the latter along with it would be immaterial. In the first case, he described an undertaking which he has not proved; but in the latter he has merely alleged one promise, and proved that, and also another.[1]

§ 68. But where the subject is entire, as, for example, the *consideration* of a contract,[2] a variance in the proof, as we have just seen, shows the allegation to be defective, and is, therefore, material. Thus, if it were alleged, that the defendant promised to pay £100, in consideration of the plaintiff's going to Rome, and also delivering a horse to the defendant, an omission to prove the whole consideration alleged would be fatal. And if the consideration had been alleged to consist of the going to Rome only, yet if the agreement to deliver the horse were also proved, as forming part of the consideration, it would be equally fatal; the entire thing alleged, and the entire thing proved, not being identical.[3] Upon the same principle, if the consideration alleged be a contract of the plaintiff to *build* a ship, and the proof be of one to *finish* a ship partly built;[4] or the consideration alleged be the delivery of *pine* timber, and the proof be of *spruce* timber;[5] or the consideration alleged be, that the plaintiff *would* indorse a note, and the proof be of a promise in consideration that he *had* indorsed a note;[6] the variance is equally fatal. But,

1 1 Stark. Evid. 401. Where the agreement, as in this case, contains several distinct promises, and for the breach of one only the action is brought, the consequences of a variance may be avoided by alleging the promise, as made *inter alia*. And no good reason, in principle, is perceived, why the case mentioned in the following section might not be treated in a similar manner; but the authorities are otherwise. In the example given in the text, the allegation is supposed to import, that the undertaking consisted of neither more nor less than is alleged.

2 Swallow *v.* Beaumont, 2 B. & A. 765; White *v.* Wilson, 2 B. & P. 116; Ante, § 58.

3 1 Stark. Evid. 401; Lansing *v.* McKillip, 3 Caines, 286; Stone *v.* Knowlton, 3 Wend. 374.

4 Smith *v.* Barker, 3 Day, 312.

5 Robbins *v.* Otis, 1 Pick. 368.

6 Bulkley *v.* Landon, 2 Conn. 404.

though no part of a valid consideration may be safely omitted, yet that which is merely frivolous need not be stated;[1] and, if stated, need not be proved; for the Court will give the same construction to the declaration, as to the contract itself, rejecting that which is nonsensical or repugnant.[2]

§ 69. In the case of *deeds*, the same general principles are applied. If the deed is declared upon, every part stated in the pleadings, *as descriptive* of the deed, must be exactly proved, or it will be a variance; and this, whether the parts set out at length were necessary to be stated, or not.[3] If a qualified covenant be set out in the declaration as a general covenant, omitting the exception or limitation, the variance between the allegation and the deed will be fatal. If the condition, proviso, or limitation affects the original cause of action itself, it constitutes an essential element in the original proposition to be maintained by the plaintiff; and, therefore, must be stated, and proved as laid; but, if it merely affects the amount of damages to be recovered, or the liability of the defendant as affected by circumstances occurring after the cause of action, it need not be alleged by the plaintiff, but properly comes out in the defence.[4] And where the deed is not described according to its tenor, but according to its legal effect, if the deed agrees in legal effect with the allegation, any verbal discrepancy is not a variance. As, in covenant against a tenant for not repairing, the lease being stated to have been made by the plaintiff, and the proof being of a lease by the plaintiff and his wife, she having but a chattel interest; or, if debt be brought by the husband alone, on a bond as given to himself, the bond appearing to have been

1 Brooks *v.* Lowrie, 1 Nott & McCord, 342.

2 Ferguson *v.* Harwood, 8 Cranch, 408, 414.

3 Bowditch *v.* Mawley, 2 Campb. 195; Dundas *v.* Ld. Weymouth, Cowp. 665; Ante, § 55; Ferguson *v.* Harwood, 7 Cranch, 408, 413; Sheehy *v.* Mandeville, ib. 208, 217.

