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NOTES

ADMISSIBILITY OF EVIDENCE AS TO THE HABIT OF ONE KILLED OR INJURED TO PROVE OR DISPROVE HIS NEGLIGENCE. — This note is limited in scope to the admissibility of evidence dealing with the habits of care or negligence of the party injured or killed. Evidence of this nature is of importance in establishing freedom from negligence, or contributory negligence, as the case may be, on the side of the party plaintiff in an action for damages for injury or death, caused by negligence. No effort shall be directed toward the matter of the defendant's habit

for care or negligence. Nor are those cases in which there is an endeavor to prove specific acts of negligence, or care, to be treated herein. A specific act does not *per se* suffice to establish a habit or custom.

Most of the reported cases involve habits of negligence, but, of course, habits of caution and prudence are of equal, if not greater, evidentiary weight. Professor Wigmore, in his treatise on evidence,[1] goes so far as to question whether acts of negligence can be anything more than casual or occasional. But in *Wallis v. Southern Pacific Railroad Company*,[2] it is said: "Experience, however, will not support this theory. It may be said, however, that prudence and caution in matters involving exposure to danger may more readily become habitual from the incentive always present to follow the path of safety." This distinction is not always apparent in the cases. The courts frequently discuss habits of care, or negligence, in a general manner. However, for the purpose of classification, the cases in this note shall be treated with this distinction present.

Direct evidence assumes an important role in this work. In contemplation of the cases to be dealt with, direct evidence means that given by eyewitnesses to the accident. Moreover, as announced in *Lowry v. Chicago & North Western Railroad Company*,[3] "where the plaintiff is alive and not proven to be insane," he is a source of direct evidence. Thus, with the addition of the expression "lack or presence of direct evidence" into the question so far limited and described, its alternative nature results in rendering it apparent in various forms. These forms, which will be treated hereafter in the order enumerated, are: habit of care where there is direct evidence, habit of negligence where there is direct evidence, habit of care where there is no direct evidence, and habit of negligence where there is no direct evidence. There is much contrariety of opinion on these situations. The subject already described has been dealt with similarly elsewhere.[4]

The first of these situations was encountered in a leading New York case.[5] The plaintiff's intestate, as he was about to walk across the defendant's street car tracks, was struck by the defendant's trolley car and fatally injured. The defendant admitted its negligence but through its witnesses claimed that the decedent was contributorily negligent. Evidence was therewith offered on the side of the plaintiff to prove that the decedent was habitually careful in crossing city streets. In the case, there was ample direct evidence. The New York court held that evidence as to the habit of care of the party injured was inadmissible where

1 1 WIGMORE, EVIDENCE (2d ed. 1923) § 97.
2 184 Cal. 662, 195 Pac. 408 (1921).
3 248 Ill. App. 306 (1928).
4 Notes (1913) 41 L. R. A. (N. S.) 684; Notes (1921) 15 A. L. R. 125.
5 Zucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209 (1912).

there was direct evidence. In a thorough opinion, an unanimous court admitted the probative value of such evidence, but announced that the latter did not outweigh the "inconvenience of a multitude of collateral issues, not suggested by the pleadings, the trial of which would take much time, tend to create confusion . . . and would tend to distract the jury and lead them away from the main issue to be decided." Moreover, it was asserted, "after all the testimony of this character was in, the fact would remain that, as no one is always careful, the subject of inquiry, although careful on many occasions, might not have been careful on the occasion in question." This general rule is adhered to in most jurisdictions,[6] but some courts apply it with modifications. Where the direct evidence was slight, it has been held that proof of a man's habit of using care tends to repel the defense of his contributory negligence.[7] Evidence of this nature is sometimes allowed to rebut evidence that the injured party was in the habit of placing himself in a position where he might more easily be injured.[8] An Indiana court held: "It is, no doubt, true that such evidence would not be competent to excuse negligence; but . . . it would be competent on the measure of damages. The loss from the death of a careful, experienced railroad man would be greater than that of one who was careless and inexperienced."[9]

The second situation as to the admissibility of evidence of habit arises when a party to a litigation attempts to admit proof of the habit of negligence on the part of the plaintiff. The prime requisite in such a case, whether the court permits such evidence or not, is that the alleged habit be a possible cause of the injury or death. If it is not, the court will, without delay, declare the evidence irrelevant and inadmissible.[10]

The decisions, in the light of this second situation, are similar in both reasoning and result with those already treated in regard to the

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6 Harriman v. Pullman-Palace Co., 29 C. C. A. 194, 85 Fed. 353 (1898); Price v. Warner, 1 Penne. (Del.) 462, 42 Atl. 699 (1899); Central Ry. & Banking Co. v. Kent, 87 Ga. 402, 13 S. E. 502 (1891); Lowry v. Chicago & N. W. Ry. Co., 248 Ill. App. 306 (1928); Adams v. Chicago, Milwaukee & St. Paul Ry. Co., 93 Iowa 565, 61 N. W. 1059 (1895); Junction City v. Blades, 1 Kan. App. 85, 41 Pac. 677 (1895); Langworthy v. Township of Green, 88 Mich. 207, 50 N. W. 130 (1891); Gulf, C. & S. F. Ry. Co. v. Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358 (1897); Spiking v. Cons. Ry. & Power Co., 33 Utah 313, 93 Pac. 838 (1908); Carter v. City of Seattle, 19 Wash. 597, 53 Pac. 1102 (1898).

7 Bush v. Brewer, 136 Ark. 246, 206 S. W. 322 (1918); Missouri P. Ry. Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837 (1899).

8 Gulf, C. & S. F. Ry. Co. v. Johnson, 42 S. W. 584 (Tex. Civ. App. 1897).

9 Pittsburg, C., C. & St. Louis Ry. Co. v. Parish, 28 Ind. App. 189, 62 N. E. 514 (1902); Mott v. Davis, 90 W. Va. 613, 111 S. E. 603 (1922).

10 St. Louis, I. M. & S. R. R. Co. v. Sparks, 81 Ark. 187, 99 S. W. 73 (1906); Ga., Midland & G. R. R. Co. v. Evans, 87 Ga. 673, 13 S. E. 580 (1891); Maysville & B. S. Ry. Co. v. Willis, 31 Ky. L. Rep. 1249, 104 S. W. 1016 (1907); Hill v. Snyder, 44 Mich. 318, 6 N. W. 674 (1880).

first situation. No great distinction is drawn between the offer to show habit of care, or of negligence, where there is direct testimony. This conclusion is substantiated by the case of *Lexington Railway Company v. Herring*.[11] The action was brought for personal injuries sustained by the plaintiff when the defendant's street car suddenly and negligently jerked forward as the plaintiff was in the act of boarding it. The defendant attempted to introduce evidence to show that the plaintiff was in the habit of boarding cars while they were in motion. There was considerable direct evidence of the accident in the case. Under these circumstances, the court rejected the evidence. In its opinion it announced: "Nearly every person is at times guilty of some negligent act, and frequently a person prompted by entirely different motives and moved by dissimilar influences will do the same thing, and if evidence of previous similar acts was admitted, the plaintiff should be permitted to explain, if possible, the reasons or the motives prompting him to do each particular act. This would inject into the trial of the case numerous collateral issues and would result in, not only confusing the minds of the jury, but in diverting their attention from the issue presented in the pleadings that they were called upon to try." In *Baker v. Irish*,[12] the court reached the same result; and added that, "men do not usually risk life and limb without motive, and the fact that a man has done so once, or oftener, does not warrant the deduction that he did so on the occasion in question." These two cases represent the general holding throughout the United States.[13] But where the evidence is conflicting, some courts have admitted evidence of habit of negligence.[14] A California court held, where there was a dispute as to whether the plaintiff jumped off the street car or was pushed off, that the evidence as to his negligent habit of jumping off the car was admissible. It was said: "a sensible man called upon, out of court, to determine whether or not a certain person had, on the occasion in question, carelessly jumped off a moving car, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit

11 29 Ky. L. Rep. 794, 96 S. W. 558 (1906).

12 172 Pa. 528, 33 Atl. 558 (1896).

13 Great Northern Ry. Co. v. Ennis, 149 C. C. A. 227, 236 Fed. 17 (1916); Birmingham Ry., L. & Power Co. v. Selhorst, 165 Ala. 475, 51 So. 568 (1917); Western & A. R. R. Co. v. Slate, 23 Ga. App. 225, 97 S. E. 878 (1919); Linck v. Scheffel, 32 Ill. App. 17 (1899); Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238 (1903); Kaillen v. N. W. Bedding Co., 46 Minn. 187, 48 N. W. 779 (1891); Eppendorf v. Brooklyn City & N. Ry. Co., 69 N. Y. 195, 25 Am. Rep. 171 (1887); International & G. N. R. R. Co. v. Ives, 31 Tex. Civ. App. 272, 71 S. W. 772 (1903); Propsom v. Leatham, 80 Wis. 608, 50 N. W. 586 (1891).

14 Craven v. Cen. P. Ry. Co., 72 Cal. 345, 13 Pac. 878 (1887); Parkinson v. Nashua & L. Ry. Co., 61 N. H. 416 (1881); Hannibal & S. J. Ry. Co. v. Preston, 132 Mo. 111, 33 S. W. 783 (1896); Allard v. N. W. Contract Co., 64 Wash. 14, 116 Pac. 457 (1911).

of alighting from cars in that manner." [15] Texas, which ordinarily follows the general rule, allowed such evidence in a case to prove intoxication, but there was already considerable evidence that the plaintiff was intoxicated at the time of the accident, so the fact was proved without habit evidence.[16] In *Gibson v. Burlington, Cedar Rapids & Northern Railway Company,*[17] it was stated that such evidence "tended to prove negligence," and it was allowed to go to the jury. The direct evidence in the case was slight, however.

The third situation arises where there is no direct evidence and proof of a habit of care is offered. When there is no direct evidence of the accident, the courts are confronted with a more persuasive appeal for the admittance of such evidence. The necessity for proof, and the absence of contradictory and direct testimony, strengthens the probative value of habitual conduct of care. In *Wallis v. Southern Pacific Railroad Company,*[18] there was no direct evidence for a short space of time just before the decedent was struck and killed by a train as he was driving a wagon across the defendant's tracks. The court ruled that, in the absence of direct testimony, evidence as to the decedent's habit of care in crossing railroad tracks was admissible. In an exhaustive opinion, it was stated that the main argument against admitting such evidence was that it raised collateral issues of which the opposing party had no prior notice. In rebuttal, it was pointed out that: "This condition, however, arises in numerous instances in nearly every trial on the introduction of probative facts, collateral in nature, and of which the ultimate facts pleaded give no inkling." The court further justified its stand by announcing that: "Men are accustomed to weighing and acting upon such evidence of conduct in their everyday affairs. Recognition of its force is seen in the adoption by the law of many presumptions based on common experience, such as the presumption that a letter properly deposited in the mails has reached its destination in due time, and the presumption that the regular custom of a business has been followed." The holding of this case represents the decided numerical authority, and the American weight of authority.[19] *Greenwood v. Boston & Maine Railroad Company,*[20] enunciates an opinion concurring with the majority, but carefully points out that it is only evidence of habit of care, and not evidence of general character which is admissible. There are many decisions to be found which do not

15 Craven v. Central P. Ry. Co., 72 Cal. 345, 13 Pac. 878 (1887).

16 Southern Traction Co. v. Kirksey, 222 S. W. 702 (Tex. Civ. App. 1920).

17 107 Iowa 596, 78 N. W. 190 (1899).

18 184 Cal. 662, 195 Pac. 408 (1921).

19 Monadnock Mills v. Fushey, 140 C. C. A. 72, 224 Fed. 386 (1915); Nawn v. Boston & M. Ry. Co., 77 N. H. 229, 91 Atl. 181 (1914); McNulta v. Lockridge, 32 Ill. App. 86 (1889); Platter v. Minneapolis & St. L. R. R. Co., 162 Iowa 142, 143 N. W. 992 (1913); Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690 (1837).

