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.

issue the plaintiff should begin.[1] If the record contains several issues, and the plaintiff holds the affirmative in any one of them, he is entitled to begin; as, if in an action of slander for charging the plaintiff with a crime, the defendant should plead not guilty, and a justification. For wherever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, according to the rule above stated, and therefore is entitled to reply. How far he shall proceed in his proof, in anticipation of the defence on that or the other issues, is regulated by the discretion of the Judge, according to the circumstances of the case; regard being generally had to the question, whether the whole defence is indicated by the plea, with sufficient particularity to render the plaintiff's evidence intelligible.[2]

§ 75. Whether the necessity of proving *damages*, on the part of the plaintiff, is such an affirmative as entitles him to begin and reply, is not perfectly clear by the authorities. Where such evidence forms part of the proof necessary to sustain the action, it may well be supposed to fall within the general rule; as, in an action of slander, for words actionable only in respect of the special damage thereby occasioned; or, in an action of the case, by a master for the beating of his servant, *per quod servitium amisit.* It would seem, however, that where it appears by the record, or by the admission of counsel, that the damages to be recovered are only nominal,

[1] Soward *v.* Leggatt, 7 C. & P. 613.

[2] Rees *v.* Smith, 2 Stark. R. 31; Jackson *v.* Hesketh, ib. 518; James *v.* Salter, 1 M & Rob. 501; Rawlins *v.* Desborough, 2 M. & Rob. 328; Comstock *v.* Hadlyme, 8 Conn. 261; Curtis *v.* Wheeler, 4 C. & P. 196; 1 M. & M. 493, S. C.; Williams *v.* Thomas, 4 C. & P. 234; 7 Pick. 100, per Parker, C. J. In Browne *v.* Murray, Ry. & Mood. 254, Lord C. J. Abbott gave the plaintiff his election, after proving the general issue, either to proceed immediately with all his proof to rebut the anticipated defence, or to reserve such proof till the defendant had closed his own evidence; only refusing him the privilege of dividing his case into halves, giving part in the first instance, and the residue after the defendant's case was proved.

or are mere matter of computation, and there is no dispute about them, the formal proof of them will not take away the defendant's right to begin and reply, whatever be the form of the pleadings, provided the residue of the case is affirmatively justified by the defendant.[1] And if the general issue alone is pleaded, and the defendant will, at the trial, admit the whole of the plaintiff's case, he may still have the advantage of the beginning and reply.[2] So also in trespass *quare clausum fregit*, where the defendant pleads not guilty as to the force and arms and whatever is against the peace, and justifies as to the residue, and the damages are laid only in the usual *formula* of treading down the grass, and subverting the soil, the defendant is permitted to begin and reply; there being no necessity for any proof on the part of the plaintiff.[3]

§ 76. The difficulty, in determining this point, exists chiefly in those cases, where the action is for *unliquidated damages*, and the defendant has met the whole case with an affirmative plea. In these actions the practice has been various in England; but it has at length been settled by a rule, by the fifteen Judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general issue may not be pleaded, and the affirmative be on

[1] Fowler *v.* Coster, 1 Mood. & M. 243, per Lord Tenterden. And see the reporter's note on that case, in 1 Mood. & M. 278–281. The dictum of the learned Judge, in Brooks *v.* Barrett, 7 Pick. 100, is not supposed to militate with this rule; but is conceived to apply to cases, where proof of the note is required of the plaintiff. Sanford *v.* Hunt, 1 C. & P. 118; Goodtitle *v.* Braham, 4 T. R. 497.

[2] Tucker *v.* Tucker, 1 Mood. & M. 536; Fowler *v.* Coster, ib. 241; Doe *v.* Barnes, 1 M. & Rob. 386; Doe *v.* Smart, ib. 476; Fish *v.* Travers, 3 C. & P. 578; Comstock *v.* Hadlyme, 8 Conn. 261; Lacon *v.* Higgins, 3 Stark. R. 178; Corbett *v.* Corbett, 3 Campb. 368; Homan *v.* Thompson, 6 C. & P. 717; Smart *v.* Rayner, ib. 721; Mills *v.* Oddy, ib. 728; Scott *v.* Hull, 8 Conn. 296. But see Post, § 76, n. 4.