4 1 Chitty, Pl. 268, 269, (5th Am. ed.); Howell *v.* Richards, 11 East, 633; Clarke *v.* Gray, 6 East, 564, 570.

given to the husband and wife; yet, the evidence is sufficient proof of the allegation.[1] But, where the deed is set out,

[1] Beaver *v.* Lane, 2 Mod. 217; Arnold *v.* Rivoult, 1 Br. & B. 442; Whitlock *v.* Ramsey, 2 Munf. 510; Ankerstein *v.* Clarke, 4 T. R. 616. It is said that an allegation, that J. S. otherwise R. S. made a deed, is not supported by evidence, that J. S. made a deed by the name of R. S. 1 Stark. Evid. 413, cites Hyckman *v.* Shotbolt, Dyer, 279, pl. 9. The doctrine of that case is very clearly expounded by Parke, B. in Williams *v.* Bryant, 5 Mees. & Welsb. 447. In regard to a discrepancy between the name of the obligor in the body of a deed, and in the signature, a distinction is to be observed between transactions which derive their efficacy wholly from the deed, and those which do not. Thus in a feoffment at the Common Law, or a sale of personal property by deed, or the like, livery being made in the one case, and possession delivered in the other, the transfer of title is perfect, notwithstanding any mistake in the name of the grantor; for it takes effect by delivery, and not by the deed. Perk. sec. 38–42. But where the efficacy of the transaction depends on the instrument itself, as in the case of a bond for the payment of money, or any other executory contract by deed, if the name of the obligor in the bond is different from the signature, as, if it were written John, and signed William, it is said to be void at law for uncertainty, unless helped by proper averments on the record. A mistake in this matter, as in any other, in drawing up the contract, may be reformed by bill in Equity. At law, where the obligor has been sued by his true name, signed to the bond, and not by that written in the body of it, and the naked fact of the discrepancy, unexplained, is all which is presented by the record, it has always been held bad. This rule was originally founded in this, that a man cannot have two names of baptism at the same time; for whatever name was imposed at his baptism, whether single, or compounded of several names, he being baptized but once, that and that alone was his baptismal name; and by that name he declared himself bound. So it was held in Serchor *v.* Talbot, 3 Hen. 6, 25, pl. 6, and subsequently in Thornton *v.* Wikes, 34 Hen. 6, 19, pl. 36; Field *v.* Winslow, Cro. El. 897; Oliver *v.* Watkins, Cro. Jac. 558; Maby *v.* Shepherd, Cro. Jac. 640; Evans *v.* King, Willes, 554; Clerke *v.* Isted, Lutw. 275; Gould *v.* Barnes, 3 Taunt. 504. "It appears from these cases to be a settled point," said Parke, B. in Williams *v.* Bryant, "that if a declaration against a defendant by one christian name, as, for instance, Joseph, state, that he executed a bond by the name of Thomas, *and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution*, such a declaration would be bad on demurrer, or in arrest of judgment, even after issue joined on a plea of *non est factum*. And the reason appears to be, that in bonds and deeds, the efficacy of which depends on the instrument itself, and not on matter *in pais*,

on oyer, the rule is otherwise; for, to have *oyer*, is, in modern practice, to be furnished with an exact and literal copy of the

there must be a certain *designatio personæ* of the party, which regularly ought to be by the true first name or name of baptism, and surname; of which the first is the most important." "But on the other hand," he adds, "it is certain, that a person may at this time sue or be sued, not merely by his true name of baptism, but by any first name, which he has acquired by usage or reputation." "If a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement; and not only is this the established practice, but the doctrine is promulgated in very ancient times. In Bracton, 188, b. it is said—'Item, si quis *binominis* fuerit, *sive* in nomine *proprio* sive in *cognomine*, illud nomen tenendum erit, quo solet frequentiùs appellari, quia adeo imposita sunt, ut demonstrent voluntatem dicentis, et utimur notis in vocis ministerio.' And if a party may sue or be sued by the proper name, by which he is known, it must be a sufficient designation of him, if he enter into a bond by that name. It by no means follows, therefore, that the decisions in the case of Gould *v.* Barnes, and others before referred to, in which the question arose on the record, would have been the same, if *there had been an averment on the face of the declaration, that the party was known by the proper name in which the bond was made, at the time of making it*. We find no authorities for saying, that the declaration would have been bad with such an averment, *even if there had been a total variance of the first names;* still less, where a man, having two proper names, or names of baptism, has bound himself by the name of one. And on the plea of non est factum, *where the difference of name does not appear* on the record, and there is evidence of the party having been known, at the time of the execution, by the name on the instrument, there is no case, that we are aware of, which decides that the instrument is void." The name written in the body of the instrument is that which the party, by the act of execution and delivery, declares to be his own, and by which he acknowledges himself bound. By this name, therefore, he should regularly be sued; and if sued with an *alias dictus* of his true name, by which the instrument was signed, and an averment in the declaration, that at the time of executing the instrument he was known as well by the one name as the other, it is conceived, that he can take no advantage of the discrepancy; being estopped, by the deed, to deny this allegation. Evans *v.* King, Willes, 555, note (b); Reeves *v.* Slater, 7 Barnw. & Cressw. 486, 490; Cro. El. 897, note (a). See also Regina *v.* Wooldale, 6 Ad. & El. 549, N. S.; Wooster *v.* Lyons, 5 Blackf 60. If sued by the name written in the body of the deed, without any explanatory averment, and he pleads a misnomer in abatement, the plaintiff in his replication may estop him by the deed. Dyer, 279, b. pl. 9, note; Story's Pleadings, 43; Willes, 555, note. And if he should be sued by his