20 77 N. H. 82, 88 Atl. 217 (1913).

allow the entrance into the trial of this type of evidence. Many of these holdings, however, cannot be sustained as dissenting from the majority ruling. Frequently, such evidence has been rejected on the grounds that it relates merely to specific acts and not habit,[21] or that the evidence was concerned only with the general character for care.[22] Nevertheless, there is a minority holding definitely against the admittance of such evidence. It is reasoned that the mere proof that a man has done one thing carefully many times in his life does not prove that it was so done on the occasion when he was not witnessed. This was said to be so in spite of man's strong instinct for self-preservation. Further, it is said that the evidence does not serve to prove the fact in issue; and lastly, that the delay and inconvenience of collateral issues does not warrant its admittance.[23]

The decisons in regard to the fourth and last situation to be discussed in this note, the admissibility of habit evidence to show carelessness when there is no direct evidence, are not numerous. Those cases holding that even though there was direct testimony, still evidence of habit of negligence was admissible, would seem *a fortiori* to be authority for allowing such evidence where there is no direct evidence. Granting the latter, the courts have considered, in the cases decided, that the sounder policy is to exclude such evidence even though there is no direct evidence available. In *Louisville & Nashville Railway Company v. McClish*,[24] the action was brought against the railroad for the death of the plaintiff's decedent after being struck and killed by the defendant's train. There were no eyewitnesses to the accident. Nevertheless, evidence of the decedent's habit of carelessness in jumping upon moving trains was not allowed. The court held that the evidence should be confined to his acts at the time of the accident which were capable of being directly or circumstantially proved. Further reasons given in this decision were that it created collateral issues, and brought uncertainty and false inferences into the cause. This view has been followed in other jurisdictions.[25] *Kroy v. Chicago Rock Island & Pacific Railroad Company*,[26] has been cited as upholding the opposite rule, but this cannot be so broadly stated. This case did allow evidence that the decedent was one of the defendant's trainmen who

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21 Gray v. Chicago, R. I. & Pac. R. R. Co., 143 Iowa 268, 121 N. W. 1097 (1909).

22 Erb v. Popritz, 59 Kan. 264, 52 Pac. 871 (1898).

23 Morris v. East Haven, 41 Conn. 252 (1874); Baltimore & Ohio R. R. Co. v. State, 107 Md. 642, 69 Atl. 439 (1908); Parsons v. Syracuse, B. & N. Y. Ry. Co., 117 N. Y. S. 1058, 133 Am. Dec. 461 (1909).

24 53 C. C. A. 60, 115 Fed. 268 (1902).

25 Mullville v. Pac. Mut. Life Ins. Co., 19 Mont. 95, 47 Pac. 650 (1897); Peoria & Pekin Union Ry. Co. v. Clayberg, 107 Ill. 644 (1883); Great Western Coal & Coke Co. v. McMohan, 43 Okla. 429, 143 Pac. 23 (1914).

26 32 Iowa 357 (1871).

participated in the negligent habit of uncoupling cars while still in motion. However, the facts of the case show that the decedent was uncoupling the cars in that manner when he was killed. The evidence in this case was used to show the decedent's assumption of risks, and not to prove that it was the cause of the accident.

The precise reason for generally allowing evidence of care where there is no direct evidence, and not so generally admitting evidence of habit of carelessness where there is no direct evidence, cannot be found in the cases cited. The cases which draw no distinction between habit of care, or habit of negligence, might be cited as supporting a rule that evidence as to careless habits where there is no direct evidence is admissible. But perhaps the reason is to be found in Professor Wigmore's theory that acts of negligence are usually nothing more than casual or occasional, and that man's instinct for self-preservation is too strong and apparent in humanity to permit evidence which tends to show that it is not.

Edwin D. O'Leary.

ADVERSE POSSESSION — REQUIREMENTS — EFFECTS.—One method of obtaining title to lands is by adverse possession, which is the disseisin of the true owner by the adverse holder. This method has been purely statutory since the beginning of law. Until the Statute of Merton, 20 Henry III, c. 8,[1] one had to trace his title to Henry I. The Statute of Merton provided that one had to claim from Henry II and by the Statute of Westminister I, c. 39,[2] from the time of Richard I. In 1540, 32 Henry VIII, c. 2, provided that one must be in possession for sixty years, at which time title would pass. The Statute of James I, c. 16 [3] provided, "that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue." [4]

This statute of limitations remained the law in England until 1874 when by 37 and 38 Victoria v. 57, s. 1, the limitation was lowered to twelve years instead of twenty.[5]

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[1] 1154 A. D.

[2] 1275 A. D.

[3] 1623 A. D.

[4] By 21 Jac. I, c. 16, a peaceable possession for 20 years takes away the right of entry. In which case a release of actions will create a good title, for no writ of right can be brought for the fee simple after such release. An uninterrupted possession for 20 years not only gives a right of possession which cannot be divested by entry but also gives right of entry to the possessor. Stocker v. Burney 1 Ld. Raym. 741; 2 Salk 421.

[5] For a complete exposition of the nature and origin of adverse possession under the old common law see: Walsh 783; Digby (5th ed.) 427; Tiffany 1917; 2 POLLACK & MAITLAND, HIST. OF ENGLISH LAW; Blackstone, iii, pp. 178, 188, 192, 196; 3 CRUISES DIGEST 484.

In the United States the period of limitation varies. A few statutes still maintain the old common law requirement of twenty years, while others have a fifteen year limitation,[6] and still others have a short term statute requiring other conditions to be performed.[7]

There is an acceptance by all the authorities that in order to bar the owner from recovering from an occupant in adverse possession, the disseisor must have been in possession for the period prescribed by statute, and that this possession must be actual, open, notorious, visible, continuous, and hostile.[8]

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[6] Fifteen year Statute of Limitation: CONN. GEN. STAT., (1930) § 6003; CARROLL'S KEN. STAT. (Baldwins Revision), (1936) § 2505; MINN. STAT., (1927) § 9187; NEW YORK CIVIL PRAC. ACT (Cahill, 1937) § 38; COMPILED OKLA. STAT. (1921) § 185; PUBLIC LAWS OF VT. (1933), § 1642; VA. CODE (1930) § 5805; GEN. STAT. OF KAN. (Carrick 1935) c. 60, § 304.

[7] The general short term statute provides for a payment of taxes on the property possessed. See REVISED CODE OF ARIZ. (Struckmeyer 1928) § 2054; ARK. DIG. STAT. (Crawford & Moses, 1921) § 6942; CIVIL CODE OF CALIF. (Deering, 1937) § 321; GA. GEN. CODE (1933) § 406; ILL. REVISED STAT. (Bar Ass'n. Ed. 1937) c. 83, § 6; CODE OF IOWA (1935) § 11007; COMPILED LAWS OF MICH. (1929) § 3466; MINN. STAT. (1927) § 9187; REVISED STAT. OF MO. (1919) § 1305; REVISED CODE OF MONT. (1935) § 9024; COMPILED STAT. OF NEBR. (1929) c. 76, § 311; ORE. CODE (1930) c. 1, § 201; TENN. CODE (Williams. 1934) § 8583; TEX. STAT. (Vernon, 1936) § 5513; REVISED STAT. OF UTAH (1933) c. 104, § 2. The period of limitation in these statutes varies from one year to ten years although the majority of the states have set it at seven years. Although Indiana has added the requirement of paying taxes it has not shortened the period of time, see BURNS, IND. STAT., (1933) § § 602, 1314.

[8] Toerner v. Texas Co. 70 Fed. (2) 359, (1934); Montgomery v. Spear, 117 So. 753, 218 Ala. 160 (1928); Sheehan v. All Persons etc., 80 Cal. App. 393, 252 P. 337 (1927); Haymaker v. Windsor Reservoir & Canal Co., 81 Colo. 168, 254 P. 768 (1927); Pepe v. Aceto, 119 Conn. 282, 175 A. 775 (1935); Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, 16 Del. Ch. 410, 147 A. 165 (1929); Sanders v. Alford Bros., 92 Fla. 719, 111 So. 278 (1926); Branch v. Central Trust Co. of Ill. 320 Ill. 432, 151 N. E. 284 (1926); White v. Board of Comm'rs of Owen County, 87 Ind. App. 536, 162 N. E. 61, (1928); Montgomery County v. Case, 212 Iowa 73, 232 N. W. 150 (1926); Ahart v. Wilson, 211 Ky. 682, 277 S. W. 1007 (1925); Clayton v. Rickerson, 160 La. 657, 107 So. 569 (1927); Peper v. Traeger, 152 Md. 174, 136 A. 537 (1927); Distasio v. Gervagio. 255 Mich. 418, 208 N. W. 176 (1926); Daniels v. Jordan, 161 Miss. 78, 134 So. 903, (1931); Pioneer Cooperage Co. v. Dillard, 332 Mo. 798, 59 S. W. (2d) 642 (1933); Ferguson v. Strandley, 89 Mont. 489, 300 P. 245 (1931); Aynes v. Bantz. 114 Neb. 226, 206 N. W. 754 (1925); Burricher v. Westienfsky, 103 N. J. Law 340, 135 A. 890 (1927); McMahon v. Morse, 135 Misc. 236, 237 N. Y. S. 361 (1929); McKay v. Bullard, 207 N. C. 628, 178 S. E. 95 (1935); Crossman v. Foster, 44 Ohio App. 78, 183 N. E. 925 (1931); Coats v. Riley, 154 Okl. 291, 7 P. (2d) 644 (1932); Houck v. Houck, 133 Ore. 78, 283 P. 25 (1927); Baxter v. Girard Trust Co., 288 Pa. 256, 135 A. 620 (1927); Atlantic Coast Line Ry. Co. v. Searson, 137 S. C. 468, 135 S. E. 567 (1926); Labore v. Forbes, 59 S. D. 12, 238 N. W. 124, (1931); Sipes v. Sanders, 17 Tenn. App. 162, 66 S. W. (2d) 261 (1934); Gibbs v. Lester, 41 S. W. (2d) 28 (Tex. Com. App. 1931); Scampini v. Rizzi, 106 Vt. 281, 172 A. 619 (1934); Woody v. Abrams, 160 Va. 683, 169 S. E. 915 (1933); Wells v. Parks, 148 Wash. 328, 268 P. 889 (1928).

In those cases involving mistake as to boundary the courts have been unable to agree whether or not there must be an intention to disseise the true owner. In *French v. Pearce*,[9] a Connecticut case, the plaintiff and the defendant were adjoining property owners claiming under the same grantor. The deed to the defendant described his boundary "as from a butternut tree a straight line to Platt's corner. . . ." The defendant however contended that he had claimed beyond this boundary for a period of more than fifteen years as required by the statute. There was no fencing in of the property by either the plaintiff or the defendant. The plaintiff contends that since the defendant did not intend to claim the property adversely he could not then plead the statute as a bar to the recovery of the property. The court held that the necessary element was not the intent of the defendant to wrongfully disseise the plaintiff but rather a possession that is hostile to that held by the plaintiff. "I agree with the learned court that the intention of the possessor to claim adversely is an important ingredient.[10] But the person who enters on the land believing and claiming it as his own, does thus enter and possess. The very nature of the act is an assertion, of his own title, and a denial of the title of all others. It matters not that the possession was mistaken, and had he been better informed he would not have entered upon the land." [11]

On the other hand the Maine courts have taken the opposite view and maintain that there must be a wrongful intent. In *Preble v. Maine Central Railroad Company*,[12] the defendant, by mistake, occupied land that was beyond the boundary specified in a deed that he had granted to the plaintiff railroad. In the course of the examination the defendant admitted that he had no intention to claim this property but rather that it was a mistake. The court stated what is considered the majority opinion today. "The rule is that one who by mistake occupies for twenty years or more, land not covered by the deed with no intention

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9 8 Conn. 439, 21 Am. Dec. 680 (1931).

10 Moir v. Bailey, 146 Ark. 347, 255 S. W. 618 (1920); Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19 (1920); McLester Bldg. Co. v. Upchurch, 180 Ala. 23, 60 So. 173 (1912); Holland v. Nance, 102 Tex. 177, 114 S. W. 346 (1908); Lathrop v. Lavern, 83 Vt. 1, 74 A. 331 (1909); Union Trust & Deposit Co. v. Paulhamus, 74 W. Va. 1, 81 S. E. 547, (1914).

