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.

parts of the statement are so connected, as to be incapable of separation, and therefore both are alike material.[1]

§ 57. Whether an allegation is or is not so essentially descriptive, is a point to be determined by the Judge in the case before him; and it depends so much on the particular circumstances, that it is difficult to lay down any precise rules, by which it can in all cases be determined. It may depend, in the *first* place, on the nature of the averment itself, and the subject, to which it is applied. But *secondly*, some averments the law pronounces formal, which, otherwise, would, on general principles, be descriptive. And *thirdly*, the question, whether others are descriptive or not, will often depend on the technical manner in which they are framed.

§ 58. In the *first* place, it may be observed, that any allegation, which narrows and limits that, which is essential, is necessarily *descriptive*. Thus, in contracts, libels in writing, and written instruments in general, every part operates by way of description of the whole. In these cases, therefore, allegations of names, sums, magnitudes, dates, durations, terms, and the like, being essential to the identity of the writing set forth, must, in general, be precisely proved.[2] Nor is it material whether the action be founded in contract or in tort; for in either case, if a contract be set forth, every allegation is descriptive. Thus, in an action on the case for deceit in the sale of lambs by two defendants, jointly, proof of sale and warranty by one only, as his separate property, was held to

[1] Stephen on Pleading, 419, 261, 262; Turner *v.* Eyles, 3 B. & P. 456; 2 Saund. 206 *a*, n. 22; Sir Francis Leke's case, Dyer, 364, b. Perhaps the distinction taken by Lord Ellenborough, in Purcell *v.* Macnamara, and recognised in Stoddart *v.* Palmer, 3 B. & C. 4, will, on closer examination, result merely in this, that matters of description are matters of substance, when they go to the identity of anything material to the action. Thus the rule will stand, as originally stated, that the substance, and this alone, must be proved.

[2] Bristow *v.* Wright, Doug. 665, 667; Churchill *v.* Wilkins, 1 T. R. 447; 1 Stark. Evid. 386, 388.

be a fatal variance.[1] So also, if the contract described be absolute, but the contract proved be conditional, or in the alternative, it is fatal.[2] The consideration is equally descriptive and material, and must be strictly proved as alleged.[3] Prescriptions also, being founded in grants presumed to be lost from lapse of time, must be strictly proved as laid; for every allegation, as it is supposed to set forth that which was originally contained in a deed, is of course descriptive of the instrument, and essential to the identity of the grant.[4] An allegation of the character in which the plaintiff sues, or of his title to damages, though sometimes superfluous, is generally descriptive in its nature, and requires proof.[5]

§ 59. *Secondly*, as to those averments which *the law* pronounces *formal*, though, on general principles, they seem to be descriptive and essential; these are rather to be regarded as exceptions to the rule already stated, and are allowed for the sake of convenience. Therefore, though it is the nature of a traverse, to deny the allegation in the *manner and form* in which it is made, and, consequently, to put the party to prove

[1] Weall *v.* King et al., 12 East, 452.

[2] Penny *v.* Porter, 2 East, 2; Lopes *v.* De Tastet, 1 B. & B. 538; Higgins *v.* Dixon, 10 Jur. 376; Hilt *v.* Campbell, 6 Greenl. 109; Stone *v.* Knowlton, 3 Wend. 374. See also Saxton *v.* Johnson, 10 Johns. 581; Snell *v.* Moses, 1 Johns. 96; Crawford *v.* Morrell, 8 Johns. 153; Baylies *v.* Fettyplace, 7 Mass. 325; Robbins *v.* Otis, 1 Pick. 368; Harris *v.* Rayner, 8 Pick. 541; White *v.* Wilson, 2 Bos. and Pul. 116; Whitaker *v.* Smith, 4 Pick. 83; Lower *v.* Winters, 7 Cowen, 263; Alexander *v.* Harris, 4 Cranch, 299. See other cases in Cowen & Hill's notes, 401, 402, to 1 Phil. Evid. 208, 217.

[3] Sallow *v.* Beaumont, 2 B. & Ald. 765; Robertson *v.* Lynch, 18 Johns. 451.