deed declared on, every word and part of which is thereby made descriptive of the deed to be offered in evidence. In such case, if the plaintiff does not produce in evidence a deed literally corresponding with the copy, the defendant may well say it is not the deed in issue, and it will be rejected.[1]

§ 70. Where a *record* is mentioned in the pleadings, the same distinction is now admitted in the proof, between allegations of matter of substance, and allegations of matter of description. The former require only substantial proof; the latter must be *literally* proved. Thus, in an action for malicious prosecution, the day of the plaintiff's acquittal is not material. Neither is the term, in which the judgment was recovered, a material allegation, in an action against the sheriff for a false return on the writ of execution. For in both cases the record is alleged by way of inducement only, and not as the foundation of the action; and therefore literal proof is not required.[2] So, in an indictment for perjury in a

true name, and plead *non est factum*, wherever this plea, as is now the case in England, since the rule of Hilary Term, 4 W. 4, R. 21, "operates as a denial of the deed in point of fact only," all other defences against it being required to be specially pleaded, the difficulty occasioned by the old decisions may now be avoided by proof, that the party, at the time of the execution, was known by the name on the face of the deed. In those American States, which have abolished special pleading, substituting the general issue in all cases, with a brief statement of the special matter of defence, probably the new course of practice, thus introduced, would lead to a similar result.

[1] Waugh *v.* Bussell, 5 Taunt. 707, 709, per Gibbs, C. J.; James *v.* Walruth, 8 Johns. 410; Henry *v.* Cleland, 14 Johns. 400; Jansen *v.* Ostrander, 1 Cowen, 670, acc. In Henry *v.* Brown, 19 Johns. 49, where the condition of the bond was "without fraud or *other* delay," and in the oyer the word "other" was omitted, the defendant moved to set aside a verdict for the plaintiff, because the bond was admitted in evidence without regard to the variance; but the Court refused the motion, partly on the ground, that the variance was immaterial, and partly, that the oyer was clearly amendable. See also Dorr *v.* Fenno, 12 Pick. 521.

[2] Purcell *v.* Macnamara, 9 East, 157; Stoddart *v.* Palmer, 4 B. & B. 2; Phillips *v.* Shaw, 4 B. & A. 435; 5 B. & A. 964.

case in Chancery, where the allegation was, that the bill was addressed to Robert, Lord Henley, and the proof was of a bill addressed to Sir Robert Henley Kt., it was held no variance; the substance being, that it was addressed to the person holding the great seal.[1] But where the record is the foundation of the action, the term, in which the judgment was rendered, and the number and names of the parties, are descriptive, and must be strictly proved.[2]

§ 71. In regard to *prescriptions*, it has been already remarked, that the same rules apply to them, which are applied to contracts; a prescription being founded on a grant, supposed to be lost by lapse of time.[3] If, therefore, a prescriptive right be set forth as the foundation of the action, or be pleaded in bar and put in issue, it must be proved to the full extent to which it is claimed; for every fact alleged is descriptive of the supposed grant. Thus, if in trespass for breaking and entering a several fishery, the plaintiff, in his replication, prescribes for a sole and exclusive right of fishing in four places, upon which issue is taken, and the proof be of such right in only three of the places, it is a fatal variance. Or if, in trespass, the defendant justify under a prescriptive right of common on five hundred acres, and the proof be, that his ancestor had released five of them, it is fatal. Or if, in replevin of cattle, the defendant avow the taking damage feasant, and the plaintiff plead in bar a prescriptive right of common for all the cattle, on which issue is taken, and the proof be of such right for only a part of the cattle, it is fatal.[4]

[1] Per Buller, J. in Rex *v.* Pippett, 1 T. R. 240; Rodman *v.* Forman, 8 Johns. 26; Brooks *v.* Bemiss, ib. 455; The State *v.* Caffey, 2 Murphy, 320.