[3] Hodges *v.* Holden, 3 Campb. 366; Jackson *v.* Hesketh, 2 Stark. R. 518; Pearson *v.* Coles, 1 Mood. & Rob. 206; Davis *v.* Mason, 4 Pick. 156; Leech *v.* Armitage, 2 Dall. 125.

the defendant.[1] In actions upon contract, it was, until recently, an open question of practice; having been sometimes treated as a matter of right in the party, and at other times regarded as resting in the discretion of the Judge, under all the circumstances of the case.[2] But it is now settled, in accordance with the rule adopted in other actions.[3] In this country it is generally deemed a matter of discretion, to be ordered by the Judge, at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, and to be settled by the Jury upon such evidence as may be adduced, and not by computation alone.[4]

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[1] Carter *v.* Jones, 6 C. & P. 64.

[2] Bedell *v.* Russell, Ry. & M. 293; Fowler *v.* Coster, 1 M. & M. 241; Revett *v.* Braham, 4 T. R. 497; Hare *v.* Munn, 1 M. & M. 241, note; Scott *v.* Hull, 8 Conn. 296; Burrell *v.* Nicholson, 6 C. & P. 202; 1 M. & R. 304, 306; Hoggett *v.* Exley, 9 C. & P. 324. See also Cowen & Hill's note, 370, to 1 Phil. Evid. 195; 3 Chitty, Gen. Practice, 872 – 877.

[3] Mercer *v.* Whall, 9 Jur. 576.

[4] Such was the course in Young *v.* Bairner, 1 Esp. 103, which was assumpsit for work, and a plea in abatement for the non-joinder of other defendants; Robey *v.* Howard, 2 Stark R. 555, S. P.; Stansfield *v.* Levy, 3 Stark. R. 8, S. P.; Lacon *v.* Higgins, 3 Stark. R. 178, where, in assumpsit for goods, coverture of the defendant was the sole plea; — Hare *v.* Munn, 1 M. & M. 241, note, which was assumpsit for money lent, with a plea in abatement for the non-joinder of other defendants; — Morris *v.* Lotan, 1 M. & Rob. 233, S. P.; Wood *v.* Pringle, ib. 277, which was an action for a libel, with several special pleas of justification as to part, but no general issue; and as to the parts not justified, judgment was suffered by default. See acc. Comstock *v.* Hadlyme, 8 Conn. 261; 1 Phil. Evid. 195, Cowen & Hill's Ed. note 370; Ayer *v.* Austin, 6 Pick. 225; Hoggett *v.* Exley, 9 C. & P. 324; 2 M. & Rob. 251, S. C. On the other hand are Cooper *v.* Wakley, 3 Car. & P. 474; 1 M. & M. 248, S. C., which was case for a libel, with pleas in justification, and no general issue; but this is plainly contradicted by the subsequent case of Wood *v.* Pringle, and has since been overruled, in Mercer *v.* Whall; — Cotton *v.* James, 1 M. & M. 273; 3 Car. & P. 505, S. C., which was trespass for entering the plaintiff's house, and taking his goods, with a plea of justification under a commission

§ 77. Where the proceedings are not according to the course of the Common Law, and where, consequently, the