11 One may acquire title by adverse possession to land adjoining his lot, though he takes and holds possession of it under a mistake as to the location of the boundary. Rernert v. Shirk, 163 Ind. 542, 72 N. E. 546 (1904); Richardson v. Watts, 94 Me. 476, 48 A. 180, (1901); Jordan v. Riley, 178 Mass. 524, 60 N. E. 7 (1901); Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032 (1902); *Contra;* Muller v. Mills Co., 111 Iowa 654, 82 N. W. 1038 (1900); Conrad v. Sachett, 8 Kan. App. 635, 56 P. 507 (1899); Murdock v. Stillman, 72 Ark. 498, 82 S. W. 834 (1904).

12 85 Me. 260, 27 A. 149 (1893).

to claim title beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond its true line." [13]

In summing up the various decisions and reviewing the courts' attitude one can readily see that the courts themselves are confused as to whether or not the intent to disseise is necessary. At one moment they are loath to reward the wrongdoer and at another they require that a tort be committed and for such tort they reward the tort-feaser thus placing a premium on dishonesty. Perhaps the reluctance of some of the courts to grant possession to persons holding property by mistake is due to the fact that it is not a difficult matter to make a mistake as to the true boundary.

The fallacy in these cases appears to be the introduction of an element in adverse possession that does not have any existence at all since the mere possession beyond the boundary would seem to be all that is necessary to give the adverse claimant a claim to that property. If the courts find it necessary to discover whether or not there is a wrongful intent it will necessitate the exploration of the mind of the adverse holder with a confusing of the jurors as a consequence. The better rule, as laid down in *French v. Pearce,* that the intent is manifested by the very fact that the disseisor holds and claims the property as against the true owner regardless of intent, is beginning to receive support in many of our modern courts.

Some jurisdictions add to the above requirements the necessity of claim or color of title. The law on this question may be succintly stated by quoting from Justice Daniel in *Wright v. Mattison.*[14] "Color of title and claim of title are often confounded; the terms being used as if synonymous, whereas in fact they are different things. 'Claim of title' is where one enters and occupies land, with the intent to hold it as his own against the world, irrespective of any shadow or color of right or title as a foundation for his claim.[15] 'Color of title' is the semblance or appearance of title by which in reality, is not. They are distinct from,

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13 There must be an intent to hold and claim title to land, to constitute adverse possession. Kansas City v. Scarritt, 169 Mo. 471, 69 S. W. 283 (1902); Beer v. Plant, 1 Neb. 372, 96 N. W. 348 (1901); Haney v. Breeden, 100 Va. 781, 42 S. E. 916 (1902); Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259 (1908); Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P. 574 (1909); Waldo v. Wilson, 173 N. C. 689, 92 S. E. 692 (1917); Silman v. Joseph, 9 La. App. 32, 118 So. 776 (1928).

14 18 How. 50, 15 L. Ed. 280 (1855).

15 Claim of title is considered necessary in order to show intention to occupy adversely. Carrcey v. Hennessy, 74 Conn. 107, 49 A. 910 (1901); Maple v. Stevenson, 122 Ind. 368, 23 N. E. 854 (1890); Hummell v. Adams, 153 Mo. 440, 55 S. W. 95 (1900); Gillespie v. Gillespie, 149 Ala. 184 (1907); Page v. Bellamy, 222 Ill. 556, 78 N. E. 938 (1906); Arthur v. Humble, 140 Ky. 56, 130 S. W. 958 (1910); Bellatti v. Bichardt, 228 N. Y. 296, 127 N. E. 239 (1920).

but supplementary to each other. Color of title without claim, is of little effect. Claim of title without color may ripen into title to the land actually occupied, while, with it, it may ripen into title, not only of the land actually occupied, but to all described in the color of title, if that actually occupied be a part thereof." [16]

At common law color of title is not necessary to adverse possession but there must be a claim of title to oust the true owner.[17] Color of title is required by those states having short form statutes of limitation.[18] There is a conflict as to whether this color must be evidenced by a written instrument,[19] but some courts have held that a written instrument is not necessary to give color of title but that it may be created by acts *in pais*.[20] Another point on which the courts cannot agree is whether or not there must be good faith in acquiring the color of title,[21] but they are unanimous in holding that the conveyance need not be valid.[22]

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16 "Persons entering under color of title though having actual possession of a part thereof, has constructive possession to boundaries defined provided that no one else is in possession." Liberty Coal & Coke Co. v. Lewis, 52 Fed. (2d) 655 (1931). Accord: Marsh v. Grogg, 228 Ala. 269, 153 So. 219 (1934); Union Sawmill Co. v. Pagen, 175 Ark. 559, 299 S. W. 1012 (1927); Louisville Cooperage Co. v. Collins, 214 Ky. 247, 280 S. W. 106 (1926); Inhabitants of Nantucket v. Mitchell, 271 Mass. 62, 170 N. E. 807 (1930).

17 As stated *Supra* this claim of title is necessary at common law to show the intention on the part of an adverse possessor to oust the rightful owner of his right to the land. See: Wolfe v. Langford, 14 Calif. App. 359, 112 P. 203 (1910); McCurdy v. Rich, 76 Ind. App. 469, 132 N. E. 315 (1921); Iseman v. Iseman, 228 Ky. 116, 10 S. W. (2d) 613 (1928).

18 The following courts have interpreted the statute as making color of title essential to obtain the benefit of the short term statute. Horn v. Horn, 234 Ill. 268, 84 N. E. 904 (1908); Campbell v. Miller, 165 N. C. 51, 80 S. E. 974 (1914); Beale's Heirs v. Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045 (1908); Adams v. Pearce, 218 Ala. 525, 119 So. 236 (1928); Fitschen Bros. v. Noyes Estate, 76 Mont. 175, 246 P. 773 (1926).

19 A few courts explicitly state that the color of title must be evidenced by an instrument in writing but it is presumed that there will be such an instrument. Street v. Collins, 18 Ga. 470, 45 S. E. 294 (1903); Sullivan v. Scott, 73 Colo. 451 216 P. 515 (1923); Erickson v. Crosley, 100 Neb. 372, 160 N. W. 94 (1916); Baber v. Baber, 121 Va. 740, 94 S. E. 209 (1917).

20 Those acts *in pais* that are considered to give a color of title are really acts that amount to a claim of title and not color. Bleinerhassett v. Town of Forest City, 117 Iowa 680, 91 N. W. 1044 (1902); Slater v. Reed, 37 Ore. 214, 60 P. 709 (1900); Helvey v. Tillis, 136 Calif. App. 644, 29 P. (2d) 430 (1934); Sprott v. Sprott, 110 S. C. 438, 96 S. E. 617 (1918).

21 These cases hold that there must definitely be good faith in acquiring the color of title. West v. Green, 15 La. App. 216, 131 So. 595 (1930); Fitschen Bros. v. Noyes Estate, 76 Mont. 175, 246 P. 773 (1926).

22 Taylor v. Smith, 121 N. C. 76, 28 S. E. 295 (1897); Theisen v. Qually, 42 S. D. 367, 175 N. W. 556 (1919); Byron v. Riley, 154 Ga. 580, 114 S. E. 642 (1922); Wright v. Louisville & N. R. Co., 203 Ala. 118, 82 So. 132 (1919).

It is not necessary that land be held adversely under claim or color of title for the statutory period by one person provided the possession be held continuously by successive persons in privity. In *Sherin v. Brackett*,[23] the court said, "the rule laid down by a great majority of the courts and by the text writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable."

This privity includes the vendee tacking to the vendor's possession as described in the deed;[24] the tenant's possession being that of the landlord;[25] and one taking by way of descent as heir or other legal representative.[26]

When the claimant is in possession for the statutory period the next question is just how does title pass? Some states specifically provide by statute that the title passes.[27] By 21 James I, c. 16, the title immediately passes and most of the courts in England have adhered to this rule.[28] In interpreting the law in this country the general rule is that the title passes to the disseisor to the extent of his claim or color of title.[29] Very few states adhere to the rule that the statute is a mere bar to the action. There is one Tennessee case on record where the court explicitly stated the rule as being that the statute is a mere bar to the action and that the right of entry still existed in the true owner.[30]

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23 36 Minn 152, 30 N. W. 551 (1886).

24 Bugner v. Chicago Title & Trust Co., 280 Ill. 620, 117 N. E. 711 (1917); McHugh v. Albert Hansen Lumber Co., 145 La. 421, 82 So. 392 (1919); Robertson v. Baylon, 214 Mich. 27, 181 N. W. 989 (1921); Stanaland v. Horne, 165 Ga. 685, 142 S. E. 142 (1928); Jeffries v. Sheehan. 242 Mich. 167, 218 N. W. 703 (1928); Conaway v. Daly, 106 N. J. Law 207, 148 A. 719 (1930).

25 Powers v. Malovazos, 25 Ohio App. 450, 158 N. E. 654 (1927).

26 If the decedent's heir takes possession of the property and remains in possession for such a period that with the possession of the decedent the statute has run, such heir obtains the title. Redemeyer v. Cunningham, 61 Calif. App. 423, 215 P. 83 (1923); Vanderbilt v. Chapman, 172 N. C. 809, 90 S. E. 993 (1916); Lundquist v. Eisenman, 87 Colo. 584, 290 P. 277 (1930); Abbott v. Mars, 277 Mass. 122, 177 N. E. 829 (1931).

27 The following states have a specific statute on this point which expressly states that title passes; Ariz., Calif., Ga., Tex., and N. J.

28 Taylor v. Hardy, 1 Burr. 60; Stokes v. Berry, 2 Salk. 421.

29 Guaranty Title & Trust Corp. v. U. S., 264 U. S. 200, 68 L. Ed. 636, 44 Sup. Ct. 264 (1924); Milardo v. Branceforte, 109 Conn. 693, 145 A. 573 (1929); Capra v. Viola, 16 La. App. 350, 135 So. 599 (1931); Gardner v. Gardner, 257 Mich. 172, 241 N. W. 179 (1932); Tiffany v. Babcock 51 R. I. 350, 154 A. 784 (1931).

30 Wallace v. Hannum, 1 Humph. (Tenn.) 443, 34 Am. Dec. 659 (1839). This case was later overruled by Earnest v. Little River Lumber Co., 109 Tenn. 427, 75 S. W. 1122 (1902). The later case explains that the reason for the passage of the act concerning the limitation of actions on real property was because of the confusion that arose in Wallace v. Hannum. The court quotes the preamble to the Act as expressly stating that the intent of the legislature was to pass title.

Therefore, if a person other than the rightful owner is in continuous, actual, open, visible, notorious, and hostile possession for the statutory period such person gets title to the land. The earlier cases in most jurisdictions added the requirement of the intention of the claimant to disseise the rightful owner. In order to facilitate matters, some legislatures have decreased the time required but at the same time have added other requirements that were not found at common law, such as, the payment of taxes, color of title, and in the case of fencing in, have varied the term in order to have a good title.

Edward F. Grogan, Jr.

DEDICATION — ACCEPTANCE REQUIRED TO IMPOSE LIABILITY UPON THE PUBLIC.—Dedication is a means of exchange of land unique in the modern law; it is one of the few modes of conveyance not bound by the writings and other formalities of present real estate law. Simply, a dedication is a setting apart of land for the public use.[1] AMERICAN JURISPRUDENCE defines it more fully as "an appropriation of realty by the owner to the use of the public and the adoption thereof by the public having respect to the possession of the land and not the permanent estate, express when explicity made by oral dedication, deed, or note, implied when there is an acquiescence in a public use, and applying in this country not only to highways, but to public squares, commons, burying grounds, school lots, lots for church purposes, and pious and charitable uses generally." [2]

CORPUS JURIS [3] traces the origin of this type of transfer back to the early English case of *Lade v. Shepherd*,[4] which seems to be the first case to use the word "dedication," although the method was known sometime earlier, at which time this right of the public was said to arise "from custom," and not "dedication."