[2] Rastall *v.* Stratton, 1 H. Bl. 49; Woodford *v.* Ashley, 11 East, 508; Black *v.* Braybrook, 2 Stark. R. 7; Baynes *v.* Forrest, 2 Str. 892; United States *v.* McNeal, 1 Gall. 387.

[3] Ante, § 58.

[4] Rogers *v.* Allen, 1 Campb. 313, 315; Rotherham *v.* Green, Noy, 67; Conyers *v.* Jackson, Clayt. 19; Bull. N. P. 299.

§ 72. But a *distinction* is to be observed between cases, where the prescription is the foundation of the claim, and is put in issue, and cases, where the action is founded in tort, for a disturbance of the plaintiff in his enjoyment of a prescriptive right. For in the latter cases it is sufficient for the plaintiff to prove a right of the same nature with that alleged, though not to the same extent; the gist of the action being the wrongful act of the defendant, in disturbing the plaintiff in his right; and not the extent of that right. Therefore, where the action was for disturbance of the plaintiff in his right of common, by opening stone quarries there, the allegation being of common, by reason both of a messuage and of land, whereof the plaintiff was possessed, and the proof, in a trial upon a general issue, being of common by reason of the land only, it was held no variance; the Court observing, that the proof was not of a different allegation, but of the same allegation in part, which was sufficient, and that the damages might be given accordingly.[1] Yet, in the former class of cases, where the prescription is expressly in issue, proof of a more ample right than is claimed will not be a variance; as, if the allegation be of a right of common for sheep, and the proof be of such right, and also of common for cows.[2]

§ 73. But the party may now, in almost every case, *avoid the consequences of a variance* between the allegation in the pleadings, and the state of facts proved, *by amendment* of the record. This power was given to the Courts in England by Lord Tenterden's act,[3] in regard to variances between matters in writing or in print, produced in evidence, and the recital thereof upon the record; and it was afterwards extended[4] to all other matters, in the judgment of the Court or Judge not

[1] Rickets *v.* Salwey, 2 B. & A. 360; Yarly *v.* Turnock, Cro. Jac. 629; Manifold *v.* Pennington, 4 B. & C. 161.

[2] Bushwood *v.* Pond, Cro. El. 722; Tewksbury *v.* Bricknell, 1 Taunt. 142; Ante, § 58, 67, 68.

[3] 9 G. 4, c. 15.

[4] By St. 3 & 4 W. 4, c. 42, § 23.

material to the merits of the case, upon such terms, as to costs and postponement, as the Court or Judge may deem reasonable. The same power, so essential to the administration of substantial justice, has been given by statutes to the Courts of most of the United States, as well as of the nation; and in both England and America these statutes have, with great propriety, been liberally expounded, in furtherance of their beneficial design.[1] The Judge's discretion, in allowing or refusing amendments, like the exercise of judicial discretion in other cases, cannot, in general, be reviewed by any other tribunal.[2] It is only in the cases and in the manner