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of bankruptcy; but this also is expressly contradicted in Morris *v.* Lotan; — Bedell *v.* Russell, Ry. & M. 293, which was trespass of assault and battery, and for shooting the plaintiff, to which a justification was pleaded; where Best, J. reluctantly yielded to the supposed authority of Hodges *v.* Holden, 3 Campb. 366, and Jackson *v.* Hesketh, 2 Stark. R. 518; in neither of which, however, were the damages controverted; — Fish *v.* Travers, 3 Car. & P. 578, decided by Best, J. on the authority of Cooper *v.* Wakley, and Cotton *v.* James; — Burrell *v.* Nicholson, 6 Car. & P. 202, which was trespass for taking the plaintiff's goods in his house, and detaining them one hour; which the defendant justified as a distress for parish rates; and the only issue was, whether the house was within the parish or not. But here, also, the damages were not in dispute, and seem to have been regarded as merely nominal. See also Scott *v* Hull, 8 Conn. 296. In Norris *v.* Ins. Co. of N. America, 3 Yeates, 84, which was covenant on a policy of insurance, to which performance was pleaded, the damages were not then in dispute, the parties having provisionally agreed upon a mode of liquidation. But in England, the entire subject has recently undergone a review, and the rule has been established, as applicable to all personal actions, that the plaintiff shall begin, wherever he goes for substantial damages not already ascertained. Mercer *v.* Whall, 9 Jur. 576. In this case, Lord Denman, C. J., in delivering the judgment of the Court, expressed his opinion as follows: — "The natural course would seem to be, that plaintiff should bring his own cause of complaint before the Court and Jury, in every case where he has anything to prove either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him. The law, however, has by some been supposed to differ from this course, and to require that defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact, which if proved will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial, anticipating the plaintiff's statement of his injury, disparaging him and his ground of complaint, offering or not offering, at his own option, any proof of his defensive allegation, and, if he offers that proof, adapting it not to plaintiff's case as established, but to that which he chooses to represent that plaintiff's case will be. It appears expedient that plaintiff should begin, in order that the Judge, the Jury, and the defendant himself should know precisely how the claim is shaped. This disclosure may convince defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best con-

onus probandi is not technically presented, the Courts adopt the same principles which govern in proceedings at Common Law. Thus, in the *probate of a will*, as the real question is, whether there is a valid will or not, the executor is considered as holding the affirmative; and, therefore, he opens and closes the case, in whatever state or condition it may be, and whether the question of sanity is or is not raised.[1]

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clusion. If this does not occur, plaintiff by bringing forward his case points his attention to the proper object of the trial, and enables defendant to meet it with a full understanding of its nature and character. If it were a presumption of law, or if experience proved, that plaintiff's evidence must always occupy many hours, and that defendant's could not last more than as many minutes, some advantage would be secured by postponing plaintiff's case to that of defendant. But, first, the direct contrary in both instances may be true, and, secondly, the time would only be saved by stopping the cause for the purpose of taking the verdict at the close of defendant's proofs, if that verdict were in favor of defendant. This has never been done or proposed: if it were suggested, the Jury would be likely to say, on most occasions, that they could not form a satisfactory opinion on the effect of defendant's proofs till they had heard the grievance on which plaintiff founds his action. In no other case can any practical advantage be suggested as arising from this method of proceeding. Of the disadvantages that may result from it, one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and affirming something by way of defence which he knows to be untrue, for the mere purpose of beginning." See 9 Jur. 578. Ordinarily speaking, the decision of the Judge at *nisi prius*, on a matter resting in his discretion, is not subject to revision in any other Court. But in Hackman *v.* Fernie, 5 M. & W. 505, the Court observed, that though they might not interfere in a very doubtful case, yet if the decision of the Judge "were clearly and manifestly wrong," they would interfere to set it right. In a subsequent case, however, it is said that instead of "were clearly and manifestly wrong," the language actually used by the Court was, "did clear and manifest wrong;" meaning that it was not sufficient to show merely that the wrong party had begun, but, that some injustice had been done in consequence. See Edwards *v.* Matthews, 11 Jur. 398. See also Geach *v.* Ingall, 9 Jur. 691.

[1] Buckminster *v.* Perry, 4 Mass. 593; Brooks *v.* Barrett, 7 Pick. 94; Comstock *v.* Hadlyme, 8 Conn. 254; Ware *v.* Ware, 8 Greenl. 42; Hubbard *v.* Hubbard, 6 Mass. 397.

§ 78. To this general rule, that the burden of proof is on the party holding the affirmative, there are some *exceptions*, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases, in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, the establishment of this negative is an essential element in his case;[1] as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause. Here, the want of probable cause must be made out by the plaintiff, by some affirmative proof, though the proposition be negative in its terms.[2] So, in an action by husband and wife, on a promissory note made to the wife after marriage, if the defendant denies that she is the meritorious cause of action, the burden of proving this negative is on him.[3] So, in a prosecution for a penalty given by statute, if the statute, in describing the offence, contains negative matter, the count must contain such negative allegation, and it must be supported by *primâ facie* proof. Such is the case in prosecutions for penalties given by statutes, for coursing deer in inclosed grounds, not having the consent of the owner;[4] or, for cutting trees on lands not the party's own, or, taking other property, not having the consent of the owner;[5] or, for selling, as a pedler, goods not of the produce or manufacture of the country;[6] or, for neglecting to prove a will, without just excuse made and accepted by the Judge of Probate therefor.[7] In these, and the like cases, it is obvious, that

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[1] 1 Chitty on Pl. 206; Spiers *v.* Parker, 1 T. R. 141; Rex *v.* Pratten, 6 T. R. 559; Holmes *v.* Love, 3 B. & C. 242; Lane *v.* Crombie, 12 Pick. 177.