There are generally considered to be two kinds of dedication: common law, and statutory; the chief distinction being that the statutory dedication operates as a grant, while the common law dedication operates by way of estoppel in pais.[5] An Illinois case, *Ryerson v. Chicago*,[6] distinguishes the two as follows: the right conferred by the common law dedication is an easement only, while in most jurisdictions a stat-

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1 Gore v. Blanchard, 96 Vt. 234, 118 Atl. 888 (1890).

2 16 AM. JUR. 348.

3 C. J. 39.

4 Str. 1004, 93 Reprint 997 (1732).

5 Poindexter v. Schaffner, 162 S. W. 22 (Texas 1914). *Contra:* TIFFANY, REAL PROPERTY, 1885.

6 247 Ill. 185, 93 N. E. 162 (1910).

utory dedication vests the fee of the property in the municipality to which the dedication was made. This note shall not consider statutory dedication, but shall pry into the amount of acceptance required to render the public liable for care and upkeep of the dedicated property, and since this acceptance is generally provided for by the statute involved, the result is that there is no real question regarding statutory dedication. Generally a statutory dedication is created by a particular form of instrument, usually recorded; there must be a substantial compliance with the provisions of the statute. Such dedication operates by way of grant, and the necessity of acceptance by the public is dispensed with.[7]

Since the discussion is confined to common law dedication, it might be well to consider the requirements for such a dedication and the nature of the interest the public acquires thereby. Quite simply, common law dedication requires an intention of the dedicator to dedicate, and an acceptance of the dedication by the public. "To constitute common law dedication there must be an intention by the proprietor of land to dedicate it to the public, and there must be an acceptance by the public and proof of such facts must be clear, satisfactory, and unequivocal." [8] A general essential to its validity is that it prevent the owner from retracting his dedication.[9]

Generally a common law dedication of property does not affect the ownership thereof, but merely gives the public a right of user therein.[10] A Texas case reaches a unique view in holding the city a trustee of the property for the public. "Where property is appropriated to a public use by common-law dedication, the municipality within the borders of which the premises are a part takes the property as trustee for the public, for the special use designated by the dedicator." [11] For a somewhat similar view see a Maryland case, *North Beach v. North Chesapeake Beach Land & Improvement Co. of Calvert County*.[12] On the other hand, a recent California case [13] held that once the dedication of land was complete for street purposes the property became the public's property and the owner lost all control over it, or special right to its use. In some states the view has been taken, that in case of land dedicated for a park or commons, or even for a highway, the municipality which controls the land so dedicated to the public has a suffi-

7 MICH. COMP. LAWS (1929) § 3936. Olsen v. Village of Grand Beach, 282 Mich. 364, 276 N. W. 481 (1938).

8 City of St. Petersburg v. Meloche 110 So. 341 (Fla. 1926).

9 WORDS AND PHRASES (First Series, 1909).

10 TIFFANY, REAL PROPERTY, 1886.

11 City of Fort Worth v. Burnett 114 S. W. (2d) 220 (Texas 1938).

12 191 Atl. 71 (Md. 1937).

13 Brick v. Cazaux, 64 Pac. (2d) 155 (1937).

cient right of possession to enable it to maintain an ejectment suit against an intruder.[14]

We have already seen that the essential requirements for a common law dedication are an intention to dedicate and an acceptance. The problem we face is: Just what amount of acceptance is required to complete the dedication, and what will be the varying results of different kinds of acceptance? The law is inconsistent in many cases in holding that a much greater degree of acceptance is required to bind the public to liability for the care and upkeep of the dedicated land than merely to preclude the owner from retracting his dedication. The somewhat unjust result is reached whereby the public frequently benefits; but cannot be bound — the unique situation of a right without a duty, something generally unheard of in the field of law. CORPUS JURIS presents the problem excellently, "There is considerable conflict as to whether user by the public will, in addition to binding the dedicator and consummating the dedication, bind the municipality so that it will be responsible for the maintenance and repair of the property for the purposes for which it was dedicated. The probable weight of authority is that liability cannot be fastened upon the municipality; this is obviously so where statutes require acceptance by a municipal council." [15]

The whole problem finally narrows down to whether public user is sufficient acceptance of a dedication, to bind the public, or whether a formal acceptance is required. It is generally conceded that mere use by the public — not necessarily for the statutory period of limitations — is sufficient to consummate the dedication for most purposes.[16] The jurisdictions, however, are definitely divided as to whether it is sufficient to bind the municipality to maintenance of the dedicated property, and before any attempt at reconciliation or comment can be made, it seems prudent to present the cases accepting the prevailing conflicting views.

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14 TIFFANY, REAL PROPERTY, 1886.

15 18 C. J. 79.

16 Stewart v. Conley, 122 Ala. 179, 27 So. 303 (1889); Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756 (1895); City of Denver v. Denver & S. F. Ry., 17 Colo. 583, 31 Pac. 338 (1892); Phillips v. City of Stamford, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114 (1908); Parsons v. Trustees of Ala. U., 44 Ga. 529 (1871); Consumers Co. v. Chicago, 268 Ill. 113, 108 N. E. 1017 (1915); Raymond v. Wichita, 70 Kan. 523, 79 Pac. 323 (1905); Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642 (1903); Cushwa v. Williamsport, 117 Md. 306, 84 Atl. 389 (1912); Attorney-General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251 (1891); Minium v. Solel, 183 S. W. 1037 (Mo. 1916); Cassidy v. Sullivan, 75 Neb. 847, 106 N. W. 1027 (1906); Schmidt v. Spaeth, 82 N. J. L. 575, 83 Atl. 242 (1912); Montgomery v. Somers, 50 Ore. 259, 90 Pac. 674 (1907); Watertown v. Troeth, 25 S. D. 21, 125 N. W. 501 (1910); Morris v. Bhent, 49 Utah 243, 161 Pac. 1127 (1916); Seattle v. Hinckley, 67 Wash. 273, 121 Pac. 444 (1912).

The weight in numbers seems to be with those courts demanding a formal acceptance before holding the public liable. The Maine court so held in *Mayberry v. Standish,*[17] in *State v. Wilson,*[18] and in *State v. Bradbury,*[19] where the court went so far as to declare that the repairing of a dedicated highway by the state surveyor of highways did not constitute sufficient acceptance to bind the state for injuries resulting from defects in maintenance. However, compare the dictum in another Maine case, *Bartlett v. Bangor*[20] to the effect that public user would be sufficient to bind the public if it continued over the prescriptive period. An old Maryland case, *Ogle v. City of Cumberland*[21] is one of the best known cases for this view and the opinion states the rule excellently, "There can be no question that the facts of the case establish a dedication to the public's use by the railroad of the road, upon which the appellant was injured. As between the owner of the land covered by the road and the public, the latter was entitled to use it as a highway; but that did not, of itself, impose upon the city the obligation to keep the road in repair, nor make it liable for accidents resulting from the defective condition of the road. Before the appellee (the city) can be held liable for the injury for which the present suit was instituted, it must appear that there had been an acceptance by it, through the acts of its authorized public departments or officials, of the road on which the accident happened, as one of the public streets." The fact that the city had placed a street light there, and had provided for fire protection was not considered a sufficient acceptance.[22] Illinois is in accord with this holding,[23] as is Connecticut,[24] California,[25] Georgia,[26] Michigan,[27] Ohio,[28] West Virginia,[29] Texas,[30] and Wyoming.[31]

17 56 Me. 242 (1868).

18 42 Me. 9 (1856).

19 40 Me. 154 (1855).

20 67 Me. 460 (1878).

21 90 Md. 59, 44 Atl. 1015 (1899).

22 See also: Baltimore v. Broumel, 86 Md. 153, 37 Atl. 648 (1897); State v. Kent County, 83 Md. 377, 35 Atl. 62 (1896); Commissioners of Baltimore County v. Collins, 158 Md. 335, 148 Atl 242 (1930); MD. ACTS. 1920, c. 597.

23 Beebe v. Menard County Road District No. 1, 134 Ill. App. 583 (1907); Krisch v. City of Chicago, 150 Ill. App. 197 (1909); Forbes v. Balenseifen, 74 Ill. 183 (1874); Willey v. People, 36 Ill. App. 609 (1889).

24 Town of Stratford v. Fidelity & Casualty Co., 106 Conn. 34, 137 Atl. 13 (1927).

25 See Stone v. Brooks, 35 Cal. 489 (1868).

26 Penick v. Morgan Co., 131 Ga. 385, 62 S. E. 300 (1809).

27 Chapman v. Sault Ste. Marie, 146 Mich. 23, 109 N. W. 53 (1906); Irving v. Ford, 65 Mich. 241, 32 N. W. 601 (1887). Also Olsen v. Village, *supra* note 7.

28 Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452 (1832); Cincinnati Ry. Co. v. Roseville, 760 Ohio St. 108, 81 N. E. 178 (1907).

29 Hast v. Piedmont R. Co., 52 W. Va. 396, 44 S. E. 155 (1903); Michaelson v. City of Charlestown, 71 W. Va. 35, 75 S. E. 151 (1912).

30 Poindexter v. Schaffner, 162 S. W. 22 (Texas Civ. App. 1914).

31 Hatch Bros. Co. v. Black, 24 Wyo. 416, 171 Pac. 267 (1918).

A Kentucky court held that a city was not liable for the condition of the street which it had not taken control of or accepted, though it had been used by owners of houses facing on it, and by persons going to and from these houses for years.[32] In the decision in *Johnson v. City of Niagara Falls* [33] a New York Court held that the fact that a portion of the public had travelled over the road in question for twenty years would not make it a highway so as to compel the city to repair it, it being necessary that in addition to user as a highway there be some adoption by public authority. A Vermont court demanded other acceptance than extensive use: such acts of public recognition as putting the road in rate bills of the highway surveyor, expending money thereon, shutting up the old road, and leaving no other avenue of travel,[34] while a Virginia court decided that acceptance must be of record, as by laying off highways into precincts, or by appointing surveyors or overseers.[35] The New Jersey court in *Schoenberg v. O'Connor* [36] said that although the municipality must accept a street dedication by property owners by formal adoption before it can be forced to repair, acceptance is not essential to consummation of the dedication so as to cut off the owner from the power of recission or subject the lands to public use whenever the wants of the public require a street for that purpose. The Massachusetts court held that a road laid out by a park partly across private land was not a road so as to make the city liable for injury caused by defects, even though the road was of such an appearance as, to lead a reasonable traveler to suppose it was a public highway and not a parkway.[37] However this is not surprising in the face of an early Massachusetts statute [38] which changed the common law rule so as to prevent the creation of a highway by dedication. A Canadian court in Quebec [39] held that the fact that a municipal corporation had laid drains in a private lane within the city limits was not sufficient acceptance to make it a city street so as to impose responsibility for injuries to a person falling thereon.

Missouri seems to be a jurisdiction that is somewhat bewildered as to just which rule to adopt, and a perusal of the cases would indicate

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32 Raines v. East Tenn. Telephone Co., 150 Ky. 670, 150 S. W. 830 (1912). *Cf.* Mulligan v. McGregor, 165 Ky. 222, 176 S. W. 1129 (1915); Schuster v. Barber Asphalt Paving Co., 24 Ky. L. 2346, 74 S. W. 226 (1903).

33 230 N. Y. 77, 129 N. E. 213 (1920). *Accord:* Kiepper v. Seymour House Corp. of Ogdensburg, 246 N. Y. 85, 158 N. E. 29, 62 A. L. R. 955 (1927).

34 Tower v. Rutland, 56 Vt. 28 (1884); Page v. Weathersfield, 13 Vt. 424 (1841); Bacon v. Boston Ry. Co., 83 Vt. 421, 76 Atl. 128 (1910).

35 Commissioners v. Kelly, 8 Gratt. (49 Va.) 632 (1851).

36 14 N. J. Misc. 412, 185 Atl. 377 (1936), *aff'd* 166 N. J. L. 398, 185 Atl. 382 (1936).