[4] Morewood *v.* Wood, 4 T. R. 157; Rogers *v.* Allen, 1 Campb. 309, 314, 315, note (a). But proof of a more ample right than is alleged will be regarded as mere redundancy. Johnson *v.* Thoroughgood, Hob. 64; Bushwood *v.* Pond, Cro. El. 722; Bailiffs of Tewksbury *v.* Bricknell, 1 Taunt. 142; Burges *v.* Steer, 1 Show. 347; 4 Mod. 89, S. C.

[5] 1 Stark. Evid. 390; Moises *v.* Thornton, 8 T. R. 303, 308; Berryman *v.* Wise, 4 T. R. 366.

it to be true in the manner and form, as well as in general effect;[1] yet, where the issue goes to the *point of the action*, these words, *modo et formâ*, are but words of form.[2] Thus, in trover, for example, the allegation, that the plaintiff lost the goods, and that the defendant found them, is regarded as purely formal, requiring no proof; for the *gist* of the action is the conversion. So, in indictments for homicide, though the death is alleged to have been caused by a particular instrument, this averment is but formal; and it is sufficient, if the manner of death agree in substance with that which is charged, though the instrument be different; as, if a wound alleged to have been given with a sword, be proved to have been inflicted with an axe.[3] But, where the traverse is of a *collateral point in pleading*, there the words, *modo et formâ*, go to the substance of the issue, and are descriptive, and strict proof is required; as, if a feoffment is alleged by deed, which is traversed *modo et formâ*, evidence of a feoffment without deed will not suffice.[4] Yet, if in issues upon a collateral point, where the affirmative is on the defendant, partial and defective proof, on his part, should show that the plaintiff had no cause of action, as clearly as strict and full proof would do, it is sufficient.[5]

§ 60. *Thirdly*, as to those averments, whose character, as being descriptive or not, depends on the *manner in which they are stated.* Every allegation, essential to the issue, must, as we have seen, be proved, in whatever form it be stated; and things immaterial in their nature to the question at issue may be omitted in the proof, though alleged with the utmost explicitness and formality. There is, however, a middle class of

[1] Stephen on Plead. 213.

[2] Trials per Pais, 308, 9th Ed.; Co. Lit. 281, b.

[3] 2 Russell on Crimes, 711; 1 East, P. C. 341.

[4] Bull. N. P. 301; Co. Lit. 281, b. Whether *virtute cujus*, in a sheriff's plea in justification, is traversable, and in what cases, is discussed in Lucas *v.* Nockells, 7 Bligh, N. S. 140.

[5] Ibid.; 2 Stark. Ev. 394.

circumstances, not essential in their nature, which may become so by being inseparably connected with the essential allegations. These must be proved as laid, unless they are stated under a *videlicet;* the office of which is to mark, that the party does not undertake to prove the precise circumstances alleged; and in such cases he is ordinarily not holden to prove them.[1] Thus in a declaration upon a bill of exchange, the date is in its nature essential to the identity of the bill, and must be precisely proved, though the form of allegation were, "of a certain date, to wit," such a date. On the other hand, in the case before cited, of an action for maliciously prosecuting the plaintiff for a crime, whereof he was acquitted on a certain day; the time of acquittal is not essential to the charge, and need not be proved, though it be directly and expressly alleged.[2] But where, in an action for breach of warranty upon the sale of personal chattels, the plaintiff set forth the price paid for the goods, without a *videlicet*, he was held bound to prove the exact sum alleged, it being rendered material by the form of allegation;[3] though, had the averment been, that the sale was for a valuable consideration, *to wit*, for so much, it would have been otherwise. A *videlicet* will not avoid a variance, or dispense with exact proof, in an allegation of material matter; nor will the omission of it always create the necessity of proving, precisely as stated, matter, which would not otherwise require exact proof. But, a party may, in certain cases, impose upon himself the necessity of proving precisely what is stated, if not stated under a *videlicet*.[4]

[1] Stephen on Pleading, 309; 1 Chitty on Pl. 261, 262, 348, (6th Ed.); Stukeley *v.* Butler, Hob. 168, 172; 2 Saund. 291, note (1); Gleason *v.* McVickar, 7 Cowen, 42.