[2] Purcell *v.* Macnamara, 1 Campb. 199; 9 East, 361, S. C.; Ulmer *v.* Leland, 1 Greenl. 134; Gibson *v.* Waterhouse, 4 Greenl. 226.

[3] Philliskirk *v.* Pluckwell, 2 M & S. 395, per Bayley, J.

[4] Rex *v.* Rogers, 2 Campb. 654; Rex *v.* Jarvis, 1 East, 643, note.

[5] Little *v.* Thompson, 2 Greenl. 128; Rex *v.* Hazy & al. 2 C. & P. 458.

[6] Commonwealth *v.* Samuel, 2 Pick 103.

[7] Smith *v.* Moore, 6 Greenl. 274. See other examples in Commonwealth *v.* Maxwell, 2 Pick. 139; 1 East, P. C. 166, § 15; Williams *v.* Hingham

plenary proof on the part of the affirmant can hardly be expected; and, therefore, it is considered sufficient if he offer such evidence as, in the absence of counter testimony, would afford ground for presuming that the allegation is true. Thus, in an action on an agreement to pay £100, if the plaintiff would not send herrings for one year to the London market, and, in particular, to the house of J. & A. Millar, proof that he sent none to that house was held sufficient to entitle him to recover, in the absence of opposing testimony.[1] And generally, where a party seeks, from extrinsic circumstances, to give effect to an instrument which, on the face of it, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for, in the absence of extrinsic proof, the instrument must have its natural operation, and no other. Therefore, where real estate was devised for life with power of appointment by will, and the devisee made his will devising *all his lands*, but without mention of or reference to the power, it was held no execution of the power, unless it should appear that he had no other lands; and that the burden of showing this negative was upon the party claiming under the will as an appointment.[2]

§ 79. But where the subject-matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act, which the statutes do not permit to be done by any persons, except those, who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.[3]

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and Quincy Turnpike Co. 4 Pick. 341; Rex *v.* Stone, 1 East, 637; Rex *v.* Burditt, 4 B. & Ald. 95, 140; Rex *v.* Turner, 5 M. & S. 206.

[1] Calder *v.* Rutherford, 3 B. & B. 302; 7 Moore, 158, S. C.

[2] Doe *v.* Johnson, 7 Man. & Gr. 1047.

[3] Rex *v.* Turner, 5 M. & S. 206; Smith *v.* Jeffries, 9 Price, 257; Sheldon

§ 80. So, where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence, and quiet possession, is in favor of the party charged. Thus, in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Exchequer, in violation of his duty, the prosecutor was required to prove the negative. So, where one in office was charged with not having taken the sacrament within a year; and where a seaman was charged with having quitted the ship, without the leave in writing, required by statute; and where a shipper was charged with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burned and lost; in each of these cases, the party alleging the negative was required to prove it.[1] So, where the defence to an action on a policy of insurance was, that the plaintiff improperly concealed from the underwriter certain facts and information which he then already knew and had received, it was held that the defendant was bound to give *some* evidence of the non-communication.[2] So, where the goods of the plaintiff are seized and taken out of his possession, though for an alleged forfeiture under the revenue laws, the seizure is presumed unlawful, until proved otherwise.[3]

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v. Clark, 1 Johns. 513; United States *v.* Hayward, 2 Gall. 485; Gening *v.* The State, 1 McCord, 573; Commonwealth *v.* Kimball, 7 Met. 304; Harrison's case, Paley on Conv. 45, n.; Apothecaries Co. *v.* Bentley, Ry. & Mood. 159. By a statute of Massachusetts, 1844, ch. 102, the burden of proving a license for the sale of liquors, is expressly devolved on the person selling.