37 Jones v. City of Boston, 201 Mass. 267, 87 N. E. 589 (1909).

38 MASS STAT. 1846, c. 203 § 1.

39 Tongas v. Montreal, Rap. Jud. Quebec, 12 Can. S. 532.

that judges have generally tended to adopt the view that at the moment appears more equitable. *Downend v. Kansas City*[40] comes out quite unequivocally in favor of the majority rule of formal acceptance and holds that approval of the plat of a proposed addition to a city by the common council does not constitute an acceptance of the streets therein laid out so as to bind the city for repair, although such plat does vest the fee in the streets therein described. The method of acceptance did not sufficiently meet the city charter's demands. Seemingly in accord with this strict rule is another Missouri court which went so far as to say that the establishment of a street cannot be proven by parol; that it is a matter only of the record.[41] However this is not a popular view and the universal authority is to the contrary, that no writing be necessary for such a dedication.[42] A glance at *Downend v. City of Kansas City*[43] would seem to settle the law unless one went further and discovered that in many Missouri cases, the courts have decided otherwise — that where a street of a city, whether formally accepted or not, had been used by the public as a public street for ten years and generally recognized as such, the street became a public street so as to render the city liable for injuries to a traveler caused by defects therein.[44] It is interesting to note that these latter cases are subsequent in time, and probably reflect the trend as evidenced in this jurisdiction.

And then there is the line of cases which hold that mere public user is sufficient acceptance of dedicated property to impose liability upon the public for the maintenance and upkeep thereof. These cases place the dedicatee in no better position than the dedicator — a position obviously fair. In England, in the early days of the common law, the courts required no adoption of a dedicated road by public authority to bind the public to repair the roads,[45] and even when the British Parliament changed this rule by statute the courts decided that the statute had no application to roads already dedicated.[46] Kansas would seem to be in line with the early English rule, one court holding that a city by conveyance of a part of a dedicated public levee cannot divest itself of its public municipal duty to control the property for the pub-

40 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 300 (1900).

41 Beaudeau v. Cape Girardeau, 71 Mo. 393 (1880).

42 Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418 (1909); Winchester v. Carroll, 99 Va. 727, 40 S. E. 37 (1901).

43 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 300 (1900).

44 Hemphill v. City of Morehouse, 162 Mo. App. 566, 142 S. W. 817 (1912); Accord: Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418 (1909); Scheffler v. City of Hardin, 140 Mo. App. 13, 124 S. W. 569 (1910); Ballew v. City of St. Joseph, 163 Mo. App. 297, 146 S. W. 454 (1912); Twedell v. City of St. Joseph, 167 Mo. App. 547, 152 S. W. 432 (1912).

45 Rex v. Leake, 5 B. & Ald. 469, 27 ECL. 201, 110 Reprint 86.

46 Reg. v. Westmark, 2 M. & Rob. 305.

lic good.[47] This case is not strictly in point, but it implies an adherence to the rule. A North Carolina court ruled that if the authorities of a city have treated a place as a public street, taking charge of it and regulating it as they do other streets, and a person is injured in consequence of the negligent manner in which the city maintains it, the city, when sued for such injury, cannot question the regularity of the proceedings by which the place became a street or the authority by which it was originally established.[48] A neighbor state, South Carolina, reached the same result in *Caston v. City of Rock Hill*[49] where a lot holder had set his fence back and thereby dedicated a space for a sidewalk which was accepted by user. The law cast upon the city the duty to keep that space in reasonably safe condition for use. An Idaho court held that public use for five years was sufficient acceptance to impose liability upon the city.[50] Pennsylvania, from the very beginning, has seemed to adhere to this rule, and in a recent case of *Calhoon v. Pittsburgh Coal Co.*,[51] the court decided that constant use by the public of a roadway, leading to a ferry, was sufficient to bind the borough for repairs and damages resulting from defects thereon, since no formal acceptance is necessary to make a dedicated roadway a public highway; this is the law in that state as evidenced by earlier cases.[52] The fact that a city had expended money in repair of a bridge and assumed exercised control and supervision over it, was held by a Minnesota court,[53] to be sufficient acceptance, even in the absence of action by the city council on the matter; and a Wisconsin court [54] said that "mere user was the highest form of acceptance." In Tennessee it was decided where two boys were drowned in an old quarry along which the street in question ran, that the mere putting of a fire plug along this dedicated street was sufficient acceptance by the city so as to demand its keeping the way beside the road safe for the traveling public.[55] The judge intimated, however, that he so decided, because the quarry amounted to an attractive nuisance.[56] Despite an opposing rule in Connecticut,[57]

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47 Board of Commissioners of Douglas County v. City of Lawrence, 102 Kan. 656, 171 Pac. 610 (1918).

48 Gilbreath v. City of Greensboro, 153 N. C. 396, 69 S. E. 268 (1910).

49 107 S. C. 124, 92 S. E. 191 (1917).

50 Gallup v. Bliss, 44 Idaho 756, 262 Pac. 154 (1927); IDAHO COMP. STAT.; § 1304, 3977.

51 128 Pa. Super. 582, 194 Atl. 768 (1937).

52 Probst v. Williamsport, 227 Pa. 596, 76 Atl. 422 (1910); Ackerman v. Williamsport, 227 Pa. 591, 76 Atl. 421 (1910).

53 Shartle v. Minneapolis, 17 Minn. 308 (1871); Accord: Kennedy v. Le Van, 23 Minn. 513 (1877); Phelps v. Mankatoo, 23 Minn. 276 (1877).

54 Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23 (1869).

55 Doyle v. City of Chattanooga, 128 Tenn. 433, 161 S. W. 997, Ann. Cas. 1915C, 283 (1915).

56 Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346 (1891).

57 Green v. Canaan, 29 Conn. 157 (1860).

that jurisdiction in *Phelps v. City of Stamford* [58] said that cases of public user being sufficient acceptance were to be limited to those highways of common convenience and necessity, which are therefore a benefit to the public and not a burden. This seems to be an effort to effect a compromise between the two rules. Other jurisdictions which hold that formal acceptance is not necessary are Indiana,[59] New Hampshire,[60] Iowa,[61] Alabama,[62] and Washington.[63]

It can be seen from a review of the cases cited that there is a definite split of authority, but it seems that the latter view is more equitable. In the Iowa case of *Manderschid v. City of Dubuque*,[64] Justice Beck says, "Now it appears to be unreasonable, and contrary to the plainest principles of justice, that acceptance may be thus proved and inferred against the land owner, or those who are charged with the violation of the law by obstructing a public way, and yet that the same evidence will be insufficient to prove the like fact when the public authorities are charged with neglect of duty or violation of law touching the highway, whereby the private citizen suffers loss. This would be establishing one kind of law for the citizen, and another for municipalities and other quasi corporations and public officers. . . ." This indictment seems to be a just one. It really seems as if the city were "having its cake and eating it too." The law on dedication has gone so far as to hold that even though highways had not been adopted as such by public authority, and no responsibility was thus shifted to the municipality, mere use constitutes sufficient acceptance to authorize the public to entertain criminal proceedings against persons obstructing the road so dedicated,[65] or suits to enjoin such obstruction.[66]

Many courts do not adhere to the harsher rule, as has been seen. And there are a few states which, although requiring formal acceptance, also require such acceptance for other purposes.[67] Thus in these states where public user is not sufficient acceptance for any purpose the equal-

58 81 Conn. 408, 71 Atl. 361 (1908).

59 Hammond v. Maher, 30 Ind. App. 286, 65 N. E. 1055 (1903); Sell v. State 125 N. E. 402 (Ind. 1919); City of Michigan City v. Szczepanek, 85 Ind. App. 227, 150 N. E. 374 (1926).

60 Willy v. Portsmouth, 35 N. H. 303 (1857).

61 Manderschid v. Dubuque, 29 Iowa 73, 4 Ann. Rep. 196 (1870); Dunn v. Oelwein (Iowa, 1908), 118 N. W. 764.

62 Mobile v. Fowler, 147 Ala. 403, 41 So. 468 (1906).

63 Spencer v. Arlington, 49 Wash. 121, 94 Pac. 904 (1908).

64 29 Iowa 73, 4 Ann. Rep. 196 (1906).

65 State v. Birmingham, 74 Iowa 407, 38 N. W. 121 (1888); Summers v. State, 51 Ind. 201 (1875); Commissioners v. Moorehead, 118 Pa. 344, 12 Atl. 424 (1888).

66 Mobile v. Fowler, 147 Ala. 403, 41 So. 468 (1906).

67 Palmer v. Palmer, 50 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966; Smith v. Smythe, 197 N. Y. 457, 90 N. E. 1121, 35 L. R. A. (N. S.) 524 (1910); Cincinnati & M. V. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178 (1907); Lynchville Traction & Light Co. v. Guill, 107 Va. 86, 57 S. E. 644 (1907).

ity between the dedicator and the public is reached just as in those states where the user is sufficient to impose liability upon the public, but by different means. A New York case, *Rochford v. State*,[68] held that mere public user was not sufficient acceptance so as to pass title to the dedicated land to the public; and another recent case from the same jurisdiction aimed at justice to the dedicator when it said, "Generally, where convincing proof is lacking of dedication, acceptance, and general public use, courts look unkindly on the efforts of those having in mind some mercenary or other unworthy purpose, rather than the genuine convenience of the public in attempting to establish a mere private way as a public way, and such efforts would work injustice." [69]

After all, this matter of acceptance is largely a matter that should depend on the facts of the case as to the intention of the parties involved. If the public intended accepting the land in question for all purposes as its own, I believe it should be held to have accepted it, so as to impose upon it the same responsibility it has in connection with streets and highways owned by the people Certainly the rule should be modified in some circumstances so that the municipality does not maintain unfair advantage over the dedicator.

Leon L. Lancaster, Jr.

EXTRA-LATERAL RIGHTS IN MINING.—"He who owns the surface owns below to the center of the earth, and above to the sky." This is the well known common law principle which gives to the possessor of the surface of the land only those ore bodies which are directly beneath such surface. Strict application of this rule is also found in the continental civil law sovereignties which confine the locator of an ore body, vein, or lode to perpendicular lines on every side.[1] Despite this age old maxim there exists in some parts of our system of mining jurisprudence an apparent departure therefrom which allows the locator of a surface claim containing minerals to pursue an ore bearing body, lode, vein, or ledge which apexes or commences within such claim, on its downward course or dip, to its ultimate depth even though such vein or ledge should, underground, so far depart from the perpendicular as to enter the land adjoining.[2]

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68 274 N. Y. Supp. 656 (1934).

69 People Ex. Rel. Minard v. Donovan, 240 N. Y. Supp. 766, 770, 228 App. Div. 596 (1930).

1 See Flagstaff Silver M. Co. v. Tarbet, 98 U. S. 463, 468, 25 L. Ed. 253 (1878).

2 Tom Reed Gold M. Co. v. United Eastern M. Co., 24 Ariz. 269, 209 Pac. 283 (1922); Rico-Argentine M. Co. v. Rico-Cons. M. Co., 74 Colo. 444, 223 Pac. 31 (1924); Iron Silver M. Co. v. Cheesman, 8 Fed. 297 (1881).

The origin of this doctrine of Extra-Lateral Rights, as it is called, though surrounded by much doubt, is believed by some to have sprung from the early rule of mining jurisprudence which once obtained in Germany and was, it is claimed, abandoned because of the endless litigation it entailed;[3] by others it is said to have its foundation in the practice of miners in Derbyshire, England. It appeared first in this country soon after the famous gold rush of '49, in California, embedded in the mining regulations, which gave to the discoverer of a vein possessory rights to the "dips, spurs and angles, off-shoots, depths, variations, widths, and all mineral and other valuables therein contained."[4]

Before proceeding farther with this discussion it is elemental that a few expressions peculiar to the field of mining law be defined. Though the terms "location" and "mining claim" are used interchangeably in mining parlance, and for most ordinary purposes may be considered synonymous, strictly speaking, a "location" is the act or series of acts of appropriation of a parcel of land, in accordance with the regulations of the mining act, which parcel of land contains precious metals in its soil or rock; while a mining claim designates the land appropriated,[5] and may include a series of adjoining locations. The formal requirements, or the acts of appropriation, necessary to constitute a valid location are:—1. Discovery of minerals;[6] 2. Placing upon such land appropriated a notice of discovery;[7] 3. Sinking a discovery shaft, or its statutory equivalent, which exposes to view the vein discovered;[8] 4. Marking the location plainly on the surface so that its boundaries may be readily traced;[9] and 5. Recording a notice of discovery at the office of the county recorder or other place provided by statute.[10] The area of a location under the modern federal mining law is limited to fifteen hundred feet of length along the course of the vein discovered, and to three hundred feet feet of width on each side of such vein at the surface.[11] One may, however, locate a smaller area than the amount permitted and still remain within the statute.[12] The location is limited

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3 KLOSTERMAN, TREATISE RUSSIAN MINING LAW (1870) § 81; Anaconda Cop. M. Co. v. Pilot Butte M. Co., 52 Mont. 165, 176, 156 Pac. 409 (1916).