[2] Ante, § 56; Purcell *v.* Macnamara, 9 East, 160; Gwinnett *v.* Phillips, 3 T. R. 643; Vail *v.* Lewis, 4 Johns. 450.

[3] Durston *v.* Tuthan, cited in 3 T. R. 67; Symmons *v.* Knox, 3 T. R. 65; Arnfield *v.* Bates, 3 M. & S. 173; Sir Francis Leke's case, Dyer, 364, b; Stephen on Plead. 419, 420; 1 Chitty on Pl. 348, (6th Ed.)

[4] Crispin *v.* Williamson, 8 Taunt. 107, 112; Attorney Gen. *v.* Jeffreys, M'Cl. R. 277; 2 B. & C. 3, 4; 1 Chitty on Pl. 348, a.; Grimwood *v.* Bar-

§ 61. But, in general, the allegations of *time*, *place*, *quantity*, *quality*, and *value*, when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass to the person, the material fact is the assault and battery; the time and place not being material, unless made so by the nature of the justification, and the manner of pleading. And, in an action on a policy of insurance, the material allegation is the loss; but whether total or partial is not material; and if the former be alleged, proof of the latter is sufficient. So in assumpsit, an allegation, that a bill of exchange was *made* on a certain day, is not descriptive, and therefore strict proof, according to the precise day laid, is not necessary; though, if

rett, 6 T. R. 460, 463; Bristow *v.* Wright, Doug. 667, 668. These terms "immaterial," and "impertinent," though formerly applied to two classes of averments, are now treated as synonymous; 3 D. & R. 209; the more accurate distinction being between these, and *unnecessary* allegations. Immaterial, or impertinent averments are those, which need neither be alleged, nor proved, if alleged. Unnecessary averments consist of matters, which need not be alleged; but, being alleged, must be proved. Thus, in an action of assumpsit upon a warranty on the sale of goods, an allegation of deceit on the part of the seller is impertinent, and need not be proved. Williamson *v.* Allison, 2 East, 446; Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 292. So, where the action was for an injury to the plaintiff's reversionary interest in land, and it was alleged, that the close at the time of the injury was, and "continually from thence hitherto hath been, and still is," in the possession of one J. V., this latter part of the averment was held superfluous, and not necessary to be proved. Vowles *v.* Miller, 3 Taunt. 137. But if, in an action by a lessor against his tenant, for negligently keeping his fire, a demise for *seven years* be alleged, and the proof be of a lease at will only, it will be a fatal variance; for though it would have sufficed, to have alleged the tenancy generally, yet having unnecessarily qualified it, by stating the precise term, it must be proved as laid. Cudlip *v.* Rundle, Carth. 202. So, in debt against an officer for extorting illegal fees on a *fieri facias*, though it is sufficient to allege the issuing of the writ of *fieri facias*, yet if the plaintiff also unnecessarily allege the judgment, on which it was founded, he must prove it, having made it descriptive of the principal thing. Savage *v.* Smith, 2 W. Bl. 1101; Bristow *v.* Wright, Doug. 668; Gould's Plead. 160–165; Draper *v.* Garratt, 2 B. & C. 2.

it were stated that the bill *bore date* on that day, it would be otherwise.[1] Thus, also, proof of cutting the precise number of trees alleged to have been cut, in trespass; or, of the exact amount of rent alleged to be in arrear, in replevin; or the precise value of the goods taken, in trespass, or trover, is not necessary.[2] Neither is matter of aggravation, namely, that which only tends to increase the damages, and does not concern the right of action itself, of the substance of the issue. But if the matter, alleged by way of aggravation, is essential to the support of the charge or claim, it must be proved as laid.

§ 62. But in *local actions*, the allegation of place is material, and must strictly be proved, if put in issue. In *real actions*, also, the statement of quality, as arable or pasture lands, is generally descriptive, if not controlled by some other and more specific designation. And in these actions, as well as in those for injuries to real property, the abuttals of the close in question must be proved as laid; for if one may be rejected, all may be equally disregarded, and the identity of the subject be lost.[3]

§ 63. It being necessary to prove the substance of the issue, it follows, that any departure from the substance, in the evidence adduced, must be fatal; constituting what is termed in the law a *variance*. This may be defined to be a disagreement between the allegation and the proof, in some matter, which, in point of law, is essential to the charge or claim.[4] It is the legal, and not the natural identity, which is regarded; consisting of those particulars only, which are in

[1] Gardiner *v.* Croadales, 2 Burr. 904; Coxon *v.* Lyon, 307, n.