[1] United States *v.* Hayward, 2 Gall. 498; Hartwell *v.* Root, 19 Johns. 345; Bull. N. P. [298]; Rex *v.* Hawkins, 10 East, 211; Frontine *v.* Frost, 3 B. & P. 302; Williams *v.* E. Ind. Co. 3 East, 192. See also Commonwealth *v.* Stow, 1 Mass. 54; Evans *v.* Birch, 3 Campb. 10.

[2] Elkin *v.* Janson, 13 M. & W. 655.

[3] Aitcheson *v.* Maddock, Peake's Cas. 162. An exception to this rule is

§ 81. So, where *infancy* is alleged;[1] or, where one born in lawful wedlock is alleged to be *illegitimate*, the parents not being separated by a sentence of divorce;[2] or, where *insanity* is alleged;[3] or, a person once living is alleged to be *dead*, the presumption of life not being yet worn out by lapse of time;[4] or, where nonfeasance or negligence is alleged, in an action on contract;[5] or, where the want of a due stamp is alleged, there being faint traces of a stamp of some kind;[6] the burden of proof is on the party making the allegation, notwithstanding its negative character.

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admitted in Chancery, in the case of attorney and client; it being a rule there, that if the attorney, retaining the connexion, contracts with his client, he is subject to the burden of proving that no advantage has been taken of the situation of the latter. 1 Story, Eq. Jur. § 311; Gibson *v.* Jeyes, 6 Ves. 278; Cane *v.* Ld. Allen, 2 Dow, 289, 294, 299.

[1] Borthwick *v.* Carruthers, 1 T. R. 648.

[2] Case of the Banbury Peerage, 2 Selw. N. P. (by Wheaton) 558; Morris *v.* Davies, 3 Car. & P. 513.

[3] Attorney Gen. *v.* Parnther, 3 Bro. C. C. 441, 443, per Lord Thurlow; cited with approbation in White *v.* Wilson, 13 Ves. 87, 88; Hoge *v.* Fisher, 1 Pet. C. C. R. 163.

[4] Throgmorton *v.* Walton, 2 Roll. R. 461; Wilson *v.* Hodges, 2 East, 313; Ante, § 41.

[5] Crowley *v.* Page, 7 C. & P. 790; Smith *v.* Davies, Ib. 307; Clarke *v.* Spence, 10 Watts, R. 335; Story on Bailm. § 454, 457, note (3d ed.); Brind *v.* Dale, 8 C. & P. 207. See further, as to the right to begin, and, of course, the burden of proof, Pontifex *v.* Jolly, 9 C. & P. 202; Harnett *v.* Johnson, Ib. 206; Aston *v.* Perkes, Ib. 231; Osborn *v.* Thompson, Ib. 337; Bingham *v.* Stanley, Ib. 374; Lambert *v.* Hale, Ib. 506; Lees *v.* Hoffstadt, Ib. 599; Chapman *v* Emden, Ib. 712; Doe *v.* Rowlands, Ib. 734; Ridgway *v.* Ewbank, 2 M. & Rob. 217; Hudson *v.* Brown, 8 C. & P. 774; Soward *v.* Leggatt, 7 C. & P. 613; Bowles *v.* Neale, Ib. 262; Richardson *v.* Fell, 4 Dowl. 10; Silk *v.* Humphery, 7 C. & P. 14.

[6] Doe *v.* Coombs, 3 Ad. & El. N. S. 687.

CHAPTER IV.

OF THE BEST EVIDENCE.

§ 82. A FOURTH RULE, which governs in the production of evidence, is that which requires *the best evidence of which the case, in its nature, is susceptible.* This rule does not demand the greatest amount of evidence, which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent that better evidence is witheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant, that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence, which itself indicates the existence of more original sources of information. But where there is no substitution of evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.[1] Thus a title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence, of which the case is susceptible; and its nonproduction would raise a presumption, that it contained

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[1] Phil. & Am. on Evid. 438; 1 Phil. Evid. 418; 1 Stark. Evid. 437; Glassford on Evid. 266 – 278; Tayloe *v.* Riggs, 1 Peters, 591, 596; United States *v.* Reyburn, 6 Peters, 352, 367; Minor *v.* Tillotson, 7 Peters, 100, 101.