4 J. Ross BROWNE, MINERAL RESOURCES (1867) p. 247.

5 St. Louis Sm. and Ref. Co. v. Kemp, 104 U. S. 636, 648, 649, 26 L. Ed. 313 (1881); Creede & Cripple Creek M. & M. Co. v. Uinta M. & Trans. Co., 196 U. S. 337, 342, 25 Sup. Ct. 266 (1905).

6 REV. STAT. U. S. § 2320; Kramer v. U. S. Machine Co., 76 P. (2d) 540 (Calif. 1938).

7 Required generally by custom and, in a few states, by statute.

8 Required by statutes and local mining regulations, and usually must be at least ten feet deep.

9 REV. STAT. U. S. § 2320. Gleson v. Martin White M. Co., 13 Nev. 442, 456, 35 Pac. St. Rep. 894 (1878),

10 Governed by state statutes.

11 REV. STAT. U. S. § 2320.

12 Schlageter v. Cutting, 116 Cal. App. 489, 2 P. (2d) 875 (1931).

to the same number of feet along the vein beneath the surface as it has at the apex,[13] but extra-lateral rights may be asserted under either or both side lines.[14] The end lines of a location as contemplated by the statute are the three hundred feet lines crossing the course of the vein at the extremities of such location, while the side lines are the fifteen hundred feet lines which run lengthwise along the course of the vein. The foregoing definitions of end and side lines, however, are not conclusive in determining the rights of an imperfect location, for in such case, as will be shown later, the end lines are held to be those which are cross wise to the general course of the vein at the surface, although they may have been located as side lines.[15]

What constitutes a "vein," "lode," "ledge," or "lead" is of difficult definition, and can be properly determined only when the specific question requiring such arises. "Vein" or "lode" is the wording most commonly used in statutes, the word "ledge" is usually interchangeable, and the word "lead," used in mining districts, is synonymous. The words employed by Congress to convey the meaning are "mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." [16] Geologically a vein is a fissure, produced by some strain on the earths' crust, filled with mineral matter, or, more accurately aggregations of mineral matter containing ore in fissures.[17] This mineral matter is enclosed between more or less well defined walls, usually is inclined at some varying degree from the perpendicular or horizontal, and usually is irregular and undulating. The miners' definition, and that which is contemplated by statute, is that a vein is a formation in the earth's crust by which the miner can be led or guided with the reasonable expectancy of finding in such formation, ore or minerals in paying quantities.[18] In the leading case *Iron Silver Mining Company v. Cheesman* [19] it was said that a body of mineral or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. These definitions, at best, are vague and of uncertain comprehension, but for the purposes of this article a vein, lode, ledge, or lead may be visualized as any plane or stratum of ore bearing rock, distinguishable from the

13 Anaconda Cop. M. Co. v. Pilot Butte M. Co., 52 Mont. 165, 156 Pac. 409 (1916).

14 Jim Butler Tonopah M. Co. v. West End Cons. M. Co., 247 U. S. 450, 62 L. Ed. 1207, *aff'd*, 39 Nev. 375, 158 Pac. 876 (1918).

15 North Post Sm. & M. Co. v. Lone Pine Surprise Cons. M. Co., 271 Fed. 105, *aff'd* 278 Fed. 719 (1922).

16 REV. STAT. U. S. § 2320.

17 See Hayes v. Lavagino, 17 Utah 185, 194, 53 Pac. 1029 (1898).

18 See King v. Amy Cons. M. Co., 9 Mont. 543, 545, 24 Pac. 200 (1890).

19 8 Fed. 297, 301 (1881).

surrounding mass of rock, of varying thickness, and which extends downward into the earth and lengthwise along the surface of the earth indefinitely.

To bring a vein or lode within the statute it must be a vein or lode of "rock in place." A vein or lode "in place" is a vein or lode found in its original state or condition, in fixed and immovable rock, in the general mass of the mountain.[20] In discussing the necessity of rock in place in *Tabor v. Dexter,*[21] Judge Hallett stated that whether the ore is loose and friable, or very hard, if the enclosing walls are country rock, it may be located as a lode. But if the ore is on top of the ground, or has no covering other than the superficial deposit it is not a lode or vein within the meaning of the statute.

Extra-lateral rights are dependent upon the apexing of the vein claimed within the surface lines of the locator's claim.[22] Therefore, it is of primary importance to determine the nature of the apex of a vein. Here again the courts receive little or no assistance from the lexicographers. The apex or top of a vein has been defined as the highest point of the vein whether at the surface of the ground or at any point below the surface,[23] but this is often misleading as the highest point of a vein may be a spur, feeder, or offshoot. A good definition is that the apex of a vein is all of that portion of the terminal edge of such vein from which it extends downward in the direction of the dip and is the point from which the vein has a dip as well as a strike.[24] But it has been held that a terminal edge is not essential, and that the crest of an anti-clinal roll, or the crest of a vein in the form of a single anti-clinal fold is its apex.[25] Another commendable interpretation of this difficult term — and, perhaps, one more comprehensive — is that the apex is the uppermost edge or course of the vein, in place, at or near the surface of the earth. This edge or apex is irregular, and may be higher at one place than it is in another; but the mere elevation of this edge at different points is of no moment.[26] Thus, the true picture of the apex of a vein is that it is the highest point thereof, along a more or less con-

20 MODERN AMERICAN LAW, Vol. VI. p. 421.

21 Fed. Cas. No. 13,723 (1878).

22 Stewart M. Co. v. Ontario M. Co., 237 U. S. 350, 59 L. Ed. 989 (1915), *aff'd* 23 Idaho 724, 132 Pac. 787 (1915). Alameda M. Co. v. Success M. Co. 29 Idaho 618, 161 Pac. 862 (1916).

23 Larkin v. Upton, 144 U. S. 19, 23, 36 L. Ed. 330 (1891); Stewart M. Co. v. Ontario M. Co., 23 Idaho 724, 737; 132 Pac. 787, *aff'd* 237 U. S. 350, 59 L. Ed. 989 (1916).

24 LINDLEY, MINES (2nd Ed.), § 309. Alameda M. Co. v. Success M. Co., 29 Idaho 618, 161 Pac. 862 (1916).

25 Jim Butler Tonopah M. Co. v. West End Cons. M. Co. 39 Nev. 375, 158 Pac. 876 (1916).

26 58 Am. St. Rep. 272.

tinuous edge, and not the top of a spur or feeder, just as the apex of a house is the course along the top of the roof and not the top of a chimney or a flagstaff.

"Course" or "strike" is a miners' term, and is defined as the longitudinal direction of the vein across the surface of the earth,[27] or its continuous apex,[28] no matter what angle the surface may have with reference to the horizontal. The statute does not mention the terms "strike" or "course" but the words used to impart the meaning are "along the vein or lode." [29] Where the vein is crooked, the apex thereof is determined by a horizontal line drawn between the extremities of the vein at that depth at which it attains its greatest longitudinal extent,[30] and not by its direction at any one point. In the final analysis the words of the statute may be said to mean the length of that portion of the vein which more nearly agrees with the surface of the earth.

The "dip" of the vein is its downward course as distinguished from its strike, or onward course, and means the direction of an ore vein or lode in its descent into the earth at right angles to the strike.[31] A similar definition is that the dip or downward course signifies the course of the vein from the surface toward the center of the earth, whether in a perpendicular course or at an angle.[32]

The extra-lateral right became a part of the positive law of the federal government by the enactment of the Law of 1866,[33] in sections two and four, which followed, almost verbatim, the wording of the earlier California mining regulations. As this act did not require parallelism of the end lines of a location — nor, indeed, any regularity whatsoever of location lines — many mining claims of peculiar shapes were filed and the courts found it extremely difficult, if not impossible, at times, to equitably apply this doctrine. Consequently, in 1872, Congress repealed the Law of 1866, and enacted the law as it stands today, specifically requiring parallelism of the end lines of locations,[34] and granted that the "locators of all mining locations made on any mineral vein, lode, or ledge situated on the public domain . . . shall have the exclusive right of possession and enjoyment of all surface included within the lines of their location, and all veins, lodes, or ledges throughout their entire depths, the top or apex of which lies inside such surface extended downward vertically, although such veins, lodes, or ledges may

27 See King v. Amy Cons. M. Co., 9 Mont. 543, 565, 24 Pac. 200 (1890).
28 COSTIGAN, MINING LAW (1908) § 36.
29 REV. STAT. U. S., § 2320.
30 Brugger v. Lee Yim 55 P. (2d) 564 (Calif. 1936).
31 *Ibid.*
32 Stewart M. Co. v. Ontario M. Co., 23 Idaho 724, 132 Pac. 787 (1915), *aff'd.* 237 U. S. 350, 59 L. Ed. 989.
33 14 STAT. ch. 262. p. 251.
34 REV. STAT. U. S. § 2320.

so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portion thereof as lie between vertical planes drawn downward . . . through the end lines of their location . . .[35]

The rule laid down by this statute applies only to the precious metal bearing states of the west within what is popularly called the public domain, which includes Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, parts of Oklahoma, Oregon, South Dakota, Washington, Wyoming, and Utah. Within the original thirteen states, the states carved out of them, and the state of Texas the United States government has never owned land so, of course, there the federal statute finds no application. A number of the remainder have been expressly excepted from the operation of the mineral land acts,[36] and the rest have been released by operation of a general policy of reservation.[37] In these states the common law rule of ownership applies strictly, therefore, they have no problems of extra-lateral rights.

All of the states which fall within the provisions of the act have passed legislation supplementing the federal law, and a few have expressly incorporated within their laws the extra-lateral right.[38] The most notable of these state statutes, from which the rest are more or less copied, is that of the state of Colorado which provides as follows: "The location . . . shall be construed to include all ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward, vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges, beyond the end lines of the claim, or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by dip of the lode." [39]

The extent of this right in the land of another is, evidently, limited to entrance of such land below the surface, and then only if the terms of the statute have been meticulously complied with, for it must be kept in mind that the owner of the surface has the *prima facie* right to all beneath notwithstanding the extra-lateral right.[40] A claimant must

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35 REV. STAT. U. S. § 2322.

36 REV. STAT. U. S. § 2303 (Ala., Ark., Fla., La., & Miss.); REV. STAT. U. S. § 2345 (Mich., Wis., & Minn.); 1 SUPP. R. S. U. S. p. 104 (Mo. & Kan.); U. S. COMP. STAT. (1901) (Part of Oklahoma)

37 Ohio, Indiana, Illinois, Iowa, & Nebraska.

38 Colorado, Nevada, North Dakota, South Dakota, & Wyoming.

39 COLO. GEN'L STATS. (1883) p. 723.

40 See Parrott Sil. M. Co. v. Heinze, 25 Mont. 139, 148. 64 Pac. 326 (1901); See Bourne v. Federal M. & Sm. Co., 243 Fed. 466, 468 (1918).

therefore, show a superior right.[41] Again, should the claimant go upon the surface of another's land for exploration, or any other purpose whatsoever, without the permission of that other, he is as much a trespasser as though the sub-surface right was non-existent. The nature of this doctrine is to sever the mineral estate from an independent adjoining estate which is granted by permission of the positive law.

It must be further noted that the doctrine extends only to mineral lands [42] as are contemplated by the statute. In the Law of 1866 such minerals were enumerated as "gold, silver, cinnabar, or copper," [43] to these in 1872 were added " . . . lead, tin, or other valuable deposits." [44] The determination of what constitutes "mineral lands" and "other valuable deposits" is a function of the Land Department, and the courts invariably await an adjudication by that body when such questions are pending before them.[45] The words have been held to include asphalt, petroleum, borax, soda, sulphur, alum, kaolin, mica, marble, onyx, limestone, gypsum, amber, clay, building stone and other stone of commercial value, slate for roofing purposes, guano, and precious stones as well as all metallic substances. Common brick, clay, cement, limestone, sand, and gravel are not minerals according to the rulings of the Land Department. Coal lands do not come within the mineral lands statute as Congress has passed special laws governing their acquisition.[46] But now let us examine the application of this unique rule.