[2] Harrison *v.* Barnby, 5 T. R. 248; Co. Lit. 282, a; Stephen on Pleading, 318; Hutchins *v.* Adams, 3 Greenl. 174

[3] Mersey & Irwell Nav. Co. *v.* Douglas, 2 East, 497, 502; Bull. N. P. 89; Vowles *v.* Miller, 3 Taunt. 139, per Lawrence, J.; Regina *v.* Cranage, 1 Salk. 385.

[4] Stephen on Pl. 107, 108.

their nature essential to the action, or to the justification, or have become so by being inseparably connected, by the mode of statement, with that which is essential; of which an example has already been given,[1] in the allegation of an estate in fee, when a general averment of freehold would suffice. It is necessary, therefore, in these cases, first to ascertain, what are the essential elements of the legal proposition in controversy, taking care to include all, which is indispensable to show the right of the plaintiff, or party affirming. The rule is, that whatever cannot be stricken out without getting rid of a part essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity.[2] The defendant is entitled to the benefit of this rule, to protect himself by the verdict and judgment, if the same rights should come again in controversy. The rule, as before remarked, does not generally apply to allegations of number, magnitude, quantity, value, time, sums of money, and the like, provided the proof in regard to these is sufficient to constitute the offence charged, or to substantiate the claim set up; except in those cases, where they operate by way of limitation, or description of other matters, in themselves essential to the offence or claim.[3]

§ 64. A few examples will suffice to illustrate this subject. Thus, in tort, for removing earth from the defendant's land,

[1] Ante, § 51 – 56.

[2] Bristow *v.* Wright, Doug. 668; Peppin *v.* Solomons, 5 T. R. 496; Williamson *v.* Allison, 2 East, 446, 452.

[3] Ante, § 61; Rickets *v.* Salwey, 2 B. & Ald. 363; May *v.* Brown, 3 B. & C. 113, 122. It has been said, that allegations, which are merely *matters of inducement*, do not require such strict proof, as those which are precisely put in issue between the parties. Smith *v.* Taylor, 1 New Rep. 210, per Chambre, J. But this distinction, as Mr. Starkie justly observes, between that which is the gist of the action, and that which is inducement, is not always clear in principle. 1 Stark. Evid. 391, note (b); 3 Stark. Evid. 1551, note (x), Metcalf's Ed. Certainly, that which may be traversed, must be proved, if it is not admitted; and some facts, even though stated in the form of inducement, may be traversed, because they are material;

whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant is not necessary to be proved, for the cause of action is perfect, independent of the intention.[1] So, in trespass, for driving against the plaintiff's cart, the allegation, that he was in the cart, need not be proved.[2] But, if the allegation contains matter of description, and is not proved as laid, it is a variance, and is fatal. Thus, in an action for malicious prosecution of the plaintiff, upon a charge of felony, before Baron Waterpark of *Waterfork*, proof of such a prosecution before Baron Waterpark of *Waterpark* was held to be fatally variant from the declaration.[3] So, in an action of tort founded on a contract, every particular of the contract is descriptive, and a variance in the proof is fatal. As, in an action on the case for deceit in a contract of sale, made by the two defendants, proof of a sale by one of them only, as his separate property, was held insufficient; for the joint contract of sale was the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity.[4]

§ 65. In *criminal prosecutions*, it has been thought that greater strictness of proof was required than in civil cases, and that the defendant might be allowed to take advantage

as, for example, in action for slander, upon a charge for perjury, where the plaintiff alleged, by way of inducement, that he was sworn before the Lord Mayor. Stephen on Plead. 258. The question, whether an allegation must be proved, or not, turns upon its materiality to the case, and not upon the form, in which it is stated, or its place in the declaration. In general, every allegation in an inducement, which is material, and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged. 1 Chitty on Pl. 262, 320. It is true, that those matters, which need not be alleged with particularity, need not be proved with particularity, but still, all allegations, if material, must be proved substantially *as alleged*.

