The commonest illustration of divisibility, so-called, is in pleading, where a contract is alleged, and admitted with a plea in avoidance or exception. In that case the burthen of proof is transferred invariably to the defendant.

What the code means by "aveu" and "admission" is confession. (1) If A on interrogatories answers he borrowed from B, but paid him, the confession must be taken as a whole, because judgment could not pass against A on his confession—"*nam inanis inutilisque confessio est nisi sit certi confessio.*" *l. certum ff. de confess. quod est in controversia.* But if he pleads payment he must prove it, otherwise we should get into a violation of the rule that he who alleges must prove—*ei incumbit probatio, qui dicit, non qui negat.* (2) It will be found that what is uppermost in the thoughts of all the writers who treat of the indivisibility of the confession, is the indivisibility of the judicial confession, and principally on interrogatories. Again, there are cases of its divisibility which are left to the prudence of the judge, and to a doctrine which is too well known to require me to do more than allude to it. (3) By entering into it I should add nothing new, and I should fail to convert those who think they have all the law and the prophets when they can exclaim, "I have the article of the code on my side," meaning thereby, that they have got the most superficial doctrine that does not violate grammatical construction. (4)

There has, however, been a question as to whether the rule *in civilibus non scinditur confessio* is applicable to the *commencement de preuve par écrit.* It seems to me that the reasoning which leads to the conclusion that it is not is irresistible; and had it not been for an allusion by Serpillon (323 C. C.) to the indivisibility of the admission tending to admit proof, I should not have thought it possible to see any common principle. As I have already explained, the doctrine of the indivisibility of a confession is based on a principle of justice, which forbids one's taking the *testimony* of a man as one's whole evidence and then rejecting a part. The statutory rule that verbal evidence shall not be received without a *commencement de preuve par écrit* is simply to prevent false witnesses fabricating a story (1). All that was necessary either under the French ordinances or under the statute of frauds was something to give reality to the evidence. Here is how Pothier puts it, the evidence is to be "*non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie.*" If this be the law, it will be hard to justify the judgment in this case. However, I find everywhere the same doctrine: "*Les contradictions et demi-aveux, résultants d'une interrogatoire ou de la défense d'une partie, sont aussi un commencement de preuve par écrit.*" 1 Pigeau, 268. And Serpillon, C.C. 321, says: "*Un commencement de preuve par écrit, c'est lorsque l'on a un titre par écrit, non de la vérité totale du fait, mais de quelque fait qui y conduit, ou qui en fait partie.*" "*On entend par un commencement de preuve par écrit un écrit qui prouve seulement, ou un fait préparatif à la convention, ou une partie de la convention sans prouver l'autre, ou quelque suite de la convention.*" Prévost de la Jannes, Pr. de la Juris. 2, p. 407. Under the C. N. art. 1347, there can be no doubt, for it distinctly tells us what a *commencement de preuve* is: "*On appelle ainsi tout acte par écrit qui est émanée de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.*" This is not even a new way of stating the old law (2).

Mr. Justice Loranger made this very clear in the case of *Cox & Patton*, and then, curiously enough, dissented. (18 L.C.J. 320). Now the case of *Cox & Patton* amounts to

(1) "L'aveu de la partie, que l'on appelle aussi en droit confession," 10 Toullier, 260.

(2) Cujas decides the special point: "*Si reus allegat solutionem probare debet,*" 7, c. 874, C.

(3) 10 Toullier, 336, where the whole question, its history and authorities are fully stated.

(4) It is not uninteresting to compare the operation of doctrine on the text of the French ordinances and of the English statute. Lately a school of philosophers has sprung up, both in England and France, who regret the abandonment of the most simple exposition of their statutory evangel. The English innovator is embarrassed by precedent, his French parallel has no such superstitious terror before his eyes.

(1) It was not intended to exclude verbal testimony, but to check its abuses.

(2) Prevost de la Jannes, Pr. de Juris. 2 p. 407. N. Denisart, *vbo.* commencement de preuve.