The cases involving the extra-lateral right present questions of varying natures which may be enumerated as follows: 1. The perfect location, i. e. where the end lines are cross wise to the general strike of the vein; 2. Where the vein crosses the side lines rather than the end lines; 3. Where the vein crosses one end line and one side line; 4. Veins crossing the same line twice; 5. Veins whose known apex begins and ends within the same claim; 6. Non-parallel end lines under the law of 1866; and 7. Instances where extra-lateral rights have been denied or abridged.

The perfect location presents little or no problem since the rights of such location are quite clear under the act to include all of the vein as lies between parallel planes drawn on the end lines of the claim, and the right to pursue the dip of all veins which apex in such claim between such parallel planes to their ultimate depth even though they should depart from the perpendicular and so enter the land adjoining.

41 Consolidated Wyo. Gold M. Co. v. Champion M. Co., 63 Fed. 540 (1894). Leadville M. Co. v. Fitzgerald, Fed. Cas. No. 8158 (1879); Mt. Diablo M. & M. Co. v. Collison, Fed. Cas. No. 9886 (1879).

42 REV. STAT. U. S. § 2314.

43 14 STAT. ch. 262 § 2.

44 REV. STAT. U. S. § 2320.

45 See Ripinsky v. Hinchman, 181 Fed. 786. 704 (1910).

46 REV. STAT. § 2347, 2352.

Nor has the second instance caused much trouble to the courts, for where the vein or veins cross the side lines instead of the end lines the courts have wisely held the side lines to become the end lines for extra-lateral purposes.[47] Any other rule would give the locator the right to mine the strike of the vein, and this is clearly contrary to the intent of the statute.[48]

The third problem presents one of more difficult solution. Due, perhaps, to a miscalculation of the direction of his discovery vein the locator has drawn his location lines so that the vein intersects one of the end lines and one of the side lines. This situation is not provided for in the statute, therefore, should the courts adopt a strict interpretation and apply the rule of construction that statutes in derogation of the common law are to be strictly construed? This question has been uniformly answered in the negative; the courts having elected an equitable solution which, though not within the letter of the law, is clearly within its spirit and held that the end line crossed should remain the end line for all purposes, the extra-lateral right extending between parallel planes drawn along that end line and through that point along the side line where the vein departs from the claim.[49]

There are very few cases directly deciding the question which arises when a vein enters and departs through the same side line, in fact only one directly in point has been uncovered. In that case [50] extra-lateral rights were denied. This holding is apparently contrary to the general application of the doctrine, for there can be no justifiable reason why the aforementioned equitable construction should not obtain, and rights granted by extending parallel planes parellel with the end lines, through the points of intersection of the vein and the side line through which it departs. CORPUS JURIS cites the later case of *Rico-Argentine Mining Company v. Rico-Consolidated Mining Company* [51] as overruling the doctrine as applied in the *Catron* case; however, though the *Rico* case does contain some *dicta* contrary to the *Catron* case, it decided a problem wherein the vein crossed the side lines but once, and clearly distinguished between the case which they were determining and the

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47 Flagstaff Sil. M. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253 (1878); Tombstone M. & M. Co. v. Way Up M. Co., 1 Ariz. 426, 25 Pac. 794 (1883); Round Mt. M. Co. v. Round Mt. Sphinx M. Co., 35 Nev. 392, 129 Pac. 308 (1913); Silver King Coalition M. Co. v. Conkling M. Co., 256 U. S. 18, 64 L. Ed. 811 (1920); North Port Sm. & M. Co. v. Lone Pine Surprise M. Co., 271 Fed. 105, *aff'd* 278 Fed. 719 (1922).

48 Southern Nev. Gold & Sil. M. Co. v. Holmes M. Co., 27 Nev. 107, 73 Pac. 759. (1903).

49 Consolidated Wyo. M. Co. v. Champion M. Co., 63 Fed. 540 (1894); Del Monte M. & M. Co. v. N. Y. & Last Chance M. Co., 66 Fed. 212 (1895); Clark v. Fitzgerald 171 U. S. 92, 43 L. Ed. 87 (1897).

50 Catron v. Old, 23 Colo. 433, 48 Pac. 687 (1897).

51 74 Colo. 444, 223 Pac. 31 (1924).

Catron case which was cited by attorneys for the plaintiff. It might be said that the case, *St. Louis Mining and Milling Company v. Montana Mining Company*[52] overruled this narrow rule, but in that case the vein entering and departing was merely an incidental or secondary vein, there already being vested sub-surface rights by virtue of the discovery vein which cut both end lines. But if extra-lateral rights can be said to extend to an incidental vein it seems on principle, that they should also apply to any such irregular vein whether incidental or otherwise.

The fifth type of question, that where the known apex of a vein both begins and ends within the same location, presents an identical question as that discussed immediately above, however, the authorities are agreed that sub-surface rights attach to such vein,[53] such rights being allowed between parallel planes parallel to the end lines through such points where such vein commences and terminates.

The Law of 1886 did not require parallelism of the end lines of a location, therefore, in connection with claims filed prior to 1872, problems are encountered wherein the vein crosses both end lines, but which lines are not parallel. Queerly, the cases on this point have distinguished between end lines converging upon the dip and those diverging therefrom. In the former, extra-lateral rights have been limited by extending planes along such converging end lines to the point of convergence;[54] while in the latter, full rights have been allowed by drawing parallel planes through the points where the vein enters into and departs from the end lines of the location.[55] This application of the rule appears to be rather anomalous and without apparent reason, but as it applies only to such irregular claims allowed before 1872, it does not exert a great deal of influence on current mining; and it is quickly disappearing due to the diminishing number of mines operating under the Law of 1866.

In a few instances there arises conflicting claims to the same ore or ore-bearing vein, lode, or ledge, as, for example, where two veins cross or intersect on their dips, or veins which unite on their dip or strike which necessitates the abriding of the extra-lateral rights of the one or the other. The rule of seniority applies in such cases, and the primary right is given to the elder location.[56] However, in the former

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52 104 Fed. 664 (1900).

53 Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 43 L. Ed. 72 (1897); Consolidated Wyo. M. Co. v. Champion M. Co., 63 Fed. 540 (1894).

54 Carson City Gold & Sil. M. Co. v. North Star, 73 Fed. 597 (1896); Central Eureka M. Co. v. East Central Eureka M. Co., 146 Calif. 147, 79 Pac. 834 (1905).

55 Argonaut M. Co. v. Kennedy M. Co., 131 Calif. 15, 63 Pac. 148 (1900).

56 REV. STAT. U. S. § 2336; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 30 L. Ed. 1140 (1886); Rico-Argentine M. Co. v. Rico-Cons. M. Co., 74

case — that of intersecting veins — the junior location has the right to its vein beyond the point of intersection and is impliedly granted an easement of necessity through such point for the purpose of proper and convenient mining of the vein.[57]

Situations also exist, of course, where sub-surface rights are denied altogether. It is self-evident, as previously noted, that there are no such rights in those states outside the scope of the federal law; and also self-evident that the law finds no application to lands other than those located and classified as mineral lands as defined by the statute and the rulings of the Land Department. There are, however, cases falling within the doctrine, where, nevertheless, the right has been denied. Some courts have reached this result by a too strict adherence to the common law principle,[58] but these are in the extreme minority, and, for the most part, have been overruled, at least by *dicta,* in later cases.[59] A common example of a correct denial of extra-lateral rights is where a vein has its apex in a valid mining claim, but on its dip it enters land embraced by a previous government grant, in which the right to penetrate has not been expressly reserved, viz. agricultural grants,[60] and timber grants.[61] It has also been held that no extra-lateral rights exist to a vein beyond the point where in its downward course outside the claim of apex, it becomes flattened and extends from thence horizontally in a departure from the approximate general plane of the dip of the vein, or for any considerable distance takes an upward trend.[62] One court has denied the right where the angle of dip flattened to less than forty-five degrees.[63] There have been judicial pronouncements, however, at variance with the forty-five degree rule, to the effect that there is nothing in the mining act that can possibly justify the conclusion that extra-lateral rights attaching to a vein must

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Colo. 444, 223 Pac. 31 (1924); Esselstyn v. U. S. Gold Corp., 59 Colo. 294, 149 Pac. 193 (1915); In Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839 (1892), ore was given to the grantee as against the grantor, on the ground that the vein intersection was below the granted land, although grantor's was the senior location.

57 REV. STAT. U. S. § 2336, Twenty-One M. Co. v. Original Sixteen To One Mines, 255 Fed. 658 (1919).

58 Iron Sil. M. Co. v. Elgin M. Co., 118 U. S. 196, 30 L. Ed. 98 (1885); Doe v. Sanger, 83 Calif. 203, 23 Pac. 365 (1890); Catron v. Old, 23 Colo. 433, 48 Pac. 687 (1897).

59 See St. Louis M. Co. v. Montana M. Co., 104 Fed. 664 (1900); see Rico-Argentine M. Co. v. Rico-Cons. M. Co., 74 Colo. 444, 446, 223 Pac. 31 (1924).

60 Amador Medean Gold M. Co. v. South Spring Hill Gold M. Co., 36 Fed. 668, rev'd on other grounds 145 U. S. 300 (1888).

61 Reeves v. Oregon Exploration Co. 127 Ore. 686, 273 Pac. 389 (1929).

62 Tom Reed Gold M. Co. v. United Eastern M. Co., 24 Ariz. 269, 209 Pac. 283 (1922).

63 Stewart M. Co. v. Ontario M. Co., 23 Idaho 724, 132 Pac. 787 *aff'd.* 237 U. S. 350 (1913).

be limited to veins with a lesser dip than forty-five degrees or any other variance from the true dip.[64]

Still another question frequently before the courts for solution is that of secondary or incidental veins. There is no doubt that extra-lateral rights attach to such veins if they are approximately parallel to the original discovery vein and are within the same parallel planes which measure the extra-lateral rights on such discovery vein.[65] However, when the discovery vein and the secondary vein do not have the same extent and direction the problem becomes complex. There are authorities which abridge extra-lateral rights beyond that segment of the claim not covered by the vested rights of the discovery vein, but the better opinion would seem, in view of the statute which gives to the locator "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lie in . . (the) surface lines extended downward vertically . . .," [65a] to be to allow full rights within the whole area of the claim as if the secondary vein were a discovery vein.[66] Where the secondary vein cuts across the location at right angles to the discovery vein the policy that there can be but one set of end lines for extra-lateral purposes, and that there can be no right of pursuit along the strike of a vein, necessarily compel a qualification of the above rule, therefore, extra-lateral rights are denied on such vein.[67]

As has been said before, the owner of the surface is *prima facie* the owner of the sub-surface, therefore, a claimant to such sub-surface must establish his superior right thereto.[68] In establishing his superior right the claimant must be able to identify the vein segment which lies beneath the land of another with the vein that apexes within his own location. This identity does not depend upon a continuous contact of mineral deposits,[69] slight interruptions of the mineral bearing rock does not destroy the continuity of a vein [70] so long as it can be traced through the surrounding rock [71] by vein matter deposits, mineralized soil in the broken fissures, or by some other means. Nor does the fact that a vein or ledge has step-faulted abridge the right of sub-lateral

64 Bunker Hill M. Co. v. Empire State M. Co., 134 Fed. 268 (1905).

65 Jefferson M. Co. v. Anchoria Leland M. Co., 32 Colo. 176, 75 Pac. 1070 (1904); Walrath v. Champion M. Co., 171 U. S. 293, 43 L. Ed. 170 (1897).

65a Rev. Stat. U. S. § 2322.

66 Ajax Gold M. Co. v. Hilkey, 31 Colo. 131, 72 Pac. 447 (1903). *Contra:* Jefferson M. Co. v. Anchoria Leland M. Co., 32 Colo. 176, 75 Pac. 1070 (1904).