[1] Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 291.

[2] Howard *v.* Peete, Chitty, R. 315.

[3] Walters *v.* Mace, 2 B. & Ald. 756.

[4] Weall *v.* King et al. 12 Fast, 452; Lopes *v.* De Tastet, 1 B. & B. 538.

of nicer exceptions.[1] But whatever indulgence the humanity and tenderness of Judges may have allowed in practice, in favor of life or liberty, the better opinion seems to be, that the rules of evidence are in both cases the same.[2] If the averment is divisible, and enough is proved to constitute the offence charged, it is no variance, though the remaining allegations are not proved. Thus, an indictment for embezzling two bank notes, of equal value, is supported by proof of the embezzlement of one only.[3] And in an indictment for obtaining money upon several false pretences, it is sufficient to prove any material portion of them.[4] But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity. Thus, in an indictment for stealing a *black* horse, the animal is necessarily mentioned, but the color need not be stated; yet, if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal.[5] So, in an indictment for stealing a bank note, though it would be sufficient to describe it generally as a bank note of such a denomination or value, yet, if the name of the officer who signed it be also stated, it must be strictly proved.[6] So, also, in an indictment for murder, malicious shooting, or other offence to the person, or for an offence against the habitation, or goods, the name of the person, who was the subject of the crime, and of the owner of the house or goods, are

[1] Beech's case, 1 Leach's Cas. 158; United States *v.* Porter, 3 Day, 283, 286.

[2] Roscoe's Crim. Evid. 73; 1 Deacon's Dig. Crim. Law, 459, 460; 2 P. C. 785, 1021; 1 Phil. Evid. 506; Rex *v.* Watson, 2 Stark. R. 116, 155, per Abbott, J.; Lord Melville's case, 29 Howell's State Tr. 763; 2 Russell on Crimes, 588; United States *v.* Britton, 2 Mason, 464, 468.

[3] Carson's case, Rus. & Ry. 303; Furneaux's case, ib. 335; Tyers's case, ib. 402.

[4] Hill's case, Rus. & Ry. 190.

[5] 1 Stark. Evid. 374.

[6] Craven's case, Rus. & Ry. 14.

material to be proved as alleged.[1] But where the time, place, person, or other circumstances are not descriptive of the fact, or degree of the crime, nor material to the jurisdiction, a discrepancy between the allegation and the proof is not a variance. Such, are statements of the house or field, where a robbery was committed, the time of the day, the day of the term in which a false answer in chancery was filed, and the like.[2] In an indictment for murder, the substance of the charge is, that the prisoner feloniously killed the deceased by means of shooting, poisoning, cutting, blows, or bruises, or the like; it is, therefore, sufficient, if the proof agree with the allegation in its substance and general character, without precise conformity in every particular. In other words, an indictment describing a thing by its generic term, is supported by proof of a species which is clearly comprehended within such description. Thus, if the charge be of poisoning by a certain drug, and the proof be of poisoning by another drug; or the charge be of felonious assault with a staff, and the proof be of such assault with a stone; or the charge be of a wound with a sword, and the proof be of a wound with an axe; yet, the charge is substantially proved, and there is no variance.[3] But, where the matter, whether introductory or

[1] Clark's case, Rus. & Ry. 358; White's case, 1 Leach's Cas. 286; Jenks's case, 2 East, P. C. 514; Durore's case, 1 Leach's Cas. 390. But a mistake in spelling of the name is no variance, if it be *idem sonans* with the name proved. Williams *v.* Ogle, 2 Stra. 889; Foster's case, Rus. & Ry. 412. Tannet's case, ib. 351; Bingham *v.* Dickie, 5 Taunt. 814. So, if one be indicted for an assault upon A. B., a deputy sheriff, and in the officer's commission he is styled A. B. junior, it is no variance, if the person is proved to be the same. Commonwealth *v.* Beckley, 3 Metcalf, R. 330.

[2] Wardle's case, 2 East, P. C. 785; Pye's case, ib.; Johnstone's case, ib. 786; Minton's case, ib. 1021; Rex *v.* Waller, 2 Stark. Evid. 623; Rex *v.* Hucks, 1 Stark. R. 521.

