendant, the allegation of a general freehold title is sufficient; but if the party states, that he was seised of the close in fee, and it be traversed, the precise estate, which he has set forth, becomes an essentially descriptive allegation, and must be proved as alleged. In this case the essential and non-essential

[1] 1 Stark. Evid. 373; Purcell *v.* Macnamara, 9 East, 160; Stoddard *v.* Palmer, 3 B. & C. 4; Turner *v.* Eyles, 3 B. & P. 456; Ferguson *v.* Harwood, 7 Cranch, 408, 413.

[2] 3 B. & C. 4, 5; Glassford on Evid. 309.