[1] See Hanbury *v.* Ella, 1 Ad. & El. 61; Parry *v.* Fairhurst, 2 Cr. M. & R. 190, 196; Doe *v.* Edwards, 1 M. & Rob. 319; 6 C. & P. 208, S. C.; Hemming *v.* Parry, 6 C. & P. 580; Mash *v.* Densham, 1 M. & Rob. 442; Ivey *v.* Young, ib. 545; Howell *v.* Thomas, 7 C. & P. 342; Mayor, &c. of Carmarthen *v.* Lewis, 6 C. & P. 608; Hill *v.* Salt, 2 C. & M. 420; Cox *v.* Painter, 1 Nev. & P. 581; Doe *v.* Long, 9 C. & P. 777; Ernest *v.* Brown, 2 M. & Rob. 13; Story *v.* Watson, 2 Scott, 842; Smith *v.* Brandram, 9 Dowl. 430; Whitwell *v.* Scheer, 8 Ad. & El. 301; Read *v.* Dunsmore, 9 C. & P. 588; Smith *v.* Knowelden, 9 Dowl. 40; Norcutt *v.* Mottram, 7 Scott, 176; Legge *v.* Boyd, 5 Bing. N. C. 240. Amendments were refused in Doe *v.* Errington, 1 Ad. & El. 750; Cooper *v.* Whitehouse, 1 C. & P. 545; John *v.* Currie, ib. 618; Watkins *v.* Morgan, ib. 661; Adams *v.* Power, 7 C. & P. 76; Brashier *v.* Jackson, 6 M. & W. 549; Doe *v.* Roe, 8 Dowl. 444; Empson *v.* Griffin, 3 P. & D. 168. The following are cases of variance, arising under Lord Tenterden's act. Bentzing *v.* Scott, 4 C. & P. 24; Moilliet *v.* Powell, 6 C. & P. 223; Lamey *v.* Bishop, 4 B. & Ad. 479; Briant *v.* Eicke, Mood. & Malk. 359; Parks *v.* Edge, 1 C. & M. 429; Masterman *v.* Judson, 8 Bing. 224; Brooks *v.* Blanshard, 1 C. & M. 779; Jelf *v.* Oriel, 4 C. & P. 22. The American cases, which are very numerous, are stated in 1 Metcalf & Perkins's Digest, p. 145–162.

[2] Doe *v.* Errington, 1 M. & Rob. 344, note; Mellish *v.* Richardson, 9 Bing. 125; Parks *v.* Edge, 1 C. & M. 429; Jenkins *v.* Phillips, 9 C. & P. 766; Merriam *v.* Langdon, 10 Conn. 460, 473; Clapp *v.* Balch, 3 Greenl. 216, 219; Mandeville *v.* Wilson, 5 Cranch, 15; Marine Ins. Co. *v.* Hodgson, 6 Cranch, 206; Walden *v.* Craig, 9 Wheat. 576; Chirac *v.* Reinicker, 11 Wheat. 302; United States *v.* Buford, 3 Peters, 12, 32; Benner *v.* Frey, 1 Binn. 366; Bailey *v.* Musgrave, 2 S. & R. 219; Bright *v.* Sugg, 4 Dever.

mentioned in statutes, that the propriety of its exercise can be called in question.

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492. But if the Judge exercises his discretion in a manner clearly and manifestly wrong, it is said that the Court will interfere and set it right. Hackman *v.* Fernie, 5 M. & W. 505; Geach *v.* Ingall, 9 Jur. 691.

CHAPTER III.

OF THE BURDEN OF PROOF.

§ 74. A THIRD RULE, which governs in the production of evidence, is, that *the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.* This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable.[1] It is, therefore, generally deemed sufficient, where the allegation is affirmative, to oppose it with a bare denial, until it is established by evidence. Such is the rule of the Roman Law. *Ei incumbit probatio, qui dicit, non qui negat.*[2] As a consequence of this rule, the party who asserts the affirmative of the issue is entitled to begin, and to reply; and having begun, he is not permitted to go into half of his case, and reserve the remainder; but is generally obliged to develop the whole.[3] Regard is had, in this matter, to the substance and effect of the issue, rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or an affirmative form, at his pleasure. Therefore, in an action of covenant for not repairing, where the breach assigned was that the defendant did not repair, but suffered the premises to be ruinous, and the defendant pleaded that he did repair, and did not suffer the premises to be ruinous, it was held, that on this

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[1] Dranguet *v.* Prudhomme, 3 Louis. R. 83, 86.

[2] Dig. lib. 22, tit. 3, l. 2; Mascard. de Prob. Concl. 70, tot; Concl. 1128, n. 10. See also Tait on Evid. p. 1.

[3] Rees *v.* Smith, 2 Stark. R. 31; 3 Chitty, Gen. Pract. 872–877; Swift's Law of Evid. p. 152; Bull. N. P. 298; Browne *v.* Murray, Ry. & Mood. 254; Jones *v.* Kennedy, 11 Pick. 125, 132.