[3] 1 East, P. C. 341; Martin's case, 5 Car. & P. 128; Culkin's case, ib. 121; Ante, § 58. An indictment for stealing a "sheep" is supported by proof of the stealing of any sex or variety of that animal, for the term is *nomen generalissimum*. M'Cully's case, 2 Lew. C. C. 272; Regina *v.*

otherwise, is descriptive, it must be proved as laid, or the variance will be fatal. As, in an indictment for perjury in open Court, the term of the Court must be truly stated and strictly proved.[1] So, in an indictment for perjury before a select committee of the House of Commons, in a contested election, it was stated that an election was holden by virtue of a precept duly issued to the bailiff of the borough of New Malton, and that A. and B. were returned to serve as members for the said borough of New Malton; but the writ appeared to be directed to the bailiff of Malton. Lord Ellenborough held this not matter of description; and the precept having been actually issued to the bailiff of the borough of New Malton, it was sufficient. But, the return itself was deemed descriptive; and the proof being that the members were in fact returned as members for the borough of Malton, it was adjudged a fatal variance.[2] So, a written contract, when set out in an indictment, must be strictly proved.[3]

§ 66. Thus, also, in *actions upon contract*, if any part of the contract proved should vary materially from that, which is stated in the pleadings, it will be fatal; for a contract is an entire thing, and indivisible. It will not be necessary to state all the parts of a contract, which consists of several distinct and collateral provisions: the *gravamen* is, that a certain act, which the defendant engaged to do, has not been done; and the legal proposition to be maintained is, that, for such a consideration, he became bound to do such an act, including the

Spicer, 1 Dennis. C. C. 82. So, if the charge be of death by suffocation, by the hand over the mouth, and the proof be that respiration was stopped, though by some other violent mode of strangulation, it is sufficient. Rex *v.* Waters, 7 C. & P. 250.

[1] Where the term is designated by the day of the month, as in the Circuit Courts of the United States, the precise day is material. United States *v.* McNeal, 1 Gall. 387.

[2] Rex *v.* Leefe, 2 Campb. 134, 140.

[3] 2 East, P. C. 977, 978, 981, 982; Commonwealth *v.* Parmenter, 5 Pick. 279; The People *v.* Franklin, 3 Johns. 299.

time, manner, and other circumstances of its performance. The entire consideration must be stated, and the entire act to be done, in virtue of such consideration, together with the time, manner and circumstances; and with all the parts of the proposition, as thus stated, the proof must agree.[1] If the allegation be of an absolute contract, and the proof be of a contract in the alternative, at the option of the defendant; or a promise be stated to deliver merchantable goods, and the proof be of a promise to deliver goods of a second quality; or the contract stated be to pay or perform in a reasonable time, and the proof be to pay or perform on a day certain, or on the happening of a certain event; or the consideration stated be one horse, bought by the plaintiff of the defendant, and the proof be of two horses; in these, and the like cases, the variance will be fatal.[2]

§ 67. There is, however, a material distinction to be observed between redundancy in the allegation, and *redundancy only in the proof*. In the former case, a variance between the allegations and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate, merely because more is proved than is alleged; unless the matter superflously proved, goes to contradict some essential part of the allegation. Thus, if the allegation were, that in consideration of £100, the defendant promised to go to Rome, and also to deliver a certain horse to the plaintiff, and the plaintiff should fail in proving the latter branch of the promise, the variance would be fatal, though he sought to recover for the breach of the former only, and the latter allegation was unnecessary. But, if he had alleged only the former branch of the promise, the proof of

[1] Clarke *v.* Gray, 6 East, 564, 567, 568; Gwinnett *v.* Phillips, 3 T. R. 643, 646; Thornton *v.* Jones, 2 Marsh. 287; Parker *v.* Palmer, 4 B. & A. 387; Swallow *v.* Beaumont, 2 B. & A. 765.

[2] Penny *v.* Porter, 2 East, 2; Bristow *v.* Wright, 2 Doug. 665; Hilt *v.* Campbell, 6 Greenl. 109; Symonds *v.* Carr, 1 Campb. 361; King *v.* Robinson, Cro. El. 79. See Post, Vol. 2, § 11, *d*.