67 Cosmopolitan M. Co. v. Foote, 101 Fed. 518 (1900).

68 See footnotes 40 and 41.

69 Utah Consolidated M. Co. v. Utah Apex Co., 285 Fed. 249, *aff'd.* 261 U. S. 617, 67 L. Ed. 829 (1922).

70 Buffalo Zinc Co. v. Crump, 70 Ark. 525, 69 S. W. 572 (1902).

71 Tom Reed Gold M. Co. v. United Eastern M. Co., 24 Ariz. 269, 209 Pac. 283 (1922).

pursuit.[72] Finally it might be said that though courts will not indulge in mere speculations or conjectures, or permit mathematical projections,[73] if a vein can be reasonably traced, geologically, from its apex to the disputed segment the doctrine applies and full extra-lateral rights attach.

There have been many attempts to get Congress to abolish the doctrine of extra-lateral rights and restore the common law rule to general application; however, it is quite apparent that such a step would be impractical, if not infeasible, in view of the numerous patented claims which now have vested rights under the statute as it is at present. In my opinion abolition of the right would not only increase difficult litigation, but would, as well, be extremely unjust to future locators. I dare say that it cannot be doubted that the doctrine of extra-lateral pursuit is but a rule of right. It is but pure natural justice to allow the discoverer of an ore bearing vein to reap the full benefits of his discovery by being allowed to pursue his vein to its ultimate depth no matter where that depth should lead. It is my contention, therefore, that rather than abolish this equitable doctrine, it should be universally adopted, recognized, and applied.

Arthur J. Selna.

THE TESTAMENTARY CAPACITY NECESSARY TO MAKE A WILL IN MICHIGAN.—Testamentary capacity pertains to the ability to execute a will [1] and it is to be distinguished from "testamentary power." [2] It has no relation to undue influence and its existence isn't dependent on freedom from undue influence,[3] for testamentary incapacity implies the want of intelligent mental power,[4] while undue influence presupposes the existence of such power.

Section 13 478 of the Michigan Compiled Laws provides: "Every person of full age and sound mind being seized in his own right of any

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72 Original Sixteen to One Mines v. Twenty-one M. Co., 254 Fed. 630 (1918)

73 Collins v. Bailey, 22 Colo. App. 149, 125 Pac. 543, 548 (1912).

1 Mulford v. Central Farmers Trust Co., 99 Fla. 600, 126 So. 762 (1930); Hamilton v. Morgan, 93 Fla. 311, 112 So. 80 (1927).

2 Mulford v. Central Farmers Trust Co., *op. cit. supra,* note 1. Where it was held that, "Testamentary capacity as distinguished from testamentary power goes to ability to execute a will, and what passes under it is controlled by law. Testamentary power is the right a person has under the law to execute a will."

3 Hoff v. Hoff, 106 Kan. 542, 189 P. 613 (1920); Scott v. Townsend, 106 Tex. 322, 166 S. W. 1138, rev'd on other grounds, 159 S. W. 342 (Tex. Civ App. 1914).

4 Scott v. Townsend, *op. cit supra,* note 3.

lands or of any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament in writing, and all such estate not disposed of by will, shall descend as the estate of an intestate, being chargeable in both cases with the payment of all his debts." For our purposes the section covering bequests of personal property is substantially the same, in that it requires a "sound mind." The problem at hand is to determine the statutory construction or the meaning of the words "sound mind" as construed by the Michigan courts.

The mental capacity necessary to enable a testator to make a valid will, or the extent, or the degree of perfection to which he must attain in understanding the will and the persons and property affected by it, or the extent his mind must be impaired to render him incapable, is a question of law exclusively for the court, and with which the witnesses have no concern. It is a question of law of no little difficulty, which calls for the highest skill of competent jurists, and upon which the ablest courts are not entirely agreed. When the mental capacity required to make a will is once determined, "existence or nonexistence of sufficient mental capacity at the time the will was executed, is for the jury under the instructions of the court — not for witness' opinion regarding such facts. The jury, and not the witness is to draw the conclusion from the facts stated by the witness." [5]

Since men do not make wills in the abstract, but some particular will, the question should always relate to the capacity to understand and make the will in controversy,[6] and should bear upon the time of its execution.[7]

The testator's condition at the time of making the will should be compared with his condition at other times and not with that of other persons.[8] The reason for this holding is to simplify the investigation by the jury, and give them some standard for measuring the capacity of the testator at the time he made the will.

The rule, settled by the weight of authority, undoubtedly is, that a lesser degree of mentality is requisite to the execution of a will than a contract. However, this rule is not of very much help because it is too broad and for that reason is not workable. It merely gives us an idea of what is not necessary. In *Fraser v. Jenninson* [9] the court explains the mental capacity necessary, "Although the testator must un-

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5 White v. Bailey, 10 Mich. 159 (1862).

6 Kempsey v. McGinniss, 21 Mich. 123 (1870); Porter v. Throop, 47 Mich. 313, 11 N. W. 153 (1892).

7 Taff v. Hosmer, 14 Mich. 309 (1866).

8 Aikin v. Weckerly, 19 Mich. 482 (1870); Thayer v. Thayer, 188 Mich. 261, 154 N. W. 32 (1915); Burgess v. Joy, 191 Mich. 140, 157 N. W. 380 (1916).

9 42 Mich. 206, 3 N. W. 882 (1880).

derstand substantially the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time, perceive at least their obvious relations to one another, yet he need not have the same understanding of these matters as a person in sound and vigorous health of body and mind would have; nor is he required to know the precise legal effect of every provision contained in his will." "The will isn't valid unless the person making it not only intends of his own free will to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and whom he is depriving of it as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural object of his bounty, and the character and effect of the disposition of the will, then he has a mind sufficiently sound to enable him to make a valid will."

In order to make a valid contract a person must be capable of comprehending or understanding the subject of the contract and its nature and probable consequences.[10] The negative implication being, a general comprehension of the subject matter of the contract and its consequences would be insufficient, whereas a *general* knowledge as to the nature and consequences of the act as implied from *Fraser v. Jennison*[11] would be sufficient for a valid will. In *Rice v. Rice*[12] the testator had been determined judicially incompetent to manage his property, but the court said, "that wasn't inconsistent with the capacity to make a contract. If a party can make a contract and bargain with another, he must certainly have authority to execute, as his own voluntary and spontaneous act a testamentary disposition of his property." From this case it must be noted that a person determined incompetent by the court, to manage his own property, may still make contracts and since he has the capacity to execute a contract "he must certainly have" the capacity to make a valid will. This holding is not incon-

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10 Milks v. Milks, 129 Mich. 164, 88 N. W. 402 (1901); Davis v. Phillips, 85 Mich. 198, 48 N. W. 513 (1891); West v. Russell, 48 Mich. 74, 11 N. W. 812 (1882); Fraser v. Hennison, *op. cit. supra,* note 9; Spratt v. Spratt, 76 Mich. 384, 4 N. W. 627 (1880); Aiken v. Weckerly, *op. cit. supra,* note 8; Kempsey v. McGinniss, *op. cit. supra,* note 6; Latham v. Udell, 38 Mich. 238 (1878); Pierce v. Pierce, 38 Mich. 412 (1878); Rice v. Rice, 50 Mich. 448, 15 N. W. 545 (1883); Hoban v. Pequette, 52 Mich. 346, 17 N. W. 797 (1884); White v. Bailey, 10 Mich. 155 (1862); Conely v. McDonald, 40 Mich. 150 (1879); Porter v. Throop, *op. cit. supra,* note 6; Moriarity v. Moriarity, 108 Mich. 249, 65 N. W. 964 (1896) In re Williams Estate, 185 Mich. 97, 151 N. W. 731 (1915).

11 *Supra,* note 10.

12 *Supra,* note 10.

sistent with *Hoban v. Piquette,*[13] which held, "There is no rule of law which prescribes average capacity for a testamentary act."

From the cases cited, it is obvious that the performance of a one-party act, such as making a will, should require less strength of mind than a transaction that requires bargaining with another person, such as making a contract.

However, in all cases it doesn't necessarily follow that merely because the party is mentally competent to manage his property that he has the mental capacity to make a valid will. In cases where the person has insane delusions the testamentary disposition of property may be affected, but not the conduct of ordinary financial and commercial matters, which arise in the course of business. The will of such an individual may be disallowed while his business transactions are perfectly valid. The court said in the case of *In re Merriams Appeal,*[14] "Delusion is a belief in a fact for which there is no foundation." In *Rivard v. Rivard* [15] the counsel requested the court to charge that Mr. Rivard was competent to attend to his business affairs, to make deeds, leases, and contracts, and was therefore competent to make wills, for the reason that it requires less capacity to make a will than to execute deeds and contracts. The court said, "If the alleged incompetency depended upon senile dementia or general insanity, counsel's contention, under the instruction of the court as to his competency in this regard, would be correct, and the court should have so directed the verdict. This rule is settled, not only by the authorities in Michigan, but is recognized by courts generally . . . counsel ignores the other well-settled rule, — that, while a man may be possessed of such capacity, he still may be unable to execute the will in question, on account of some delusion which has beclouded or taken away his judgment in regard to those who are the natural objects of his bounty. If a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son-in-law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, nothwithstanding he was entirely sane upon every other subject, and fully competent to manage his own affairs." The court cited *Fraser v. Jennison,*[16] wherein it was said, "A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly

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13 *Supra,* note 10

14 108 Mich. 454, 66 N. W. 372 (1896).

15 109 Mich. 98, 66 N. W. 681 (1896); Bush v. Delano, 113 Mich. 321, 17 N. W. 628 (1884); In re Bliss Estate, 247 Mich. 389, 225 N. W. 576 (1929).

16 *Supra,* note 9

sensible division of his property; and the courts will sustain it, when it appears that his mania didn't dictate its provisions." From this the court in the principal case reasoned, "The converse of the proposition is true, — that where the monomania or delusion does dictate its provisions and results in the disinheritance of the subjects of the delusion, whom he would otherwise remember in his will, it cannot stand." In *Haines v. Hayden* [17] the court charged the jury, "If you shall find as a matter of fact that, at the time the will in question was executed, the testator was laboring under an insane delusion or mania, from whatever source he may have derived it; that this story was untrue; that he came to believe it was true, and acted upon that belief; and that it was the cause of his making the unequal disposition of his property evidenced by the terms of the will, as between his wife and daughter; when, in fact, the whole story was false, and had no reason or probability for its foundation, — then I charge you, that was such a mental delusion or derangement as would avoid the will." The court in its charge also said, "Monomania is insanity upon a single subject. It is an insane delusion which renders the person afflicted incapable of reasoning upon that particular subject; he assumes to believe that to be true which has no reason or foundation in fact on which to found his belief . . . a person persistently believing supposed facts which have no real existence, against all evidence and probability and conducting himself upon the assumption of their existence, is, so far as such facts are concerned, under an insane delusion." Upon appeal of this case, the Michigan Supreme Court held that the charge correctly embodied the law upon the subject.

Testators, with physical defects, or testators who use intoxicants, or narcotics, in making a will must come under the general test of mental capacity or the will is invalid. That is, he must realize the nature and extent of his property, the natural objects of his bounty and the disposition he is making of his estate. Intoxication doesn't avoid a will, unless it prevents the testator from acting with comprehension. But it will have a bearing on his capacity, if it exists to such an extent as to prevent his excercising self control and knowing what he is doing. Intoxication at other times than when the will was executed has no bearing on the subject at hand. The court in *Pierce v. Pierce* [18] said, "There is no foundation in reason or authority, that we have found for holding that a will is void for the intoxication of the testator.

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17 95 Mich. 332, 54 N. W. 911 (1892).

18 *Supra*, note 10. Continued: Hibbard v. Baker, 141 Mich. 124, 104 N. W. 399 (1906) held, "Habits of untidiness which increased with advancing years isn't evidence of insanity." In the case of Blackman v. Andrews, 114 N. W. 218 (1907), the court said, "Merely because the testator wouldn't exhaust the subject of his conversation, is no evidence of insanity." Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731 (1908).